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COTHAM SCHOOL V BRISTOL CITY COUNCIL [2025] EWHC 1382 (Ch)

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Although the reforms to town/village green registration law effected by the Growth and Infrastructure Act 2013 have been largely successful in stifling new applications, there is still some case law development in the field. The decision of HHJ Paul Matthews sitting as a Judge of the High Court in *Cotham School v Bristol City Council* [2025] EWHC 1382 (Ch) is interesting and instructive not only to practitioners in that specific area of law, but more generally to persons concerned with the acquisition of public rights by prescription.

The overall question for the Judge was whether to allow a claim under section 14 of the Commons Registration Act 1965 (“the 1965 Act”) for rectification of the register of town greens maintained by Bristol City Council as commons registration authority. The relief sought was removal of an area of land known as Stoke Lodge Playing Fields that had been registered in August 2023 pursuant to an application made under section 15 of the Commons Act 2006 (“the 2006 Act”) in 2019. That was in fact the third application to have been made in respect of the land. The first (made as long ago as 2011) had a convoluted history which resulted in a Committee decision to register that was quashed by Wyn Williams J [2018] EWHC 1022 (Admin). Like the first application, the third was accepted by the relevant Committee despite the recommendation to the contrary of the inspector who had held a public inquiry in 2016.

The City Council was both the registration authority and the freehold owner of the land. The Judge had ruled that it could not do what it had originally sought to do, namely to file two acknowledgments of service (one in each capacity) and play two distinct roles in the litigation. The course it chose was to oppose the claim, although it only made submissions on the law and did not call or cross-examine witnesses. No point was taken by the claimant that it ought to have adopted a neutral stance, so the Judge did not have to rule on whether Barling J had been correct in *TW Logistics Ltd v Essex County Council* [2017] Ch 310 to “incline to the view” that the fact that the authority has a quasi-judicial role at the decision-making stage does not and should not preclude it from fully defending its decision in the context of a subsequent section 14 claim.

STATUTORY INCOMPATIBILITY

The claimant (a charitable company limited by guarantee) is the operator of an academy school which in 2011 was granted a 125-year lease of the land by the City Council. Its first ground of claim was based on the decision of the Supreme Court in *R(Lancashire County Council) v Secretary of State for Environment, Food and Rural Affairs* [2021] AC 194. The claimant contended that the principle of incompatibility between the statutory purposes for which the land was held and use of that land as a town or village green applied. The facts were similar to those of the *Lancashire* case, in that both concerned land owned by the local education authority. The significant factual difference was that in this case, the school associated with use of the land was operated not by the authority itself, but by an independent body to which the land was leased. It was accepted by all parties that the land had originally been acquired for (or appropriated to) educational purposes in the 1940s by the then Council of the County Borough of Bristol (despite the absence of direct documentary proof), and up until the date of the lease had been held for those purposes by the City Council following successive local government reorganisations.

The Judge held (at paragraphs 259-270) that the case was not distinguishable from *Lancashire* as a matter of law. The City Council had not divested itself of title to the land, but only possession of the land. In granting the lease to the claimant, the City Council was actually implementing the statutory purposes for which it held the land, because the lease contained covenants restricting use of the land to educational purposes (the provision of educational services and ancillary community, fundraising and recreational purposes) and prohibiting assignment or parting with possession. In the event of breach, the lease could be forfeited. The bundle of property rights retained by the City Council were still held by it for the same statutory educational purposes for which the land had been acquired or appropriated. Further, the claimant was obliged not only by the terms of the lease, but also by the terms of its funding agreement with the Secretary of State for Education and by its own memorandum and articles, to use the land for those and no other purposes. “The identity of the owner of the relevant estate in the land that makes it possible to achieve the statutory purposes does not matter, as the *Surrey* case shows. The land is still being held (by someone) for the carrying out of the statutory purposes.” “The *Surrey* case” was a reference to *R(NHS Property Services Ltd) v Surrey County Council* [2021] AC 194, which the Judge said showed that ownership of the relevant land by a company with no statutory duties, but over which the Secretary of State had sufficient control, could suffice for the purposes of statutory incompatibility. The Judge held, following the majority judgment in *Lancashire*, that registration of the land as a green would be incompatible with the statutory

education purposes for which it was held in two ways. So far as concerned use as a school playing field, it would prevent the physical education of the children in compliance with the law (particularly safeguarding duties with regard to pupils). But secondly and more importantly, it would prevent future use of the land for any other educational purposes, such as the construction of new school buildings. He accordingly rejected as being inconsistent with the *Lancashire* case the argument of the second defendant (the individual whose application had resulted in registration) that there could be no statutory incompatibility because according to the Supreme Court in *TW Logistics* [2021] AC 1050, a landowner can go on using land registered as a green for the same purposes as prior to registration.

