Queen's Bench Division

Regina (Mann) *v* Somerset County Council

2012 May 11 Judge Robert Owen QC sitting as a High Court judge

Commons — Town or village green — Registration — Application for registration of land as town or village green — Landowner occasionally holding beer festival and funfair on part of land and charging for entry — Application refused on ground that exclusion of local inhabitants from that part of land on those occasions indicating that entirety of land used with landowner's permission and therefore not "as of right" — Whether implied grant of permission arising in those circumstances — Whether local inhabitants' belief as to nature of their use relevant — Commons Act 2006 (c 26), s 15(2)

The claimant applied to the local authority, as the relevant commons registration authority, to register a certain field as a town or village green pursuant to section 15(2) of the Commons Act 2006[1] on the ground of recreational use by local inhabitants as of right for a period of at least 20 years. The field was in the same ownership as an adjoining hotel and car park and the landowner occasionally held a beer festival and funfair on part of the field. Following a local inquiry convened by the local authority, the appointed inspector concluded that the occasional exclusive use of part of the field by the landowner, in charging for entrance to the beer festival marquee and for the use of the funfair facilities, implied that the use of the entirety of the field by the public on other days was with the landowner's permission and was therefore not "as of right". The local authority accepted the inspector's findings and accordingly refused to register the field. On a claim for judicial review of that decision, the claimant's primary contention was that the holding of beer festivals for a few days per year on a small part of the field did not amount to the implied grant of permission to use the whole field. The landowner raised a further issue as to whether "use as of right" required an actual belief by the local inhabitants that their use involved the exercise of a right.

On the claim—

Held, dismissing the claim, (1) that whether local inhabitants had established a quality of user capable of amounting to use "as of right" depended on whether the user was of such a nature as to make it appear to the reasonable landowner that it was taking place on the basis of the exercise of a right, without permission; and that there was no requirement to show that the inhabitants had an actual belief that they were exercising a right (post, paras 52, 56, 59).

(2) That, where the use of the field by the local inhabitants had the appearance of use as of right, it was for the landowner to raise the vitiating circumstance of permission, although that requirement was not onerous; that to establish overt acts or relevant or demonstrable circumstances sufficient in law to allow an inference of permission, the landowner had to make it clear that the public's use of the land was with the owner's permission, which might be shown by excluding the public on occasional days; that the landowner had to do something on the land to show that it was exercising its rights as owner over the land and that the public's use was by its leave; that there had to be a positive act by the landowner in that capacity, although a notice was not necessary provided the circumstances relied on allowed the inference to be drawn; that implied consent by taking a charge for entry, or a similar overt act communicated to the public, was sufficient without the need for express explanation or notice; that such conduct need only occur from time to time, perhaps only once during the period under scrutiny; that such conduct would be expected to have an impact on the public and show that when they had access to all or part of the land they did so with the leave or permission of the landowner; that the acts of the owner of the field in holding beer festivals was a manifest act of exclusion, albeit affecting only part of the field, which, in the absence of any clear reason to suppose otherwise, could be taken to be referable to the whole of the land; that the exclusion was an unequivocal exercise of the landowner's rights sufficient to bring home to the local inhabitants that their use was with permission and, as such, was inconsistent with use as of right by the local inhabitants;

[1] Commons Act 2006, s 15(2): see post, para 23.

that the inspector had neither misunderstood nor misdirected himself as to the nature of the test to be applied and had reached a correct conclusion; and that, accordingly, the application for registration of the field as a town or village green had been properly refused (post, paras 42, 61, 71, 73, 75, 77, 100).

R (Beresford) v Sunderland City Council [2004] 1 AC 889, HL(E) applied.

R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] 2 AC 70, SC(E) considered.

CLAIM for judicial review

By a claim form dated 27 April 2011 the claimant, Alan David Mann, sought judicial review of the decision of the defendant local authority, Somerset County Council, as commons registration authority, refusing the claimant's application to register a field owned by the interested party, Punch Taverns Property Ltd, as a town or village green pursuant to section 15(2) of the Commons Act 2006. The grounds of claim were that the local authority had erred in accepting the finding of an inspector, reached after holding a local inquiry, that the use of the field by local inhabitants was with the permission of the landowner, and therefore not "as of right", in circumstances where the landowner had excluded the local inhabitants from part of the field on certain days of the year by holding a beer festival and funfair for which it charged an entrance fee.

The facts are stated in the judgment, post, paras 1–13.

Vivian Chapman QC (instructed by *Edward Harris, Swansea)* for the claimant.

Leslie Blohm QC (instructed by *Head of Legal Services, Somerset County Council, Taunton*) for the local authority.

George Laurence QC (instructed by *TLT llp*) for the landowner.

The court took time for consideration.

11 May 2012. **JUDGE ROBERT OWEN QC** handed down the following judgment.

1 By a claim form issued on 27 April 2011 the claimant, Alan David Mann, applied to the court for permission to seek judicial review of the decision of the defendant, Somerset County Council, dated 8 April 2011 who, through their Regulation Committee which was convened pursuant to an application made by the claimant under section 15(2) of the Commons Act 2006, rejected the claimant's application to register the land described as "Pen Mill Field", Pen Mill, Yeovil as a town or village green.

2 The decision in question reads:

> "The Regulation Committee on behalf of the Somerset County Council as the registration authority has decided to reject the application and make no changes to register of town and village greens for the following reasons: on the basis of all the evidence submitted and having regard to the submissions received the report of the independent inspector, the Regulation Committee considered in denying access to part of the land by holding beer festivals the landowner was asserting his right to exclude the inhabitants, making it clear their use of the land at other times was with his permission. There was no reason to infer that the landowner was asserting the right to exclude only in relation to the areas in which the beer festival took place so that permission to use extended to the whole of the land and not just part."

3 The claimant resides in Lyde Road, Yeovil. The defendant is the relevant commons regulation authority. The land comprises 1·2 hectares of rough grassland bounded on its northeast and northwestern sides by the rear gardens of residential houses on Lyde Road and Camborne Grove. The Pen Mill Hotel and car park bounds the southwestern side while the south eastern side is bounded by former allotments. There is no public right of way leading to the land.

4 The land is and has always been privately owned. Since 1997 it has been owned by the interested party, Punch Taverns Property Ltd, whose predecessor, Bass plc, previously owned the land for some years. The interested party are the freehold owners of the hotel and the car park which in turn is licensed by them to the pub landlord who is in actual occupation of the premises car park and land.

5 The interested party objected to the claimant's application. A local inquiry was convened by the defendants which was held between 10 and 12 March 2009 by the duly appointed inspector Mr A L Roberts who, in his initial report dated 31 March 2009, concluded that the

qualifying criteria for registration under section 15 were satisfied, save that the local inhabitants' user had not been "as of right" within the meaning of the Act.

6 Following the written advice of leading counsel for the defendants, Mr Blohm QC, dated 9 September 2010 and written representations on behalf of the parties, the matter was referred to the inspector for further consideration. Five specific questions were raised for his consideration in light of what appeared to have been a misunderstanding evidenced in his report. By supplemental report dated 20 December 2010 the inspector reviewed the evidence afresh and answered the questions posed to him. Those questions were: 1. Was there public user of the land for informal recreation over the relevant 20-year period? 2. If so, was the user found by the inspector of such amount and in such manner as would reasonably be regarded as being the assertion of a public right? 3. If the answer to 2 is "yes"; it is for the land owner to establish that the user is deficient because it has for all or part of the period been vi clam or precario—forceful or contentious, secretive or furtive or permissive. Has the land owner established this? 4. Was the claimed neighbourhood a neighbourhood in fact within the ordinary English meaning of the word? 5. At the date of the application did the claim to neighbourhood fall wholly within polling districts 2 and 3 of Yeovil East Ward. In each case the inspector is required to give appropriate reasons for his findings.

