TOWN AND VILLAGE GREENS FROM NEWHAVEN TO LANCASHIRE – ARE LOCAL AUTHORITIES OFF THE HOOK?

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The registration of land as a Town or Village Green under the Commons Act 2006 (or previously the Commons Registration Act 1965) has the effect of preventing the carrying out of work of construction on the land (see section 12 Inclosure Act 1857; section 29 Commons Act 1876; Oxford City Council v Oxfordshire County Council [2006] 2 AC 674 (the 'Trap Grounds' case). Registration therefore has the effect of effectively preventing development of land (see R v Redcar & Cleveland BC oao Lewis [2010] 2 AC 70).

This might be viewed as a dispute between NIMBYs and grasping property developers; but much land is held by local and other statutory authorities for their statutory purposes; and before 2018 the Courts treated land vested in such authorities in the same manner and subject to the same rules as that held by anyone else – as they did in the Trap Grounds case. The Commons Act 2006 does not expressly exclude land vested in statutory authorities (although it does expressly exclude land in Epping Forest, the New Forest and the Forest of Dean (section 6(2) *ibid*)). The consequence is that TVG registration pre - Newhaven affected local authorities when they tried to change the use of open land that had been informally used for public recreation.

One successful argument used against TVG application relates to land that was held for the purposes of recreation. In R v North Yorkshire CC oao Barkas [2015] AC 195 the Supreme Court held that section 15 could not apply to that, as recreational use as 'by right' and not ' as of right'. But that left all local authority land that was *not* held for recreational use.

In R v. East Sussex oao Newhaven Ports & Property Ltd. [2015] AC 1547 ('Newhaven') the Supreme Court considered the claimed registration as a TVG of beach within Newhaven Harbour. The harbour was held by a company exercising statutory duties and authority to keep the harbour open. Included in those duties was the right to dredge the harbour. At first instance Ouseley J held that as the company had no power to declare a TVG over its land, it was not possible to create a TVG by long use. The Court of Appeal held that this approach wrongly treated the creation of TVGs under statute as equivalent to the creation of an easement by private law, and allowed the appeal. The Supreme Court considered the matter as one of statutory interpretation, and held that the power of local inhabitants to apply for registration was inconsistent with the statutory duty on the part of the company to maintain the harbour. In these circumstances the land could not be registered. The doctrine of statutory incompatibility was born. The question that was left open or unclear was the scope of this doctrine. To what bodies, and what statutory powers did it apply? In Newhaven the statutory provisions were specific; the land was expressly identified in those provisions; and the obligations specifically directed to that land.

The ratio of Lancashire.

R v. SSEFRA oao Lancashire County Council [2019] UKSC 59 was a conjoined appeal in respect of judicial reviews of a decision to register as a TVG land held by Lancashire County Council for educational purposes ('Lancashire'); and land that was vested in NHS Property Services Ltd. for the statutory purposes of the NHS ('NHS'). In each case the Court of Appeal held that the statutory provisions affecting the land did not preclude registration as a TVG. The Supreme Court allowed both appeals and reversed these decisions.

The Court of Appeal had held that the principle only applied to land where there were '*specific*' statutory purposes attaching to a *particular* parcel of land[1] or where it was

[1] See [2018] 2 P&CR 15 at para. [40] (Lindblom LJ) quoted by Lords Carnwath and Sales at [21] (concerning Lancashire)

necessarily the case that the statutory purpose was to be carried out on the relevant plot of land[2].

The basis of the Supreme Court's decision (Lords Carnwath and Sales JJSC; Lady Black JSC concurring; Lord Wilson JSC and Lady Arden JSC dissenting) was that it did not matter that the land was not being used for that inconsistent purpose; or that it is unlikely that the inconsistent purpose will ever come to fruition. One instead considers what powers the statutory purpose presently confers; and then asks whether registration as a TVG *could* interfere with *any* of them.

> "what matters for statutory incompatibility to exist so as to prevent the application of the 2006 Act is a comparison with the relevant statutory powers under which the land is held, not any factual assessment of how the public authority might in fact be using or proposing to use the land.[3]"

The principle applies to land held for general purposes under general powers (e.g. for education, transport, or whatever) just as much as land that was the specific object of statutory powers and duties, as in Newhaven[4].

Therefore, section 15 Commons Act does not apply where a local authority holds land for a purpose that is, in the exercise of its permitted power, inconsistent with the effect of registration as a TVG.

So in Lancashire, holding land for educational purposes gave the local authority power to build on the land; and a duty to safeguard children. That was inconsistent with the

[2] See [2018] 2 P&CR 15 at para. [40] (Lindblom LJ) quoted by Lords Carnwath and Sales at [21] (concerning NHS)

[3] Judgment of Lords Carnwath and Sales para. 69.

[4] Lords Carnwath and Sales at [56].

prohibition on building on TVGs[5] and the conferring of fairly absolute rights on the public to be on TVGs[6].

In the case of NHS, the consequences of registration were inconsistent with the power to use the land for the purposes of the NHS[7].

To what bodies does the principle apply?

Lancashire applied the Newhaven principle to local authorities generally[8]. The principle would apply to any body that holds land pursuant to statutory authority. NHS concerned a company that was wholly owned by the Secretary of State.

To what landholdings does the principle apply?

Do the three 'local authority' cases (New Windsor Corpn. v. Mellor [1975] Ch 380; Trap Grounds [2006] 2 AC 674; R v. Redcar & Cleveland Council oao Lewis [2010] 2 AC 70) indicate that there must be some local authority land that potentially falls outside the principle of statutory incompatibility? Probably not, because at least in the case of Trap Grounds and Lewis (see para [49]) (and probably New Windsor as well) the point was not raised and argued. argued. Indeed, statutory incompatibility as an implied exception to the scope of

[5] Section 12 Inclosure Act 1857; section 29 Commons Act 1876.