AS OF RIGHT: WHETHER USE RENDERED CONTENTIOUS

Although that holding was sufficient to dispose of the case, the Judge went on to consider the various arguments put forward on the claimant's behalf as to why use of the land by local inhabitants had not counted as qualifying use for the purposes of section 15 of the 2006 Act because it had not been "as of right" (*nec vi, nec clam, nec precario*). There were three strands to that argument.

First, the claimant contended that signs erected on the land had rendered use *vi*. It was established by the Court of Appeal's decisions in *Taylor v Betterment Properties (Weymouth) Ltd* [2012] 2 P&CR 3 and *Winterburn v Bennett* [2017] 1 WLR 646 that a landowner could make use contentious (and hence *vi*) simply by erecting appropriately worded signs. In this case, reliance was placed on signs erected in 1982 by the then education authority, Avon County Council, stating "MEMBERS OF THE PUBLIC ARE WARNED NOT TO TRESPASS ON THIS PLAYING FIELD" followed by reference to activities which would render the offender liable to prosecution for an offence under section 40 of the Local Government (Miscellaneous Provisions) Act 1982 (which had newly created the offence of being present without lawful authority on educational premises and causing or permitting a nuisance or disturbance to the annoyance of persons lawfully there). The Judge held (at paragraphs 277-298) that their wording clearly contested unrestricted access to the land and it was "just playing word games" to say that they set out a warning not to trespass rather than a prohibition on trespass. He distinguished the wording of the signs which Sullivan J in *R(Lewis) v Redcar and Cleveland Borough Council* [2008] EWHC 1813 (Admin) had held not to be prohibitory ("Warning: It is dangerous to trespass on this golf course"). He held that it did not matter that ownership of the land had changed while the notices were in place; they had continued to have prohibitory effect after 1996 when the land was vested in the City Council under the Local Government Changes for England (Property

Transfer and Transitional Payments) Regulations 1995 until they disappeared between 2002 and 2010, well into the 20 year qualifying period. Regulation 12 of those Regulations provided an additional, statutory route to the same conclusion (“all notices in force which were given ... by ... a relevant authority in respect of any transferred matters shall be of full force and effect in favour of ... the body to whom such matters are transferred”). He was satisfied that given the layout and use of the land, it had been sufficient that there were six signs in place, including one by each of the two vehicular entrances, although there had not been one by each of the pedestrian entrances many of which were “unofficial” (having been made by members of the public breaching the boundary fence or hedge, or by accident).

The second strand of the “as of right” argument relied on the claimant’s objection to the first (2011) registration application as having made user contentious. In *Winterburn v Bennett* David Richards LJ had said “protest against unauthorised use may take many forms ...”. The Judge said (at paragraphs 301-305) it was clear that acts of protest by the landowner could be other than simply speaking to people directly or erecting signs. “The important thing is whether, objectively speaking, they demonstrate such protest and, in the context in which they are made or take place, they are sufficient to indicate that protest to relevant members of the public (without necessarily meaning that every member of the public is actually aware of the protest).” He held that it was unnecessary as a matter of law for the actions relied on to have occurred on or near the land itself. There was no rule that any particular proportion of the local population (most of whom would never visit the land) should become aware of the landowner’s objection. “What matters is potential communication of the protest of the landowner to *those who are intending to come onto the land and make use of it.*” Applying that approach, he held that statements in local newspaper articles and a letter printed in the local newspaper from a local Councillor that the school (now operated by the claimant) wanted to exclude members of the public from the land would not have amounted to sufficient communication. A statement on the school website to the effect that it was seeking to control public access by fencing might have done so. But that did not matter because the claimant’s participation in the 2016 public inquiry into the first application had already sufficed. It had been “a significant public event, with all the attendant publicity one might expect, lasting several days” and “an open public forum in which various parties ... were able to express their views on the desirability of unrestricted public access to the land”. The position advanced by the claimant at that inquiry (that use was contentious) had constituted a sufficient form of protest against unrestricted public access to the land to render it so.