7 Those questions were specifically addressed and answered in the supplemental report, in particular at para 3 which reads as follows:

> "3.1 In answer to the questions posed by Mr Leslie Blohm QC, I find that: (a) there was public user of the application land throughout the relevant 20-year period but that it was interrupted to the south of the ridge running east-west across the land; (b) user was of such amount and in such manner as would reasonably be regarded as an assertion of a public right; (c) however, although user was by neither force nor by stealth, the landowner has established that the user was permissive; (d) the neighbourhood was a neighbourhood within the ordinary English meaning of the word; and e. at the date of the application, the claimed neighbourhood fell wholly within polling districts 2 and 3 of the Yeovil East Ward."

8 In his supplemental report the inspector confirmed his findings that the qualifying criteria as to significant number of local inhabitants who had indulged in lawful sports and pastimes for at least 20 years were established. The inspector again addressed the critical question concerning use "as of right" at para 2.20 of his supplemental report:

> "Since I submitted my report, the legal concept of 'deference' has been struck out by the Supreme Court's decision on *Redcar* [see *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11; [2010] 2 AC 70]. Furthermore, the parties are of the common view that, in assessing whether or not use had been 'as of right', I gave the impression that I had not sufficiently distinguished between the concepts of 'deference', 'licence' and 'interruption'. Although there may be an overlap between the application of each in considering whether the claimed user had been of as of right, there are different considerations and, clearly, they must be analysed separately. I therefore consider below the submissions of the parties on each of these aspects in turn."

9 The inspector's findings and conclusions in respect of the conduct of the owner which evidenced the implied licence or permission to the local inhabitants to use the land was set out in the report, in particular, between paras 2.34 and 2.41, which read as follows:

> "*Findings and conclusions on licence*
>
> "2.34 The legal issue is whether the landowner, through some overt and contemporaneous act or acts, so conducted himself as to make clear that the inhabitants' use of the land was pursuant to his permission. [Footnote reference: see *R (Beresford) v Sunderland City Council* [2003] UKHL 60; [2004] 1 AC 889, para 5].
>
> "2.35 As can be seen from paras 3.13 and 5.28 of my [original] report, there is a conflict of evidence as to whether the landowner did or did not give his permission for local residents to use the field. However, one witness for the applicant did say (see para 5.27) that he had asked, and was given permission, for children to play football in the field.
>
> "2.36 Turning to events held in Pen Mill Field, one must ask whether the occasional exclusive use of part of the land by the landowner in charging for entrance to the beer

festival marquee and for the use of the funfair facilities gives rise to the implication that use of the remainder of the application land on other days was with his permission.

"2.37 I accept that the fact that local people did not complain about either the beer festivals or the funfairs might have led the landowner to believe that they were not asserting a right to use the land for their recreation. However, for the reasons set out in *Redcar* regarding deference, the landowner's belief is not relevant to whether user was as of right except in so far as it might explain why he took no positive action further to limit their use of the land.

"2.38 Although Mr Houchin's statement suggests that, during the beer festivals, access to the land was denied to anyone who had not paid an entrance fee, I prefer the evidence of those witnesses who say they were able to continue using the land during these events, merely by walking round the facilities. However, of more significance is the fact that access to the marquee was denied to local residents unless in possession of a ticket and that they could not make use of the other facilities without paying a charge.

"2.39 I accept that the local inhabitants' acceptance of the occasional use of the parts of the application land by the landowner without complaint may well have reflected merely their courtesy in a spirit of 'give and take'. However, in my view there is one crucial difference between *Redcar* and this case. In *Redcar*, the landowner did not exclude local residents from using any part of the land for their recreation; walkers merely chose to give way to golfers as a matter of 'give and take' courtesy. In this case, by levying charges the landowner did.

"2.40 The fact that access was denied to only a relatively limited proportion of the total area of the application land and on only on a few occasions while local people continued to use the remainder of the land seems to me to be beside the point. The important point is that, in the context of Lord Bingham of Cornhill's ruling in *Beresford* [footnote reference see para 5], the landowner, even in denying access to only a limited area of the land and only on a few occasions, was asserting his right to exclude. In doing so, he was making it plain that the inhabitants' use on other occasions occurred because he did not choose on those occasions to exclude and so was permitting such use. I see no reason to infer that he was asserting such a right only in respect of the footprints of the facilities.

"2.41 I thus believe that an inference can be drawn from the conduct of the landowner that user was by licence and my findings remains that use of the land by local residents was by licence and not as of right."

10 The inspector concluded:

"3.2 Having considered the submissions made by the parties since my earlier report to the Somerset County Council as the relevant registration authority, I thus still conclude, on a balance of probabilities, that a significant number of the inhabitants of the neighbourhood within the locality did indulge in lawful sports and pastimes on the application land. However, I also conclude that user was by licence and thus not 'as of right' and, although such use continued up to the time of the application, this was interrupted south of the line of the ridge running's east-west across the land during the relevant 20-year period.

"3.3 In the event that the registration authority disagrees with my finding that user was by licence, it should consider whether or not it would be appropriate to register as a TVG that area of the application land lying to the north of the ridge lying east-west across the land. However, if it is minded to do so, it may also wish to consider arranging for the size of the claimed 'locality' to be increased to include the whole of the electoral ward of Yeovil East or even the town of Yeovil. The purpose of this would be to cater for any legal doubt about whether the term 'neighbourhood within a locality' in section 15 of the 2006 Act can be taken to mean 'within a locality or localities.'"

11 In this respect (the meaning of locality for present purposes) the inspector stated:

"2.7 I conclude that polling districts 2 and 3 with the Yeovil East electoral ward can properly be used to define the locality and find that the statutory requirements in terms of 'locality' have been met, although the application could be amended to embrace a suitable wider area should the authority consider this precaution necessary.

"2.8 The objector argues that there was no evidence to suggest that the alleged neighbourhood had any degree of cohesiveness at all and could not lead to a conclusion that the area could be regarded as a 'neighbourhood' for the purposes of section 15 of the 2006 Act.

"2.9 On the other hand, the applicant, referring to my report, argues that extensive evidence on the cohesiveness of the neighbourhood was submitted to the inquiry. Bearing in mind the 'deliberate imprecision' comment by Lord Hoffmann in *Oxfordshire* [footnote reference: *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25; [2006] 2 AC 674, at para 27], there was clearly evidence before the inquiry that could properly support a finding that Pen Mill was a neighbourhood."

12 Accordingly the recommendations were (that the application be rejected on the grounds of implied permission and in the alternative, should that recommendation be declined, none the less consideration should be given to registration in respect of the northern part but not the southern part where the inhabitants' user had been interrupted by reason of the conduct of the owners to which I have already referred. The objection taken by the interested party concerning the ambit of "locality" or "neighbourhood within a locality" within the meaning of section 15(2) was rejected for the reasons given. The defendant accepts that conclusion. The interested party does not.

