Neutral Citation Number: [2012] EWHC 647 (Admin)

Case No: CO/1421/2011

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2012

**Before** :

**MR JUSTICE OUSELEY**

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**Between :**

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| **NEWHAVEN PORT AND PROPERTIES LIMITED** | **Claimant** |
| **- and -** | |
| **EAST SUSSEX COUNTY COUNCIL** | **Defendant** |
| **- and-** | |
| **NEWHAVEN TOWN COUNCIL** | **1st Interested Party** |
| **-and-** | |
| **THE SECRETARY OF STATE FOR ENVIRONMENT, FOOD & RURAL AFFAIRS** | **2nd Interested Party** |

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**Mr Charles George, QC and Mr Philip Petchey** (instructed by **dmh Stallard Solicitors**) for the **Claimant**
**Mr Stephen Sauvain, QC and Mr John Hunter** (instructed by **Legal & Democratic Services Solicitors**) for the **Defendant**
**Mr Edwin Simpson** (instructed by **Hedleys Solicitors LLP**) for the **1st Interested Party**
**Mr David Forsdick** (instructed by **Treasury Solicitors**) for the **2nd Interested Party**

Hearing dates: 8th, 9th, 10th and 11th November 2011

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# Approved Judgment

**MR JUSTICE OUSELEY** :

# Introduction

1. Newhaven is a port town at the mouth of the River Ouse in East Sussex. In 1883, a breakwater was constructed to form the western boundary of the harbour. It extends just over 700m out to sea. The breakwater caused the accretion of sand on its eastern side; that area is now known as West Beach. To the north, the beach is bounded by a high sea wall, from which a pair of steps lead down to the beach. The sea wall is topped by a wide area of hard surfacing known as the Promenade, on which there is a car park. There is another set of steps down from the breakwater itself on to this beach. The beach is wholly covered by water at high tide; as the tide ebbs and flows, the beach becomes uncovered and covered to a greater or lesser extent, but still remains wholly covered by the sea for 42 per cent of every 25 hours 10 minutes of the full tidal cycle. It is wholly uncovered for only a few minutes each day. The area of the beach to mean low water mark is 6.07 ha (15 acres).

2. East Sussex County Council has decided to register West Beach as a town or village green under the Commons Act 2006, for which it is the registration authority. That decision is the subject of this challenge. The County Council decided to register West Beach after receiving an application from Newhaven Town Council on 18 December 2008. That application was supported by significant evidence that West Beach had been used by local inhabitants as of right for lawful sports and pastimes for at least the twenty years expiring in April 2006. That was when the owner of West Beach, Newhaven Port and Properties Ltd, the Claimant, which owns and operates Newhaven Port, fenced off public access to West Beach. It also claims that the sea wall is in a condition which would make public access to its beach dangerous.

3. Newhaven Port, as I shall call it, objected to this application; it was the only objector. The Defendant County Council held a non-statutory public local inquiry to hear the disputed evidence on user, and the legal arguments, many of which were deployed before me. It appointed Miss Ruth Stockley of Counsel, as the Inspector to report to the County Council with recommendations. She has great experience in this area of the law. After the inquiry in July 2010, she reported to the County Council with a reasoned recommendation that the application for registration be accepted. Newhaven Port was given the opportunity to comment on her report and recommendations before the County Council reached its decision. Newhaven Port did so in November 2010, which led to an addendum report from the Inspector. She did not change her mind.

4. On 22 December 2010, her reports and recommendation were reported to the County Council's Commons and Village Green Registration Panel, with an officer recommendation that the application be approved. That recommendation was accepted, which forms the decision being challenged. Registration has not yet taken place, because of this litigation.

5. Newhaven Port challenges that decision on the grounds that a tidal beach cannot be registered as a town or village green, on the proper construction of the Commons Act; and that if it can be registered, this particular beach was not registrable on a

lawful analysis of the facts relating to its actual use. A point which overlapped both those grounds was that land which had no fixed boundary could not be registered, not merely because of the ebb and flow of the tide but because the low water mark varied between the mean lows of the Neap and Spring tides and could change even more over a longer period. The Claimant next submitted that since the use of West Beach was regulated by byelaws, it was used by the public precariously, in the sense of being by licence, and therefore its use could not satisfy the requirements of the Commons Act that it be by the public as of right. This point was developed, by amendment which I permitted without objection, to claim that the use of the foreshore by the public was presumed, rebuttably, to be by permission of the Crown or its successors, and so there was no need to show that the licence had been expressly communicated by word or conduct. Nor could use by the public be as of right, as it had to be, when the public had no right of access to reach West Beach, so as to be able to use it for sports and pastimes.

6. Newhaven Port, as the port authority, developed an argument, with subsequent written submissions, that since West Beach was part of the operational land of the port and subject to the port authority's byelaw making powers and its existing byelaws, registration as a town or village green was incompatible with its statutory powers and rights. Its byelaw making power remained intact and could be used to prevent the sports and pastimes which the public sought to indulge in, if desirable for the operation of the port to do so.

7. The Claimant also sought a declaration that s15 (4) of the Commons Act was incompatible with Article 1 Protocol 1 to the ECHR, as an interference with the landowner's existing property rights, on the grounds that it created an unjustified retrospective power to register land on an application made in 2008, after the cessation of recreational use in 2006, which occurred before s15(4) was brought into force, on 6 April 2007. The Secretary of State for Environment, Food and Rural Affairs was joined to respond to that contention. After the conclusion of oral argument, further submissions were made in writing, as anticipated, on the effect of the decision in *Leeds Group plc v Leeds City Council and Others* [2011] EWCA Civ 1447, concluding on 13 December 2011.