The third strand of the “as of right” argument was that the claimant’s lease had been granted expressly “subject to all existing rights and use of the Property including use by the community”,

which could have amounted to a grant of permission for informal recreation. The Judge held (at paragraph 308) that it only referred to any existing rights, not ones requiring registration to come into existence.

INTERRUPTION OF USE

A further argument advanced by the claimant was that while the land was being used for organised sport (whether by the claimant itself or by others such as the University or sports clubs), members of the public were displaced and their use of the land was interrupted. The Judge said (at paragraphs 312-316) that he did not think this was just a case of “give and take” like *Lewis*, where walkers only had to pause for a minute while the golfers played their shots, or *TW Logistics*, where forklift truck drivers only had to stop for a few seconds to allow members of the public to cross in front of them. There was a qualitative difference between the cases. Here, people would have had to pause for an hour or so to allow a game to finish before continuing on their way across the pitch. The landowner excluding the public by playing organised sports on the land had the same effect as locking a gate for the same length of time; it could not be said that the public had had access as of right during that period. The games happened frequently, several days a week during term time. The public had not had continuous use of the land during the 20 year period and that was another reason why the application should have failed. The answer to the question how long exclusions have to be was that given by Lord Coleridge CJ in *Mayor of Southport v Morriss* [1893] 1 QB 359: “... it is not necessary to draw [the line] at any precise point. It is enough ... to say that the present case is on the right side of any reasonable line that could be drawn.” If members of the public had not given way to the playing of games, their use would have been unlawful under section 40 of the 1982 Act or its successor provision section 547 of the Education Act 1996, and so would not have counted as “lawful sports and pastimes” for the purposes of section 15 of the 2006 Act.

WHETHER RECTIFICATION JUST

Accordingly, the Judge found in favour of the claimant on all but one of its grounds of claim. However, that was not the end of the matter, because section 14(b) of the 1965 Act only permits rectification if the court “deems it just”. The claimant overcame that hurdle with ease because of the

statutory incompatibility; the land was already dedicated to another public purpose and the town/village green legislation was simply inapplicable (paragraphs 320-325).

WHAT EVIDENCE IS ADMISSIBLE ON SECTION 14 APPLICATIONS

Two other points of a procedural nature made by the Judge are worth noting. First, he queried the admissibility in evidence before him of the material contained in the inspector's reports, which had been taken for granted in light of Lightman J's observations about section 14 proceedings in *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2007] 2 All ER 1000. He had contemplated that the court in exercise of its case management powers could, having regard to the passage of time, direct that evidence adduced before the registration authority, and any findings of fact by it, should stand as evidence and findings of fact at the hearing before the court. The Judge took the view that Lightman J had been concerned with the nature of the proceedings (whether merely appellate or supervisory), not the admissibility of evidence. He therefore regarded the matter as *res integra* and proceeded to consider it afresh. He held (at paragraphs 89-94) that the court was well able to admit in evidence the evidence received by the inspector, even though it was hearsay in that it was conveyed through the medium of his reports, under the Civil Evidence Act 1995. But the inspector's *findings of fact* were altogether different. They were caught by the rule in *Hollington v Hewthorn* and inadmissible as opinion evidence going to issues before the court. That rule had been affirmed in *Rogers v Hoyle* [2015] 1 QB 265 and there was nothing in the 1965 Act to abrogate its application in the context of section 14.

EXCESSIVE REDACTION OF DOCUMENTS

Finally, the Judge deprecated the wholesale redaction of names and other personal details in the trial bundle. He said (at paragraphs 96-98) that he understood that people handling documents containing personal data (particularly in public sector occupations) were used to routinely redacting documents for fear of falling foul of data protection rules. "But, in deciding a case like this, with events over many years to consider, and many people involved from different organisations, it makes the court's job much more difficult if the identities of those sending or receiving letters or emails, or taking part in meetings, are anonymised from an excess of data protection zeal. I remind all parties (and indeed all readers of this judgment) that the data protection legislation contains wide exemptions for the use of

personal data in legal proceedings, so that liability will not attach to the disclosure of personal data for the purposes of these proceedings: see e.g. the Data Protection Act 2018, section 15, Sch 2 paras 5 and 14.”

NOTE: An application by the second defendant to the Court of Appeal for permission to appeal the Judge’s decision is pending.



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