13 In the result the committee accepted the primary conclusion and recommendation of the inspector. The question which arises is whether the inspector was entitled to come to that conclusion. Was he right, on the facts as found?

14 Mr Blohm submitted that the inspector's conclusion was a factual conclusion and that the grounds of challenge by the claimants are strictly limited. He submitted that in the circumstances the claimant must show that the conclusion complained of was perverse and he relied on *R v Hillingdon London Borough Council, Ex p Puhlhofer* [1986] AC 484, 518, per Lord Brightman.

15 Since there was evidence which was capable of supporting the inspector's conclusion it could not be argued, Mr Blohm submitted, that the evidentiary conclusion was incorrect. He submitted that the court could not substitute its own conclusion for that of an experienced inspector whose conclusion should be respected. In this respect he drew attention to the observation of Ouseley J in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2012] EWHC 647 (Admin); [2014] QB 186, at para 73.

16 Mr Chapman QC, for the claimant, submitted that it is open to the court to review whether the inference drawn by the inspector from the primary facts could reasonably have been drawn and if not the conclusion would necessarily stand as being perverse. Alternatively he submitted that it is a question of law whether the conclusion or the inference in question is capable of being drawn from those primary facts. In support of that alternative submission he too cited Ouseley J in *Newhaven* at para 73.

17 In my judgment, the issue before me is whether the inspector was entitled to come to the conclusion in question in light of the evidence and the facts found and which I have summarised from his report(s). In short, whether he misdirected himself as to the significance or effect in law of the owner's conduct in question and which he found to be sufficient to establish the grant of an implied licence or permission. In this respect see, for example, *R (Beresford) v Sunderland City Council* [2003] UKHL 60; [2004] 1 AC 889, para 8 per Lord Bingham of Cornhill; see also *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11; [2010] 2 AC 70, para 38 per Lord Walker of Gestingthorpe JSC, para 76 per Lord Hope of Craighead DPSC and para 98 per Lord Rodger of Earlsferry JSC.

18 Mr Chapman submitted that in light of the evidence and findings of fact the essential question was: did the holding of the beer festivals for a few days on a small part of the field amount, as a matter of fact, to the implied grant by the land owner to local people of permission to use the whole of the field for lawful sports and pastimes?

19 Mr Blohm agreed that Mr Chapman had posed the correct question (save that he would prefer to have omitted the words "for a few days" and "small"). Mr Blohm emphasised that the issue directly concerned a question of fact and that since there was evidence to support the conclusion the inspector's conclusion is not open to interference.

20 However, that approach begs the question whether the inspector was entitled, on that evidence, to arrive at that conclusion for if he was not and the court was satisfied (that the conclusion was wrong the decision is open to challenge, and correction).

21 Mr Laurence QC, on behalf of the interested party, did not quarrel with the formulation of the question relating to implied licence.

22 Mr Chapman, in opening, summarised the five issues which appeared to be the contentious issues in light of the parties' written submissions:

1. Whether the defendant was right to accept the recommendation from the inspector and thus right to refuse to register the land on the ground that it could be inferred from the holding of beer festivals and funfairs on part of the field that local people were using the whole field for lawful sports and pastimes with the permission of the land owner. He correctly pointed out that this was the only issue taken by the defendant.

2. If not, whether the defendant should have accepted the inspector's alternative recommendation as to registering only the northern part of the field on the ground that the beer festivals and funfairs had interrupted use on the southern part. Mr Chapman noted that the defendant did not seek to argue this point and had not accepted the inspector's alternative recommendation. He also observed that it appeared that the interested party had not formally abandoned reliance upon this alternative recommendation since there was some mention of it in their written submissions. As it transpired Mr Laurence made no mention of this issue in his oral submissions although he did not expressly disavow reliance upon that part of the skeleton argument which related to it. However, the reality was that support for the alternative recommendation was not mentioned or pursued before me.

3. Was the application bound to fail because the locality relied upon were polling districts which were said to be incapable of being a locality within the meaning of the section? This issue was raised only by the interested party. Indeed, the defendant was content to permit an amendment, if necessary, to cure the interested party's objection. The defendant offered no support to the interested party on this issue.

4. Was the application bound to fail because the quality of use of the local people did not meet the minimum threshold for registration as a new green? That is, must the claimant (first) establish something more than, or additional to, use as of right? Again, this issue was not advanced or supported by the defendant. It was advanced only by the interested party.

5. In the event that the decision is to be quashed and the matter be remitted, on what basis should it be remitted?

23 By section 15(2) of the Commons Act 2006 the 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 20 years; and (b) they continue to do so at the time of the application.

24 The principal issue before me is whether the undoubted use of the land for informal recreation, that is lawful sports and pastimes for over 20 years by a significant number of the local inhabitants, has been use as of right or whether such use was (at any time during the period relied on) pursuant to the implied licence or permission of the land owner. The claimant must make it appear that the requisite use was "as of right" within the meaning of the section (that is, nec vi, nec clam, nec precario). Having established, prima facie, such use as of right the onus would then shift to the owner to show that in fact such use was not as of right and, in this case, that the use was pursuant to implied permission. Upon the claimant having established (ultimately) use as of right it is well established by high authority that there is no additional requirement which must also be established by the claimant (see *Redcar*, at para 20 per Lord Walker; see also *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2011] EWCA Civ 1356; [2012] 2 All ER 554, para 28 per Lord Neuberger of Abbotsbury MR). That is, for the reasons explained in *Redcar*, once the local inhabitants have shown that their use of the land appeared to satisfy the common law tripartite test it would necessarily follow, in such circumstances, that a reasonable owner would be expected to demonstrate resistance if he wished to avoid the possibility of registration.

25 Save for the "quality of use point" (and the correct interpretation of locality or neighbourhood within a locality (that is, issues 3 and 4 referred to above)) counsel were agreed on the legal principles which applied to this case. The vexed question of use of land as of right (vexed, certainly, in the context of town or country greens) has been considered more than once recently by the House of Lords and the Supreme Court to which all counsel referred: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335; *R (Beresford) v Sunderland City Council* [2004] 1 AC 889; *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674; *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70.

26 Mr Chapman submitted that the inspector was wrong to conclude that the holding of the beer festivals on part only of the land amounted to the grant of implied permission to local people to use the whole of the land for recreation. He said that the inspector's conclusion was bizarre and that the mistake is explained by an evident misunderstanding on the part of the

inspector of the dictum of Lord Bingham in *Beresford*, at para 5, the decision in *Oxfordshire* and that the inspector also misunderstood the decision in *Redcar*.

27 Mr Chapman drew attention to para 2.32 of the supplementary report in which the inspector, it was submitted, revealed his misunderstanding of the decisions in *Beresford* and *Oxfordshire*. Thus:

> "It makes no difference that, when (he exclusions took place, they did not extend to the whole land. Just as *user* of part can be referable to the whole, so *exclusion* from part will often be referable to the whole [see footnote reference *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25]. Even though the activities of the landlord involved exclusion of the public on only three or four day-long occasions, those occasions fell squarely within Lord Bingham's principle [footnote reference see para 5 in *Beresford*] and fully justified the conclusion in my report that they gave rise to an implied licence, at the very least during those three or four years."