[6] Oxford City Council v Oxfordshire County Council ('Trap Grounds')

[7] "Gilbart J was satisfied that, within the statutory regime applicable in that case, there was no feasible use for health related purposes, and indeed none had been suggested. The Court of Appeal took a different view, but largely, as we understand it, on the basis that recreational use of the subject land would not inhibit the ability of NHS Property Services to carry out their functions *on other land*. We consider that Gilbart J was correct in his assessment on this point." at para. 66. (my emphasis)

[8] This was assumed and not contested – see Lords Carnwath and Sales at para. 56.

section 15 Commons Act 2006 was not the basis of the decision until the case reached the Supreme Court.

It is difficult to think of any statutory purpose for which a local authority might hold land that would not infringe the statutory incompatibility principle. Most give the local authority power to improve or build on the land for the specified purpose. If there are any that specifically give the local authority power to use the land only, then to the extent that that usage is a public recreational use, the public's use would in any event not be 'as of right' – See R v. North Yorkshire County Council oao Barkas [2015] AC 195.

Where land is acquired 'for planning purposes' under sections 226, 227 Town and Country Planning Act 1990, a power to build is conferred by section 235, where it does not already exist. Under section 237 of the Town and Country Planning Act 1990 (power to override easements and other rights) the erection, construction or carrying out or maintenance of any building or work on the land (by the council or a person deriving title from the council) is authorised if it is done in accordance with planning permission, notwithstanding that it interferes with certain private rights such as restrictive covenants and easements. Given that the purpose of these statutory provisions is to permit development, it must be the case that a court would hold that the principle of statutory incompatibility applied where land was so held.

How long does the statutory incompatibility principle operate for?

(1) A refusal to register land on the basis that it is presently held for a statutory purpose that is incompatible with Section 15 does not preclude a subsequent application for registration (so long as the use 'as of right' continues for the relevant period).

(2) If land is surplus to statutory requirements, a local authority should either appropriate it for other statutory purposes (see section 122 Local Government Act 1972) or dispose of it. However, until it is so appropriated or disposed of, those initial statutory duties apply to it, and hence (by virtue of the majority's reasoning in Lancashire) for the time being the land cannot be registered as a TVG.

(3) If the local authority changes the statutory basis on which the land is held, the relevant purpose is the one for which it is held at the time of consideration for registration.

What is the effect of the principle after disposal of the land?

The leading judgment states that such incompatibility prevents 'the operation of the 2006 Act'[9] but it would be wrong to consider that *all* of the elements of the 2006 Act do not apply whilst the land is vested in a local authority. Newhaven, Lancashire and NHS all concerned judicial reviews of decisions to register or refuse to register land as a TVG. They decided that the decision to register should be quashed, because registration itself, and its consequences, would be inconsistent with the statutory regime under which the land was held. They did not decide that the use of the land for recreational purposes was not use 'as of right' under section 15 Commons Act 2006. The consequence of this is that the restriction on registration only exists *for so long as the land is so held by a statutory undertaking or local authority for such purpose*.

If the local authority disposes of land for value, a non-statutory body acquiring the land will not be able to rely on the previous period of legal immunity as a defence to a claim for registration. This risk of registration should not be overlooked, as it will devalue the development value of the land and a local authority is under a duty to obtain best value on the disposal.

A local authority should consider filing a notice under section 15A of the Commons Act 2006 at least a year[10] before disposing of the land[11]. This is likely to be a lot less confrontational than fencing off the land.

[9] See Lords Carnwath and Sales at para. 55.

[10] In England; two years in Wales.

[11] Available to public bodies – see Lady Arden at [117]

The effect of compulsory acquisition

One of the justifications put forward by the majority for their wide principle of statutory inconsistency is that where land is already vested in a statutory body it does not have the power to compulsorily acquire that land[12]. The inference is that compulsory acquisition overrides TVG rights, where the land is acquired from a third party. I doubt whether (if this was meant) this is correct – compulsory acquisition does not defeat public rights over land.

Is Lancashire correctly decided?

It does not matter; it's the law. If one tots up the judicial decision-making in both cases, of the ten judges involved six[13] would have construed the legislation (and the decision in Newhaven) so as to allow registration, and four[14] to dismiss it. It was undoubtedly a knotty legal problem. For those who are interested in how judges come to legal decisions, the issue turned on what was meant by the judgment in Newhaven, which itself was a decision that was a question of statutory construction; what did Parliament intend to do when it enacted the Commons Act 2006?

As a simple practitioner, I would have thought that the most significant points were the following:

(1) The Commons Act 2006 does not expressly exclude land held by local authorities from its ambit, but it does expressly exclude some specified other land;
(2) The ordinary rules of statutory interpretation require the courts to assume that Parliament means what it says; words (or restrictions) are only to be read into statute where that is absolutely necessary;

[12] Lords Carnwath and Sales, para.64.

[13] One first instance; three in the Court of Appeal; two in the Supreme Court.

[14] The rest.

(3) There was no judicial authority prior to the passing of the Commons Act 2006 which excluded local authority land from the ambit of the Commons Registration Act 1965, which the 2006 Act superceded; but there was authority at all levels up to the House of Lords that assumed that local authority land was within the scope of TVG legislation;

(4) A court's decision is (binding) authority only for the necessary findings within it and no more. To treat it otherwise is to read it like a statute, which it is not.

The reasoning of the majority in Lancashire is that they were necessarily driven to extend Newhaven by the internal logic of its reasoning, whether or not they wanted to reach that end result. I thought that the approach of Lady Arden showed more welcome inventiveness in fashioning a workable balance between two competing public interests.