Village Greens and Implied Licenses –

The court gets down to details

Designation of land as a Town or Village Green ('TVG') prevents development. In order to prove the existence of a village green, you have to show 20 years usage of the land for lawful sports and pastimes, 'as of right' by a significant number of inhabits of a neighbourhood or locality[1]. 'As of right' means 'without force, secrecy or permission'. In R v. Somerset County Council ex. p. Mann[2] the Court was faced with a gloss on an issue thrown up by the House of Lords in Beresford[3]. In Beresford it was held that the license or permission need not be expressed or explicit. It could be implied. In Mann, the Court was asked to consider whether there was any particular limitation on the nature of that implication, and if there were not, whether the facts justified the decision.

The Facts

Pen Mill field is an open area of some 1.2 hectares on the South-eastern edge of Yeovil. It was next to a public house, and is presently owned by Punch Taverns. There were plans to develop the field. Mr. Mann applied to the County Council to register it as a TVG under Section 15 Commons Act 2006, relying on 20 years' usage for lawful sports and pastimes by locals. Amongst other defences, Punch argued that the public's usage was by license, and not as of right. That license it argued could be implied from activities that on occasions it expressly permitted third parties to carry out on the land. These were the holding of ticketed beer festivals in aid of charity in a large marquee on three

[1] Section 15 Commons Act 2006
[2] CO/3885/2111 (HHJ Robert Owen QC sitting as a Judge of the High Court)
[3] R v. Sunderland City Council ex p. Beresford [2004] AC 889

or four occasions; and the occasional holding of a funfair. Both of these activities took up part only of the land. It appeared to be the case that the public could (and did) use that part of the land that was not under the marquee, or used for the purposes of a funfair for recreation.

The Inquiry

The Council referred the case of a 'non-statutory inquiry', held by a Planning Inspector. Punch argued that as it was evident to the public that they were being excluded from part of the land for part of the time, it would have been obvious to them that they were being permitted to use the rest of the land for the rest of the time. They relied on the comments in Beresford to the effect that intermittent exclusion from the land by the landowner, or charging for entrance on to the land, would evidence an implied license[4]. It was a question of fact, and these facts were sufficient. In essence, that was the Inspector's finding, which the Council adopted when it declined to register the land as a TVG.

The Appeal

Mr. Mann sought to judicially review the Council's decision. His arguments were, first, that the categories of implied license set out in Beresford were limited to those where there was intermittent exclusion from the land as a whole; secondly that this usage was so trivial that it did not render the locals' usage permissive; and thirdly that the finding was inconsistent with the decision of the Supreme Court in Redcar[5], where intermittent

[4] See per Lord Bingham at [5] Lord Walker at [75] and [83].
[5] R v. Redcar and Cleveland BC ex p. Lewis [2010] 2 AC 70

usage by golfers (to which the residents 'deferred') did not prevent the usage from being 'as of right'.

Both the Council and Punch resisted the application. The Council sought to uphold the finding of license. Punch also supported the application on various subtle alternative grounds, that:

(1) The 'localities' relied on by the Applicants[6] were polling districts, and they were not 'localities' for the purpose of the Commons Act 2006;

(2) The quality of usage relied on did not meet a minimum threshold for registration, in that it did not indicate to a reasonable landowner that a right was being asserted.

The Decision

Punch's quality of use point was inconsistent with the views of the Supreme Court in Redcar, and Lewison LJ in London Tara Hotel[7].

Turning to the argument on implied license, whilst an applicant had to show usage 'as of right' for twenty years, the objector only had to show permission (or any other vitiating circumstances, such as secrecy or force) once during that relevant period.

Once the user of the inhabitants appeared to be 'as of right', the burden shifted to the landowner to show that there was (in this case) permission. The evidence from which such a finding had to be derived was the conduct of the landowner. Where an act of exclusion by the landowner related to part of the land, its effect may be taken as being referable to the whole of the land. The Inspector applied the right test, by asking

[6] The Applicant claimed that usage was by a significant number of the inhabitants of a neighbourhood (which he identified as 'Pen Mill') and that neighbourhood fell within two electoral polling districts.

whether the landowner's acts had unequivocally asserted to the public his right to exclude them from the land, and was right to conclude that exclusion from the 'footprint of the activities' (i.e. the beer tent, or the actual funfair areas) brought it home to local inhabitants that their use of the land otherwise was by its permission.

Redcar was distinguishable from the present case. It concerned how the usage of the land by the public might appear to the landowner; not whether the landowner's use demonstrated to the public that their use was permissive. In Redcar there was no equivalent exclusionary act on the part of the landowner.

The Judge's findings on the locality argument were more tentative as they were in the circumstances unnecessary. However he indicated that he thought a locality could be a polling ward; a locality must have a real or credible relationship with the land in question (a county would probably be too large to do so). In any event the application could be amended to refer to Yeovil Town if necessary.

Commentary

It is unusual for significant areas of land to remain entirely unused save for public recreation over a period of twenty years; concurrent usage by a landowner is common. Where that usage involves rendering public usage of part of the land permissive (by fairs or indeed any licensed undertaking) then it is a matter of fact and degree whether it has unequivocally demonstrated to the public that their usage of the rest of the land, the rest of the time, is permissive. Although Courts have regularly interfered with the legal decisions of Registration Authorities made under section 15 Commons Act 2006, this case re-iterates that the Court will only interfere with the factual findings of a Registration Authority on a judicial review where that decision is 'perverse', or not open

[7] London Tara Hotel Ltd. v. Kensington Close Hotel Ltd. [2012] 2 All ER 554

to it on the evidence. This is likely to encourage landowners to examine closely their and their predecessors in title's usage of such land with a view to demonstrating an implicit license. It also draws a sharp distinction between the implied license cases and Redcar, which appears to be a case dealing with an unjustified development in the law (the concept of 'deference') rather than being of more general application to cases of concurrent usage as between the public and landowners.

Lastly it should be noted that it is possible that the decision will be appealed. Watch this space….

Leslie Blohm QC appeared for Somerset County Council.

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