28 Mr Chapman emphasised the reference to "Lord Bingham's principle" and to the express lack of a distinction drawn between exclusion from the whole and exclusion from part only. Mr Chapman submitted that the inspector's conclusion as to an implied licence was simply not open to him on the facts as found. His essential point was that the overt acts which involved partial closure or exclusion occasioned by the beer festivals or fun fairs, viewed objectively, could not give the message to the public that they had no right to use the other land for lawful sports and pastimes. He observed that nowhere had Lord Bingham said that exclusion from part of the land could give rise to an implied permission to use the whole of the land. There was a material difference, he argued, between full and partial closure of the land which the inspector had overlooked. There was no objective reason to think that the public were being excluded from the beer tents or fun fairs to make the point that they had no right to be on the land.

29 Accordingly, he argued, that not only did the inspector elevate Lord Bingham's comment to a statement of principle (see earlier) the inspector also failed to appreciate the significance of the comments of Lord Walker at para 83 who had in mind (submitted Mr Chapman) admission charges which related to the whole of the land and not part only. (Mr Chapman placed particular emphasis on the reference by Lord Walker to "when they do have access"). He compared the owner's activities with, say, the (hypothetical) erecting of a temporary tea tent by the golf club (in *Redcar*) and charging for entrance for tea by all comers including the public who happened also to use the land for recreation. In that example, Mr Chapman submitted, there could be no question of an inference of implied permission to use the whole of the land.

30 Mr Chapman also submitted that the inspector misunderstood the decision in *Redcar.* Rather than distinguishing (see para 2.39 of the supplemental report) the present case from *Redcar*, the inspector ought to have seen that the case was on all fours with *Redcar*. That is, he submitted, like *Redcar*, this is a classic case of co-existing uses. Mr Chapman submitted that in such a case use by an owner which co-exists with use by the public could not give rise to an inference of permission. He argued that the owner's conduct in erecting a marquee for the beer festival with payment for entrance could be compared to the erection of a tent or marquee by the local inhabitants as part of their user for the purpose of holding their own "village green dance".

31 In summary, the claimant's case was that the owner's conduct and activities could not count as an overt act necessary in law to permit the inference or finding of implied permission and that the owner's activities on the land were wholly compatible with the public's recreational use being as of right. In this respect *Redcar* was heavily relied on.

32 Mr Blohm, on behalf of the defendant, submitted that the question was whether a licence to use land may as a matter of law be implied from the occasional licensing of part of the land to the public, if so whether there is evidence from which it could be concluded that such an implied licence arose in the present case. He submitted that the starting point was to see whether the evidence was capable of supporting the conclusion or decision complained of. He submitted that the conclusion could not be described as perverse, it was a factual conclusion and in respect of which there was clear evidence to justify that conclusion. Mr Blohm submitted that whilst *Beresford* concerned overt acts necessary to permit the inference of permission ultimately the fact of permission would depend on the facts and circumstances of the particular case. He submitted that it is open to the court to draw the necessary inference from "demonstrable circumstances" as well as overt acts.

33 In this respect Mr Blohm relied on the decision of the Court of Appeal in *Batsford Estates (1983) Co Ltd v Taylor* [2005] EWCA Civ 489; [2006] 2 P & CR 64, paras 22 and 25, per Sir Martin Nourse. This was an adverse possession claim and the question arose whether the occupation of

part of the land was subject to the implied permission of the estate owner. The Court of Appeal cited with approval the test for implied permission formulated by Etherton J in *Lambeth London Borough Council v Rumbelow* (unreported) 25 January 2001, at p 25:

> "In order to establish permission in the circumstances of any case two matters must be established. Firstly, there must have been some overt act by the land owner or some demonstrable circumstances from which the inference can be drawn that permission was in fact given. It is, however, irrelevant whether the users were aware of those matters … Secondly [it must be established that] a reasonable person would have appreciated that the user was with the permission of the land owner."

34 The facts of that claim were of course very different to those in the present case. Sir Martin Nourse, with whose judgment Gage and Pill LJJ agreed, observed (see para 25) that whilst it was not possible to point to some overt act by the estate owner in that case from which permission could be inferred, the matters relied on by them, certainly constituted demonstrable circumstances from which that inference could be made. The reasonable person, who must be assumed to have knowledge of the material facts would have appreciated that the occupation in fact was with the permission of the estate owner.

35 Mr Chapman, in reply to Mr Blohm's submission on this point, observed that in the present case there were no other "demonstrable circumstances" beyond the facts as found by the inspector. Mr Chapman submitted that *Batsford* had been overtaken in any event by the recent decision of the Court of Appeal in *Zarb v Parry* [2011] EWCA Civ 1306; [2012] 1 WLR 1240 in which it was emphasised that the acts of the owner relied on to show permission had to be probative of, and not merely consistent with, the giving of permission (see paras 26–27, per Arden LJ). It was submitted on behalf of the claimant that the holding of a beer festival or fun fair on part of the land was not probative of a grant of permission to the public to use the land.

36 In my judgment, it is clear that whilst overt acts were specifically referred to in *Beresford* there is no real distinction between overt acts or demonstrable circumstances for present purposes. They mean the same thing in the context of this case. The decision in *Batsford* is wholly consistent with *Zarb v Parry*. Ultimately, it is necessary to scrutinise all the circumstances of the particular case to determine whether the grant of permission or implied licence is made out, whether by reason of "overt acts" or "demonstrable circumstances or, indeed, 'relevant circumstances' (see *Beresford*, para 59 per Lord Rodger JSC)."

37 Mr Blohm submitted that an overt act which might permit the inference of permission was authoritatively discussed in *Beresford.* That is, by the owner so conducting himself as to make clear that the inhabitants' use is pursuant to his permission, for example, by excluding the inhabitants when he wishes to use the land for his own purposes or on occasional days (para 5); such conduct which is unequivocal, as excluding (not necessarily from the whole of the land) (see para 7); making a charge for entry to the land (see para 74); communication by overt act or non-verbal means by the owner—such as an act of exclusion, albeit in relation to part of the land (see para 75); overt conduct, such as exclusion or charging or otherwise asserting ,as owner, title which might reasonably be expected to have an impact on the public using his land (see para 83).

38 In relation to Lord Walker's observation at para 83, specifically relied on by the claimant, Mr Blohm submitted that Lord Walker could not be taken to have had in mind a distinction between the whole of the land and part of the land for he was merely giving factual examples. I agree. Moreover, this case is concerned with wholly different facts. Mr Blohm submitted that it is a question of fact whether the exclusion in question and the circumstances in which it took place made it plain to the (objective or reasonable) member of the public going onto the land that their use of the land was permissive and the mere fact that the owner's activities did not involve the physical inclusion of the whole of their land is not material.

39 Mr Blohm submitted that the inspector's conclusion as to implied licence followed an impeccable analysis of the facts and was a conclusion which he was entitled to draw. He submitted that the inspector plainly did not misunderstand the decisions in *Beresford*, *Oxfordshire* or *Redcar*. It was simply a question of fact whether the exclusion and the holding of beer festivals and fun fairs gave rise to the inference or implication that use of the whole or remainder of the land was by permission.

40 Mr Blohm challenged whether there was any assistance to be derived from Mr Chapman's examples given in the course of his submissions. He pointed out that Mr Chapman did not seek to challenge the fact that the owner had excluded all comers, albeit from part only of the land. Moreover, he noted that Mr Chapman's submissions in part were based on the assertion that if and when the local inhabitants attended the festivals by payment of an entrance fee, they would,

submitted Mr Chapman, merely be continuing their recreational use. Mr Blohm submitted with force that making payment to the owner to continue the recreational use was inconsistent with assertion that such use was "as of right".

