VILLAGE GREENS:
A PARLIAMENTARY TRAVESTY?

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2007

VILLAGE GREENS

1. The modern law in this field commences with the Commons Registration Act 1965. This then applied to England and Wales albeit by subordinate legislation. The functions exercisable by the Minister of the Crown were transferred to the National Assembly for Wales.

2. The Act came into force over the period 1 January 1966 through to 2nd January 1967.

3. By virtue of Section:

4. 1(2): *"After the end of such period, not being less than three years from the commencement of this Act, as the Minister may by order determine-*

   (a) *no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered;"*

5. By SI 1966/1470 the period specified began on 2nd January 1967 and ended 31st March 1970 and by SI 1970/383 was extended to the 31st July 1970.

6. Thus began the process of registering greens. Unless registered by the extended date the only process by which any new green could be registered was pursuant to section 13(b) where *"any land becomes…a town of a village green"*

7. The definition of what a town of village green is appears in section 22, the Interpretation section:

SECTION 22 (1):

" "town or village green" means land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes [or which fall within subsection 1A of this section].

(1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants, of any locality or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either-

(a) *Continue to do so, or*
(b) *Have ceased to do so for not more than such periods as may be prescribed, or determined in accordance with prescribed provisions."*[1]

8. No determination was ever made by the Minister in either legislative house for any period of cessation in subsection (1A)(b).

9. On the face of it there is the unamended definition contained in the 1965 Act and the amended definition added by the 2000 Act.

10. Even the interface of the two definitions has recently been the result of litigation in the High Court. In *Betterment Properties (Weymouth) Limited v Dorset County Council*[2] Lightman J had to deal with the following preliminary issue:

"Whether an application to register land as a Town or Village Green (made before 30 January 2001 but not determined before that date) should be determined (1) by reference to the definition of Town or Village Green as it existed before the amendment effected by section 98 and section 103 of the Countryside and Rights of Way Act 2000, or (2) by reference to the amended definition which came into force on that date."

11. It is to be observed that there are two differences of great importance between the two definitions. In the unamended definition:

(a) The 20 year qualifying user could have expired prior to the application for registration being made. Further that user must continue until the date of the application for registration; and

(b) The user has to be to be by *"the inhabitants of a locality"* and in the amended definition the user can be more amorphous in that it is a *"significant number of the inhabitants, of any locality or of any neighborhood within a locality"*

12. As can be seen for the words used and as will be seen below the factual inquiry required by the definition is very different.

13. Lightman J formed the view that the process, which the registration authority is engaged in determining an application for registration), is a judicial process. Therefore it must approach the issue (unless the contrary is indicated) on the footing that the outcome is to be determined by reference to the definition in force at the time of the application.

14. So any application made before 30th January 2001 must be determined under the definition under the 1965 before amendment and after that date under the amended subsection (1A).

15. So far as the definitions are concerned there are several periods in chronology that must be identified so as to understand which law applies to the application:

(a) Before 30th January 2001
(b) After 30th January 2001: CRoW Act 2000
(c) After 6th April 2007: Commons Act 2006 (England)
(d) After 6th September 2007: Commons Act (Wales).

Unamended Definition under the 1965 Act

16. Is the right "*which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes*"

Amended Definition under s 22(1A) of the 1965 Act

17. The notes from this point deal only with the amended definition since for the time being any "new application" received in England before the 6th April 2007 and before the 6th September 2007 in Wales and is not dealt with before that date the application must be dealt with in accordance with the definition set out in section 22(1A)(a). Unless they were made before the 30th January 2001, in which case they are dealt with under section 22(1) of the 1965 Act.

18. The day to day effect will be that some application will be running under the old law and some under the new law.

Section 22(1A)

"Village Green"

19. The house of Lord has ruled on this issue. In the light of the conclusions of the House of Lords in *Oxfordshire*[3] **[38-40]**, the current law is that the nature of the land in question does not *necessarily* preclude it from being a VG.

The Extent of the Application Site

20. The Registration Authority is entitled to register only that part of the area covered by the plan which the applicants have proved to have been used for the necessary period for the necessary users: *Oxfordshire* **[62]**.

21. There is no basis for claiming that even if one part of an (arbitrarily defined) application site satisfies the statutory test, the whole application site must be a VG.

22. *Oxfordshire* **[67]** shows that the conclusions in that case were very fact specific. It is not correct to read the *Oxfordshire* case as authority for a proposition that as long as some of the land meets the statutory test, other parts also meet that test. Nor is it authority for the proposition that all open land through which paths run is necessarily a VG (see e.g. the treatment of the Frog Lane in that case).