41 As for the *Redcar* decision (and the argument that the inspector had misunderstood it or that it is on all fours with the present case) Mr Blohm submitted that in *Redcar* the focus was on the nature of the use of the local inhabitants and how that might appear to the reasonable owner whereas in the present case the focus was necessarily on the activities and behaviour of the owner and how that behaviour might impact upon or appear to the reasonable local inhabitants. He submitted that this distinction was correctly appreciated by the inspector at, for example, para 2.39 and that Mr Chapman's criticism of the inspector is misplaced.

42 Mr Blohm submitted, correctly in my judgment, that whilst the public use must be established for over 20 years (uninterrupted) the establishment by the owner of a vitiating circumstance is less onerous; that is, for example, permission need only be established on one occasion during that period, in order to arrest the accrual of any asserted right.

43 Mr Laurence adopted the arguments of Mr Blohm in relation to implied permission. Mr Laurence emphasised the fact that any material overt act involving exclusion, of part only of the land, would reasonably be expected to have an impact on the local inhabitants and make it plain that their recreational use of the owner's land was pursuant to his permission. Mr Laurence emphasised that this is a case concerning exclusion and that the owners might at any time wish to impose such exclusions more frequently or regularly in which case, he submitted, the claimant could hardly expect to establish any use as of right. In those circumstances, he asked, where would the line be drawn? That is, what degree or frequency of exclusion would count and defeat the claimants' assertion, if not that degree and frequency as found by the inspector?

44 Mr Laurence's additional ground, the "quality of use" point, was less straightforward, or convincing. Essentially, Mr Laurence submitted that where, as here, the local inhabitants accepted without demur occasional exclusion, the owner might reasonably be expected to believe that they had accepted his right to exclude and that the reasonable landowner in those circumstances could hardly be taken to recognise that the local inhabitants' use was being asserted as of right. Thus, he argued, the claim as to use as of right would fall at the first of the two hurdles identified by Lord Hope DPSC in *Redcar* (see para 67).

45 Mr Laurence developed his additional ground before me in his oral submissions. Central to his submission was the proposition that the (subjective) belief of the local inhabitant was not irrelevant. He submitted that their use had to be such as to suggest to a reasonable owner that they believed they were, in fact, exercising a right by such user. Mr Laurence sought support for this proposition from *Sunningwell*, at pp 352 and 354. That is, the inhabitants' use must be such as to convey to the reasonable owner that they believed they were exercising a right. If such belief was absent, so the argument went, even if such use was without force, secrecy or permission it could not trigger a claim for registration under the Act. Further support for this proposition was sought from Lord Hope DPSC's approach in *Redcar* (see paras 67–69). Mr Laurence recognised that to put that argument on its feet he would need to overcome apparently (but not, in my judgment, real) conflicting observations in *Redcar,* from Lord Kerr of Tonaghmore JSC (see para 116; and see also para 107 per Lord Brown of Eaton-under Heywood JSC).

46 Mr Laurence drew attention to the recent decision of the Court of Appeal in *London Tara Hotel Ltd v Kensington Close HoteI Ltd* in which *Sunningwell*, *Beresford* and, in particular, *Redcar* were considered in the context of a case concerning a right of way over a roadway by prescription. In that case the claimant had granted a licence to use the roadway personal to the defendant's predecessors in title from year to year. Many years later unbeknown to the claimant the licensee sold his interest in the hotel to the defendant who continued to use the roadway. When the claimant became aware of the change in ownership a claim was brought for damages and an injunction to restrain the defendants from trespassing upon the roadway. The trial judge found that the defendant had acquired a right of way by prescription. The original licence had terminated in 1980. The roadway had, as it appeared to the world, at all times been used by the defendant "as of right". On appeal, which was dismissed, the claimant was not permitted to raise a new claim based on licence to be inferred from words or conduct (see paras 38–42 per Lord Neuberger MR). Lewison LJ reviewed *Redcar* (see paras 66–73) and concluded as follows (para 74):

> "In my judgment this is clear authority at the highest level that if a use satisfies the tripartite test (not by force, nor stealth, nor the licence of the owner) then a prescriptive right will be established. There is no further criterion that must be satisfied. As Lord

> Kerr JSC put it, once those three criteria are established it is ipso facto reasonable to expect the landowner to challenge the use. In other words, once these three criteria are established the owner is taken to have acquiesced in the use. It follows, in my judgment that unless the use by [the defendant] was forcible, stealthy or permissive a right of way will have been established."

47 Mr Laurence invited me not to accept that approach as articulated by Lewison LJ. However, he conceded that if I were to follow that which he described as the approach of Lord Kerr JSC and Lewison LJ the interested party's "quality of use" point could not succeed. Mr Laurence urged me to find that the correct approach is to be found in the combined observations of Lord Hoffmann in *Sunningwell* (see p 354) and Lord Hope DPSC in *Redcar* (see para 67) which, he submitted, made good the "quality of use" point. I am not persuaded by these submissions on this point.

48 It would be convenient, and logical, to deal first with Mr Laurence's quality of use point. That is, the quality of the user relied on by the local inhabitants had to be such as to suggest to a reasonable owner that they, the local inhabitants, believed they were exercising a right. It was submitted that this consideration comes into play with the first question as posed by Lord Hope DPSC (see para 67). Mr Laurence's submission was that as the local inhabitants were from time to time excluded (and they did not object or complain about exclusion) their use in such circumstances could not suggest to the reasonable owner that such use was being exercised as of right.

49 In *Sunningwell* the parish council's application for registration (under section 22(1) of the Commons Registration Act 1965) was rejected by the county council on the ground that the inhabitants' use of the land had not been shown to be as of right since it had not been shown that inhabitants exercised such user in the belief that they had a right to do so. The parish council lost at every stage in the legal and appeal process until the case came before the House of Lords when their appeal was allowed. Lord Hoffmann gave the leading speech and explained authoritatively why the common law did not require subjective belief in the existence of the right.

50 Lord Hoffmann said (at pp 350–351): "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 …"

51 He continued (at pp 354–355):

> "I rather doubt whether, in explaining this term [per Tomlin J in *Hue v Whiteley* [1929] 1 Ch 440, 445] as involving a belief that they were exercising a public right, Tomlin J meant to say more than Lord Blackburn had said in *Mann v Brodie*, 10 App Cas 378, 386, namely that they must have used it in a way which would suggest to a reasonable landowner that they believed they were exercising a public right. To require an inquiry into the subjective state of mind of the users of the road would be contrary to the whole English theory of prescription … For this purpose, the actual state of mind of the road user is plainly irrelevant."

52 These comments are not authority for the proposition that the inhabitants' belief, that they were exercising a right, is relevant. Lord Hoffmann explained the dictum of Tomlin J which mentioned the inhabitants' belief and he explained that the focus had to be on the perspective of the reasonable owner. In my judgment the question is:

> "Was the nature of the inhabitants' user such as to make it appear to the reasonable owner that the (inhabitants') use is taking place on the basis that it is being carried on in the exercise of a right to use, without permission?"

Whether the inhabitants believed they were exercising a right is irrelevant, for the reasons explained by Lord Hoffmann.

53 Moreover, I do not agree that Lord Hope DPSC provides any such support for Mr Laurence's submission.

54 In *Redcar* Lord Hope DPSC said, at para 67:

> "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 … 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."

55 Lord Hope DPSC expressly agreed that there were only three vitiating circumstances (see para 69). Having also agreed that the quality of the user by the local inhabitants must be such as to be reasonably regarded as being the assertion of a public right Lord Hope DPSC's approach was to analyse and simplify the approach to the problem posed by reference to two questions. Lord Hope DPSC dealt with the relevance and effect, if any, of the owner's conduct, to the overarching issue (namely, whether the claim was made out) after dealing with the first question (user apparently as of right).

56 If Mr Laurence's point was simply that the relevance of the owner's conduct (fact and/or effect of exclusion) must be addressed at the first stage an identical analysis of the material facts would be required and the outcome would necessarily be the same. It seemed to me that there was, in reality, no real difference in approach between Lord Hope DPSC or Lord Kerr JSC. Certainly, in my judgment, Lord Hope DPSC does not provide support for the proposition that it must be shown that the inhabitants believed they were exercising a right.

57 Of course, the issue in the present case (implied permission) was not present in *Redcar*. Both Lord Hope DPSC and Lord Kerr JSC recognised that the merit of an alleged vitiating circumstance would have to be dealt with. Lord Hope DPSC simply, and helpfully, separated for orderly consideration the two factual matters which would need to be addressed before the (ultimate) correct legal answer could be arrived at.

58 As it appears from the final questions posed by the parties to the inspector (see earlier) the two question/stage approach was adopted in any event. It is true that the inspector, understandably in the circumstances, did not expressly deal with the additional ground relied on by the interested party but this omission (or implicit disregard or rejection of the point) is not material in my judgment.

59 Mr Laurence's submission on the "quality of the user" point fell into error in my judgment. It fell into error in asserting that the local inhabitants' belief must be shown or inferred. Whilst it is clear that the amount and manner of such user must be such as would reasonably be regarded by the reasonable owner as being the assertion of a public right, there is no such requirement that the belief of the inhabitants must also be shown, for the reasons given by Lord Hoffmann. I prefer the submissions on this issue of Mr Chapman. For the reasons which I have given I reject the "quality of the user" point (issue number 4). Accordingly I now turn to the main issue.

60 The quality of the user by the inhabitants and the owner's use or conduct are not mutually exclusive and one cannot be considered in a vacuum or without regard to the other, certainly not in this kind of case where there is evidence of dual use and where Lord Hope DPSC's "second question" arises.

61 For the reasons given by the inspector the local inhabitants' use of the land appeared to be "as of right". This appearance shifted the evidential burden to the owner to raise a vitiating circumstance; in this case, permission inferred from conduct. Thus, it is the nature or characteristics of the owner's conduct which must be examined to ascertain whether, ultimately, the inhabitants' use was "as of right". That was the exercise which was undertaken by the inspector and which he answered in the owner's favour.

62 The question before me is whether there was material before him which entitled him to do so. The answer depends on the facts concerning the local inhabitants' user of the land and also the owner's user of the land. The starting point is *Beresford* which dealt directly with the necessary qualities or indicia which may demonstrate implied permission. It is suggested that the inspector misunderstood or misdirected himself on this decision.

63 In *Beresford*, the relevant land was in public ownership. It was council owned land which was regularly used, with the encouragement of the council, by local inhabitants for recreation for decades. The council's objection to registration was based on the assertion of an implied licence demonstrated by the fact that they mowed the grass as and when necessary and provided seating around parts of the perimeter for the convenience of the public and to encourage them to visit

or use the land. That assertion was upheld at first instance and on appeal. The local inhabitants' appeal to the House of Lords was allowed. The local inhabitants' argument that the acts relied on by the council were equivocal and incapable of supporting the assertion of implied permission was upheld.

64 The question arose as to whether it was possible to imply a licence in such circumstances. Lord Bingham said (at para 5):

> "I can see no objection in principle to the implication of a licence where the facts warrant such an implication. To deny this possibility would, I think, be unduly old-fashioned, formalistic and restrictive. A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use."

65 He continued (citing as follows the Lord President (Hope) in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SLT 1035, 1041), at para 6:

> "where the user [that is by the local inhabitants] 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. If his position is to be that the user is by his leave and licence, he must do something to make the public aware of that fact so that they know that the route is being used by them only with his permission and not as of right."

66 Lord Rodger JSC said, at para 59:

> "The council were, accordingly, entitled to refuse Mrs Beresford's application for registration of the area as a town or village green only if those who used the sports arena did so by the revocable will of the owners of the land, that is to say, by virtue of a licence which the owners had granted in their favour and could have withdrawn at any time. The grant of such a licence to those using the ground must have comprised a positive act by the owners, as opposed to their mere acquiescence in the use being made of the land. Prudent landowners will often indicate expressly, by a notice in appropriate terms or in some other way, when they are licensing or permitting the public to use their land during their pleasure only. But I see no reason in principle why, in an appropriate case, the implied grant of such a revocable licence or permission could not be established by inference from the relevant circumstances."

67 Lord Walker said, at para 75:

> "An entry charge of this sort can aptly be described as carrying with it an implied licence. The entrant who pays and the man on the gate who takes his money both know what the position is without the latter having to speak any words of permission (although he may qualify the permission by saying that no dogs, or bicycles, or radios are allowed). Similarly (especially in a small village community where people know their neighbours' habits) permission to enter land may be given by a nod or a wave, or by leaving open a gate or even a front door. All these acts could be described as amounting to implied consent, though I would prefer (at the risk of pedantry) to describe them as the expression of consent by non-verbal means. In each instance there is a communication by some overt act which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass."

68 He continued, at para 76:

> "The authorities contain many references (which can be identified and understood more readily since *Sunningwell*) to the importance of looking at the overt conduct of

those involved, including what the landowner said and did from time to time during the period which the court has to examine …"

69 He continued, at para 79:

"Acquiescence, by contrast, denotes passive inactivity. The law sometimes treats acquiescence as equivalent in its effect to actual consent. In particular, acquiescence may lead to a person losing his right to complain of something just as if he had agreed to it beforehand. In this area of the law it would be quite wrong, in my opinion, to treat a landowner's silent passive acquiescence in persons using his land as having the same effect as permission communicated (whether in writing, by spoken words, or by overt and unequivocal conduct) to those persons. To do so would be to reward inactivity; despite his failing to act, and indeed simply by his failure to act, the landowner would change the quality of the use being made of his land from use as of right to use which is (in the sense of the Latin maxim) precarious."

70 He concluded, at para 83:

"In the Court of Appeal Dyson LJ considered that implied permission could defeat a claim to user as of right, as Smith J had held at first instance. I can agree with that as a general proposition, provided that the permission is implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all-comers. Such actions have an impact on members of the public and demonstrate that their access to the land, when they do have access, depends on the landowner's permission. But I cannot agree that there was any evidence of overt acts (on the part of the city council or its predecessors) justifying the conclusion of an implied licence in this case."