"This is not an application for judicial review of Mr Chapman's decision and your Lordships are not invited to express a view on whether, on the facts, he was entitled to reach the conclusions which he did. For my part, in the absence of an inspection or at least photographs of the site, I would be very reluctant to do so. If the area is in fact intersected with paths and clearings, the fact that these occupy only 25% of the land area would not in my view be inconsistent with a finding that there was recreational use of the scrubland as a whole. For example, the whole of a public garden may be

used for recreational activities even though 75% of the surface consists of flowerbeds, borders and shrubberies on which the public may not walk."

Qualifying User

23. The categories of user which qualify are broad and

    (a) Sports and pastimes is to be read conjunctively but what is really required is informal recreation: *Sunningwell*[4];
    (b) Pastimes include those activities which would "be so regarded in our own day": *Sunningwell* and include walking the dog and playing with children, blackberry picking, flying kites, tobogganing, Guy Fawkes Night bonfires.

24. However, the user may be "so trivial and sporadic" as not to carry the outward appearance of user as of right. This is because the law of prescription is predicated upon acquiescence.

The Period of Usage

25. The period of usage is 20 years up to the date of the application: *Oxfordshire* at para 44. It is not just any period of 20 years.

26. The evidence has to be rigorously tested to see whether for 20 years continuously up to the date of application.

27. The burden is on the Applicants to show that a significant number of the inhabitants of a locality or a neighbourhood within a locality have used each part of the application site as of right[5]

28. What must be proved on a balance of probabilities is continuous and uninterrupted over a 20 year period back dated from the date of the application. Any use prior to this application period does not contribute to satisfying the statutory test; nor does any use after this period.

Significant number of the inhabitants of any locality, or any neighbourhood within a locality.

The Neighbourhood

29. The "neighbourhood" is a deliberately imprecise term: see Lord Hoffmann in *Oxfordshire* **[20]**. The Applicants will have to demonstrate that a significant number of the inhabitants of a neighbourhood (identified by them) have used the areas sought to be registered continually throughout the period.

30. The "predominantly" used test in *Sunningwell* does not apply to s.22(1A).

31. The evidence has to be tested to see whether the use is by a significant number of the inhabitants of a specific locality or neighbourhood.

"As of Right"

32. "As of right" in s.22(1A) means the same as it did in the s.22(1) considered in *Sunningwell*. In that s.22(1) it means "not by force, nor stealth, nor the licence of the owner": per Lord Hoffman in *Sunningwell*. The subjective view of the person exercising "the right" is irrelevant.

33. Particular care must be taken on the examination of the fact in any particular case. Nec vi, Nec Clam & Nec Precario all come into play.

Evaluation of the Evidence

34. For guidance as to the appropriate approach to the evidence see Lightman J in *Oxfordshire* at first instance; and Sullivan J in *R (Laing Homes) v. Buckinghamshire County Council* [2004] 1 P&CR 573 (598-9).

Defences

35. When looking at "as of right" it should not be forgotten. On the issue of acquiring rights by long usage, the facts have to be looked at *not upon how matters would have appeared to the person seeking to acquire the right by long usage, but upon "how the matter would have appeared to the owner of the land" Sunningwell.*[6]

36. In *R. (On the application of Laing Home Ltd) v Buckinghamshire CC*[7] Sullivan J said that the proper approach," *is not to examine the extent to which those using the land for recreational purposes were interrupted by the land owner's agricultural activities, but to ask whether those using the fields for recreational purposes were interrupting Mr Pennington's agricultural use of the land in such a manner, or to such an extent, that Laings should have been aware that the recreational users believed that they were exercising a public right. If the starting point is, "how would the matter have appeared to Laings?" it would not be reasonable to expect Laings to resist the recreational use of their fields so long as such use did not interfere with their licensee, Mr Pennington's use of them, for taking an annual hay crop"*[82]

37. The principal activity in the Laing case was walking but walking which was confined to the perimeter of the three fields with very little activity in the fields themselves.