71 From these observations, which I take as authoritative guidance on conduct by an owner which may count as an overt act or as a relevant or demonstrable circumstance sufficient in law to allow an inference of permission, it appears that the owner must make it clear that the public's use of the land is with his permission and that that may be shown by excluding the public on occasional days (per Lord Bingham, para 5; and see para 79 per Lord Walker); he must do something on his land to show that he is exercising his rights (as owner) over his land and that the public's use is by his leave (para 6); there must be a positive act by owner qua public though a notice is not necessary provided the circumstances relied on allows the inference to be drawn (para 59); implied consent by taking a charge for entry or similar overt act communicated to the public is sufficient without the need for express explanation or notice (para 75); such conduct need only occur from time to time (I should add, perhaps once only during the period under scrutiny) (para 76); such conduct will be expected to have an impact on the public and show that when the public have access (I should add, to all or part of the land) they do so with the leave or permission of the owner (para 83).

72 It is clear from the terms of the inspector's report and reasons that this guidance was heeded by him, in my judgment. I do not consider that the inspector misunderstood or misdirected himself as suggested on behalf of the claimant. The reference to "Lord Bingham's principle", read in the context of the whole section of the report shows that the correct question is posed, the appropriate evidence relied on is identified and the answer to the question and conclusion is given. The question before me is whether his conclusion was correct.

73 It was common ground that the acts of the owner in question in holding such festivals constituted an act of exclusion albeit the argument concerned the effect of an exclusion which affected part only of the land and not of the whole. None the less, there was a manifest act of exclusion by the owner. In the absence of clear reason to suppose otherwise an act by the owner relating to part of the land, as occurred in this case, may be taken to be referable to the whole of the land.

74 In the present case the land in question was privately owned and was known (or must be taken to have known) to be so by the local inhabitants. There was no act of encouragement to them by the owner to use the land. Nothing was done by the owner which could, or has been suggested did, reinforce any impression which the local inhabitants now assert that their use was as of right. On the contrary, the owners have demonstrated by positive acts from time to time that, as owners, they were exercising and retaining their rights over their land by excluding all comers, subject to payment of an entrance charge. The owners acted in this way without regard

to the local inhabitants views and without consultation or so much as a "by your leave". They conducted themselves as an active landowner and, as the local inhabitants might reasonably be taken to have appreciated, as though the local inhabitants had no right over the land.

75 It is difficult to see, viewed objectively, how the local inhabitants could not have appreciated that in continuing to use the land they were doing so with the (implied) permission of the owner. The claimant's arguments seriously undervalue the nature and quality of the owner's acts and fail to recognise the significance of the exercise of the owner's right to exclude, albeit expressly over part of the land and on occasions only.

76 I am satisfied that the inspector did not misdirect himself in finding that exclusion from part of the land, or the granting of a licence to enter part of the land did not mean that the owner's assertion of his right, as owner, to exclude was limited to "the footprints of the facilities", (see supplemental report, para 2.40).

77 That is, he was right to find that the critical point was that the owner had unequivocally exercised his right a owner to exclude and the owner did not have to do more than they did to bring it home to the reasonable local inhabitant that this right was being exercised and that the use by the local inhabitants was pursuant to permission.

78 Mr Chapman suggested that the nature of these activities or use by the owner is comparable to that which might equally have been enjoyed by the local inhabitants who might have decided erect their own marquee for a village dance which they might have wished to hold on the land (as part of the recreational use). It is difficult to see how the local inhabitants might (or might reasonably be expected to) take it upon themselves, without reference to the owner in the present circumstances, to erect any such tent, let alone demand payment from those attending the owner's field. The two examples are not, in my judgment, comparable. Moreover, I am unable to accept Mr Chapman's submission that there is no material difference between the use of the land by local inhabitants who do not pay the entrance fee and those who do. Payment on entrance to gain access to the land and to use the owner's facilities could not be treated, in my judgment, as if the local inhabitants were merely continuing their recreational use of that land. The significance of the acts of the owner in question is that these acts are wholly consistent with the exercise of the owner's rights and in particular the owner's right to exclude and are, in my judgment, inconsistent with use "as of right" as asserted by the local inhabitants.

79 The claimant also submitted that the inspector went wrong in respect of the decision in *Redcar.* The decision in *Redcar* is of relevance and importance because the case, which concerned co-existing uses and whether such apparently harmonious co-existence pre-registration might properly be assumed to continue post-registration, was argued by Mr Chapman as being on all fours with the present case and thus the decision, correctly understood and applied, he argued, provides the answer in the present case. It was argued that the inspector misunderstood the decision, misdirected himself over it and thus came to the wrong conclusion (see earlier).

80 In *Redcar* the land in question was publicly owned, by the local authority and which had been used by members of a private golf club. Local inhabitants continued to use the land for informal recreation without interrupting the play by the golfers. The two uses co-existed in that either the inhabitants would wait for the golfer to complete his shot before carrying on his way across the land or the golfer would wave the inhabitant across before resuming his play. The inspector recommended that registration be refused because the local inhabitants had "overwhelmingly deferred" to the golfers' use. The sole issue before the Supreme Court was that of "deference" and whether such deference excluded user as of right, (see para 15 per Lord Walker).

81 In *Redcar* the question of implied permission did not arise. The question of use as of right did arise. It was authoritatively confirmed that whilst the English theory of prescription was concerned with how matters would have appeared to the landowner the common law tripartite test (the three vitiating circumstances of force, stealth and licence) was sufficient to establish that recreational use was "as of right" for the purposes of section 15 of the Act. It was unnecessary to superimpose a further (or additional or overarching) test as to whether it would appear to the reasonable landowner that the inhabitants were asserting a right to use the land or deferring to his rights. In that respect Mr Laurence's submissions for the council in *Redcar* were rejected (see earlier).

82 The critical question on appeal concerned the respective rights of the local inhabitants and the owner following registration. (see para 54 per Lord Hope DPSC). The concern was that upon registration the limited pre-registration use by the local inhabitants might expand to include all possible recreational use which would practically negate any right of use previously enjoyed by the owner or that any use by the owner post registration would have to be such that it would not

interfere with the newly recognised (full or unlimited) recreational rights of the local inhabitants. This understandable concern, that an unintended consequence of registration would strip the owner of any useful enjoyment of his own land in a case where he had made use of it before registration, was at the heart of the critical issue of "deference" in *Redcar*.

83 That concern arose out of the observations of Lord Hoffmann in *Oxfordshire* at paras 51 and 57 which I need not recite for present purposes. Those comments were considered in detail in *Redcar* (see, for example, paras 26–27 and 45 per Lord Walker JSC; see paras 57–58 per Lord Hope DPSC).

84 The claimant's case is that the local inhabitants' use existed concurrently (or perhaps simultaneously) with the owner's use and did so harmoniously over the years as appears from the absence of any dispute or complaint from either side. That is, just as the golfers and recreational users adopted a "give and take" approach to the joint use of the land in *Redcar* so too did, and should, the local inhabitants and the owners in the present case argued Mr Chapman. Hence, he submitted, this is a classic case of co-existing uses of the field (see earlier).

85 In my judgment the flaw in the claimant's argument is, as I have indicated, that it fails to recognise the nature or effect of the owner's use and the significance of their act of exclusion. In *Redcar* there was no such overt act (or relevant or demonstrable circumstance). In the present case the inspector was entitled, and right, to distinguish this case from *Redcar* for this reason (see the supplemental report at para 2.39; see earlier).