Perpetual Warfare

38. Sullivan J in the *Laing Builders* case also quoted from the judgment of Kerr LJ from *Newnham v Williamson*[8]: *"If there is a state of "perpetual warfare " between the parties, there can obviously be no user as of right; and if the servient owner chooses to resist not by physical but by legal force….the claimant's user will not help a claim by prescription"* and further at page 19 *"In my view what these authorities show is that there may be 'vi' – a forceful exercise of the user- in contrast to a user as of right once there is knowledge on the part of the person seeking to establish prescription that his user is being objected to and that the use has become contentious".*

Implied Licence

39. In *R (Beresford) v. Sunderland City Council*[9] the Lords held that a landowner could show on the evidence for instance by overt conduct that, notwithstanding the absence of an express statement, notice or record, use of his land was pursuant to its permission so as to amount to the grant of a revocable licence precluding a claim of use "as of right": see Lord Bingham at **[5]**.[10]

40. However, mere inaction with knowledge of the use is not enough to establish an implied licence **[6]** and toleration by the landlord is not inconsistent with such user having been "as of right" - see *Sunningwell* (it being synonymous with acquiescence - per Lord Rodger in Beresford **[65]**).

41. Thus, if the landlord's 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 [or land] is being used by them only with his permission and not as of right."* (Lord President Hope in *Cumbernauld*).

42. In *Beresford,* mowing the lawn and providing benches was not inconsistent with the use being "as of right" **[7]**; **[60]; [83]**. What this actually shows is that mere

inaction is not sufficient to show in plied licence there must be something more.

43. For an implied licence to exist, overt conduct by the landlord is required. The sort of acts discussed in *Beresford* included making a charge for admission **[83].**

Implied Statutory Licence

44. There is an abundance of statutory provisions relating to public authority land being used for the proposes of public recreation. Where ever publicly owned land is the subject matter of an application this needs to be considered.

45. This issue was left open by the House of Lords in *R (On the application of Beresford) v Sunderland City Council*[11] The question there was under:

Section 10 of the Open Spaces Act 1906. Section 10 provides:

"A local authority who have acquired any estate or interest in or control over any open space … under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired – (a) hold and administer the open space … in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose; and (b) maintain and keep the open space … in a good and decent state …"

"Open space", as defined in section 20, includes "land … which … is used for purposes of recreation …" Section 123(2B)(b) of the Local Government Act 1972 enables open space land held under a 1906 Act trust to be disposed of freed from that trust.

46. Lord Scott at paragraph of his speech said that: *"Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation."* Emphasis added.

47. There is no guidance as to when and how this would work. It something that one needs to be aware of.

Consequence of Registration as a Village Green

48. They are spelled out in two principal statutes which the cases refer to as the Victorian Statutes:

    Section 12 of the Inclosure Act 1857 was designed as a summary means of preventing nuisances on town and village greens and land allotted for recreation. It states"

    "If any person willfully cause any injury or damage to any fence of any such town or village green or land, or willfully and without lawful authority lead or drive any cattle or animal thereon, or willfully lay any manure, soil, ashes, or rubbish, or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green or land, or to the interruption of the use or enjoyment thereof as a place for exercise and recreation, such person shall for every such offence, upon a summary conviction thereof [pay a fine]."

49. Further provision for the protection of town and village greens was made by section 29 of the Commons Act 1876 which states:

"an encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance, and if any person does any act in respect of which he is liable to pay damages or a penalty under section 12 of the Inclosure Act 1857, he may be summarily convicted thereof upon the information of any inhabitant of the parish in which such town or village green or recreation ground is situate, as well as upon the information of such persons as in the said section mentioned."

THE NEW LAW

Section 15 of the Commons Act 2006

15 Registration of greens

(1) *Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.*

(2) *This subsection applies where—*

(a) *significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*

(b) they continue to do so at the time of the application.

(3) *This subsection applies where—*

(a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*

(b) *they ceased to do so before the time of the application but after the commencement of this section; and*

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

(4) *This subsection applies (subject to subsection (5)) where—*

(a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*

(b) *they ceased to do so before the commencement of this section; and*

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

(5) *Subsection (4) does not apply in relation to any land where—*

(a) *planning permission was granted before 23 June 2006 in respect of the land;*

(b) *construction works were commenced before that date in accordance with that planning permission on the land or any other land in respect of which the permission was granted; and*

(c) *the land—*

(i) *has by reason of any works carried out in accordance with that planning permission become permanently unusable by members of the public for the purposes of lawful sports and pastimes; or*

(ii) *will by reason of any works proposed to be carried out in accordance with that planning permission become permanently unusable by members of the public for those purposes.*

(6) *In determining the period of 20 years referred to in subsections (2)(a), (3)(a) and (4)(a), there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.*

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

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

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

(8) *The owner of any land may apply to the commons registration authority to register the land as a town or village green.*

(9) *An application under subsection (8) may only be made with the consent of any relevant leaseholder of, and the proprietor of any relevant charge over, the land.*

(10) *In subsection (9)—*

"relevant charge" means—

(a) *in relation to land which is registered in the register of title, a registered charge within the meaning of the Land Registration Act 2002 (c. 9);*

(b) *in relation to land which is not so registered—*

(i) *a charge registered under the Land Charges Act 1972 (c. 61); or*

(ii) *a legal mortgage, within the meaning of the Law of Property Act 1925 (c. 20), which is not registered under the Land Charges Act 1972;*

"relevant leaseholder" means a leaseholder under a lease for a term of more than seven years from the date on which the lease was granted."