86 If it were necessary to go further I would agree with the submission of Mr Blohm that given the nature of the owner's conduct and use of their land whereby the local inhabitants were excluded (and certainly excluded from part of the land in circumstances where no steps were taken to limit by physical marker or otherwise a precise area of exclusion), this is not a case of concurrent competing uses, but consecutive uses in which following exclusion there is, at best, tolerated use by the local inhabitants as permitted by the owner. That is, this is not a case of mere inaction or passive toleration but one involving a period of active exclusion. (see *Redcar*, at para 27 per Lord Walker JSC).

87 Mr Chapman submitted that the clearest example of a qualifying overt act sufficient to show permission is that of, say, the Inns of Court and the exclusion of the public on Ascension Day. In that example, the public use is tolerated following prior exclusion but it is accepted by all concerned that the public's user following closure is not as of right. The question arises as to whether the exclusion by the owner in the present case is different in kind to the exclusion by the Inn of Court in Mr Chapman's example and thus incapable of amounting to an implied permission. I do not consider that there is any difference in principle or kind between the exclusion exercised in the present case and in Mr Chapman's example. Both acts are exercised by the owner without regard to the position of the local inhabitants and both demonstrate to all comers that the right of exclusion by the owner is being exercised. Both allow the inference that the public's user is by permission.

88 Indeed, in both cases both parties' user appears to co-exist harmoniously. That fact is not, however, determinative. It is the nature or quality of the owner's act which counts as a matter of law. In both cases the owner exercises his right as owner to exclude.

89 For the reasons given I prefer the submissions of Mr Blohm, supported by Mr Laurence to those of Mr Chapman. In my judgment, the inspector was entitled to conclude as he did from the material before him.

90 In coming to this conclusion I remind myself, as Lord Bingham did at para 2 in *Beresford* as follows:

> "… As Pill LJ rightly pointed out in *R v Suffolk County Council, Ex p Steed* (1996) 75 P & CR 102, 111: 'it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green …' It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision-makers must consider carefully whether the land in question has been used by the inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met …"

91 In follows that careful consideration must also be given to the nature and effect of the owner's conduct relating to his use of the land during (any date within) the period in question. This case concerns an owner who evidently maintained a commercial interest in making substantial use of his land as and when he wished. A landowner is not to be lightly deprived of his exclusive right to use his land, especially in a case where it is proved or admitted

that the owner has made use of his land during the period in question and where that use could not reasonably be regarded (or dismissed) as insignificant and involved an act of exclusion. It is universally recognised that the (mere) erecting of notices offers little or no protection to the owner in respect of his maintaining exclusive right to use his land. The law of England and Wales does not expect or require an owner who wishes to maintain his exclusive right to use his own land to erect and maintain barriers or fencing to prevent others from going onto the land. Equally, the law does expect an owner to resist that which appears to be use of his land by others and the assertion of a right to do so. In those circumstances the owner is expected "to do something". In this case the owner "did something", as owner, which showed to the reasonable onlooker that the right to exclude was being exercised. The significance of the owner's use of the land could not reasonably have been mistaken by the local inhabitants at the time. In my judgment, it was not necessary for the owners to do more than they did. The inspector's conclusion at para 2.40 of the supplemental report was open to him in the circumstances.

92 Mr Chapman's submissions were attractively presented. It was tempting to adopt them and follow the argument that this is a simple case of co-existing harmonious uses and that occasional limited exclusion during short-lived beer festivals or fun fairs albeit on payment of a small entrance fee is insignificant. However, adopting that approach would as I have indicated fail to recognise the true nature and effect of the act of exclusion by the landowner in this case. It is quite right that in the previous cases the focus has been on the quality of use by the recreational users. In the present case the focus fell squarely on the conduct of the owner as, in light of the inspector's findings, the evidential onus, which is not onerous, had shifted to the owner. I am satisfied that that evidential onus has been discharged by them in the manner found by the inspector.

93 As for the remaining issues I am able to deal with them much more briefly. The second issue was interruption of user in respect of part only of the land. If the owner's use does not count as a relevant overt act or a demonstrable or relevant circumstance to defeat the claim of use as of right it is difficult to see how such use by the owner could stand as evidence of interruption of use sufficient to defeat the claim on the basis suggested by the inspector. I agree with the short submissions of Mr Chapman on this issue. It was not challenged by the defendant. The interested party did not address the issue in oral submissions, rightly so in my judgment.

94 As to the third issue, namely, whether the claim was bound to fail on the ground that the locality relied on by the claimant, and as found by the inspector, (two polling districts) were incapable in law of constituting a "locality" within the meaning of section 15(2), I prefer the submissions of Mr Chapman to those of Mr Laurence. In my judgment the inspector was entitled to reach his conclusion on this issue in favour of the claimant and, in any event, the objection taken by the interested party, if valid, is capable of being cured by amendment to allow the substitution suggested by the defendant and endorsed by the inspector without causing any true prejudice to the interested party (see, for example, Lord Hoffmann in *Oxfordshire* at para 61).

95 Mr Laurence placed much reliance upon the recent decision of *Paddico (267) Ltd v Kirklees Metropolitan Council* [2012] EWCA Civ 262; [2012] LGR 617, in particular paras 27–29 per Sullivan LJ and para 62 per Carnwath LJ. Mr Chapman submitted that these passages were indeed obiter and addressed the question whether a conservation area could stand as a locality which, on the facts it could not. He submitted that the suggested additional requirement of a locality, namely, "community" in the first limb of the subsection and did not affect, in any event, the second limb, "neighbourhood within a locality". He disagreed with Mr Laurence's submission that "locality" necessarily has the same meaning or effect in both limbs. Mr Chapman's submission has some support from Carnwath LJ (see para 51).

96 Mr Chapman referred to the history of this issue within these proceedings to show the equivocal stance taken by the interested party on this issue. The history does not, of itself, undermine Mr Laurence's argument, of course. However, the inspector found on the evidence that the requirement in respect of a significant number of inhabitants of any locality, the polling districts identified in the application form was met and that the inhabitants, in any event, were from a neighbourhood within a locality (which could be more than a single locality as explained by Lord Hoffmann) which met any requirement as to cohesiveness.

97 Finally, Mr Chapman submitted that even if there was merit in the objection taken in respect of the inspector's finding as to locality such objection could fairly be cured without causing prejudice to the interested party. I recognise Mr Laurence's point that the locality must have a real or credible relationship with the field in question. For the reasons given by the inspector that criteria was established on the available evidence. I also accept that the locality must be credible in the sense that it is one from which inhabitants might be expected to come to

enjoy the land, It is for that reason that the relevant locality could hardly or credibly be identified as, to use Mr Laurence's example, "the county of Surrey" (or Somerset). As an alternative, to meet the theoretical or technical objection raised (late in the day) by the interested party those who know the area and locality (in the non-technical sense) are content to identify Yeovil which it appeared to the inspector, the defendant and claimant to be a credible and appropriate substitute. Thus, the interested party's objection may be met by amendment.

98 On balance, I prefer the findings and conclusion of the inspector in his report(s) which mirrors the approach taken by the defendant and which Mr Chapman adopts, namely, on the facts of this case, the polling districts in question constitute the relevant locality for the purposes of the section. In so far as that finding is impermissible then the matter may be cured by the proposed amendment.

99 The remaining issue (the correct basis to remit) does not arise for determination in light of my findings.

100 For these reasons I dismiss the application. The refusal to enter the land in question on the register was correct for the reasons given by the inspector.

Claim dismissed.

SALLY DOBSON, Barrister