CHANGES

50. The principal changes made by section 15 are as follows:

(a) The Act in certain circumstance provides an opportunity to apply for registration even after there has been a cessation of qualifying user. In some case the window is a wide as 5 year. Previously under the 1965 Act the qualifying user had to continue until the time of the application to make out the 20 years use;

(b) Where use of the land, the subject matter of the application to register, becomes permissive when there had already been 20 years user as of right the use continues as of right without limit unless the landowner takes other steps to challenge the use.

(c) When use of land for sport and pastime is interrupted for statutory purposes that stoppage is deemed not to be a stoppage for the calculation of the 20 year period.

(d) It allows, for the first time, a landowner to voluntarily register his land as a green.

51. It can be readily seen from the choice of words used that the section derives from and indeed is fashioned from section 22(1), (1A) and (1B) of the Commons Registration Act 1965.

52. The following are the methods set out in section 15 by which Land can become designated a Village Green and so registered:

(a) Section 15(8) Where the owner of Land applies to the Registration Authority to register the land as a town or Village Green. Under this provision there is no requirement for any inhabitants to have engaged in lawful sports and pastime on the land to be registered. That factual matrix has to be shown when registering under ss15(2), (3) or (4).

(b) Section 15(2)(a) *"where a significant number of the inhabitants of any locality have indulged as of right in lawful sports and the pastimes on the land for a period of at least 20 years and continue to do so at the time of the application"*

(c) Section 15(2)(b) *"where a significant number of the inhabitants of any neighbourhood within a locality (or probably adjoining localities have similarly indulged in and continue to do so at the time of the application"*

Special Provisions in relation to section 15(2)(b).

53. Subsection (7) which applies to sub section 2(b). Where the qualifying user is itself made out and where access to the land is prohibited within the meaning of Sub section 6, user is deemed to continue as of right.

54. Further where qualifying user is made out within the meaning of Sub section 2(b), any subsequent permissive use is deemed use as of right.

55. Section 15(3)(a): Where a significant number of the inhabitants of any locality have indulged in lawful sports and pastimes, but they ceased to do so before the time of the application and after the commencement of section 15 and the application is made within the period of two years beginning with the date of cessation of use.

56. Section 15(4)(a): Where a significant number of the inhabitants of any locality or neighbourhood within a locality have indulged in lawful sports and pastimes but ceased to do so on or after April 6, 2007, but before the making of the application, and the application is made within the period of five years beginning with the date of the cessation of use.

57. Sub section (6) which applies the disregards to sub section (2)(a), apply them to 3(a) and 4(a).

58. The longer period to apply is slightly ameliorated by the fact that sub section (4) takes effect subject to subsection (5). This provides:

Subsection (4) does not apply in relation to any land where—

(a) *Planning permission was granted before 23 June 2006 in respect of the land;*

(b) *construction works were commenced before that date in accordance with that planning permission on the land or any other land in respect of which the permission was granted; and*

(c) *The land—*

(i) *has by reason of any works carried out in accordance with that planning permission become permanently unusable by members of the public for the purposes of lawful sports and pastimes; or*

(ii) *will by reason of any works proposed to be carried out in accordance with that planning permission become permanently unusable by members of the public for those purposes.*

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SEPTEMBER 2007

FOOTNOTES

[1] *Subsection (1A) was added by the Countryside and Rights of Way Act 2000 by s 98(1) & (2). CRoW 2000 came into force on the 30th January 2001*

[2] *[2007] EWHC 365 (Ch)*

[3] *Oxfordshire County Council v Oxford City Council & Mary Robinson [2006] UKHL 25;(2006) 2WLR 1235. Aka: The Trap Grounds case.*

[4] *[2000] 1AC 335*

[5] *R v (On the application of Cheltenham Builders v South Gloucestershire D.C [2003] EWHC 2803(Admin)*

[6] *[352H – 353A] per Lord Hoffman.*

[7] [2004] 1 P & CR 573

[8] [1988] 56 P & CR 8

[9] [2003] UKHL 60

[10] *[2004] 1 AC 889. See paragraphs 9,24-30 & 52 , 62 and 88.*