## The Commons Act 2006

8. The registration of common land, rights of common and of town and village greens has a recently complex statutory history, with amendment responding to problems revealed and to judicial decisions, as the competing interests of landowner and recreational user conflict and require resolution.

9. The directly relevant Act is the Commons Act 2006. S15 provides:

> "(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) 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"".

The section came into force on 6 April 2007.

10. By s61, "land" includes "land covered by water".

**Can a tidal beach be a town or village green?**

11. Newhaven Port contends that a tidal beach cannot be registered as a town or village green, as a matter of statutory construction. It contends that a town or village green must be an area mainly of grass, in or on the edge of a town or village. That was what a town or village green was in popular parlance, the town or village playground. That was of the essence of what Parliament was making registrable, even though it had to be expressed as a more exact legal definition. A variety of dictionaries defined a "village green" in such a way; the Oxford English Dictionary 1989, for example, defined it as "a piece of public or common grassy land situated in or near a village …." It cannot have been Parliament's intention that all tidal beaches near a town or village, where they would be probably used for sports and pastimes, would be registrable under the 2006 Act. It was contrary to a sensible or common understanding of the words Parliament used for them to cover a tidal beach.

12. Crucial to this argument of Mr George QC for Newhaven Port was the decision of the House of Lords in *Oxfordshire County Council v Oxford City Council and Robinson* [2006] UKHL 25, [2006] AC 674, the Trap Grounds case. He contended that that decision left unresolved the very question which he now raised. He invited me to hold that Lord Hoffmann's analysis, with which the majority agreed, was obiter, and that Lord Scott's detailed consideration of the point in his dissenting speech, supportive of Mr George's submissions, was to be preferred. Lord Scott did not consider the issue to be obiter; rather it was an essential precursor to a decision on the specific issues raised by the parties. Although the decision concerns the definition of town or village green in s22(1) of the Commons Registration Act 1965, that definition is not materially different from s15 of the 2006 Act so far as this ground is concerned.

13. It is necessary to examine this decision in a little detail, although the issues with which it was directly concerned, i.e. the nature of the activities which registration as a town or village green enabled the inhabitants to carry on, and whether the recreational use had to continue after the date of the application and until registration, are not directly relevant here. The question of what was a village green was not one of the ten issues listed for decision by Lightman J at first instance, nor by Lord Hoffmann in the House of Lords. Yet the first issue he addressed was

"What is a village green?" He questioned whether the statutory concept was being stretched too far beyond the traditional or popular concept, and whether the statutory definition of a town or village green should be affected by the lack of resemblance of the Trap Grounds to a traditional village green. The Trap Grounds was an area of nine acres, of which one third was permanently under water and the rest was largely impenetrable scrub, one quarter of which was accessible to "the hardy walker"; "overgrown, rubble-strewn, semi-submerged, sandwiched between the canal and the railway…"; as Lord Walker later described it.

14. Lord Hoffmann concluded, however, that the statutory definition should not be augmented by the inclusion of elements of the traditional village green, at any rate not without full argument. He said, before turning to the ten issues:

> "38. My Lords, it is true that in construing a definition, one does not ignore the ordinary meaning of the word which Parliament has chosen to define. It is all part of the material available for use in the interpretative process. But there are several reasons why I think that it would be unwise for your Lordships, at any rate without full argument, to embark upon the process of introducing some elements of the traditional village green into the statutory definition.
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> "39. First, your Lordships will observe that the question of whether the Trap Grounds failed, by reason of their current character, to qualify as land capable of becoming a town or village green was not among the 10 questions on which the parties sought rulings from the House. It was not discussed in any of the printed cases. Secondly, this is not surprising because there is no authority, either at common law or on earlier statutes which used the term "village green", in which such a restricted meaning was applied. Thirdly, any restriction derived from the ordinary meaning of "village green" must apply to all three limbs of the definition, but the Royal Commission plainly thought that all land with customary rights of recreation (such as Stockbridge Common Down) would fall within class b. Fourthly, Parliament must have been alerted to the width of the definition by the Royal Commission's proposed restriction for class c greens but chose to define them without restriction. Fifthly, even if Parliament had not noticed in 1965, the subsequent practice of the very learned Commons Commissioners and the courts would have shown how the definition operated. On 19 May 1977 Mr CA Settle QC, as Commons Commissioner, registered as falling within the statutory definition some rocks at Llanbadrig, Ynys Mon, which had been used by the inhabitants of the locality to moor boats while engaged in the pastime of boating. On 24 May 1976 the Chief Commissioner Mr Squibb ordered registration of land which the local authority wanted to use for housing purposes but upon which there was a custom of having an annual Guy Fawkes bonfire. No doubt there are other examples in the archive of decisions of the Commons Commissioners. In *New Windsor Corporation v Mellor* [1975] Ch 380 the Court of Appeal confirmed the registration of a car park in Windsor as a customary (class b) green. Sixthly, Parliament in 2000 showed no unease at the way registration was operating. Seventhly, if Parliament thinks that the definition needs to be narrowed, it will have an immediate opportunity to do so. Eighthly, the terms of the proposed Auburn test

> would be inherently uncertain. To say that the registration authority will recognise a village green when it sees one seems inadequate."

15. Lord Scott recognised that this was one issue in which he was in the minority, but he addressed it because he saw it as an unavoidable precursor to the resolution of the issues which arose**:**

> "71. …The issue is as to what would have been understood by Parliament and by the public generally prior to the enactment of the 1965 Act by the expression "town or village green" and, consequently, how the definition of "town or village green" in section 22(1) of the 1965 Act should be applied. The issue has not been addressed by counsel who have appeared on this appeal, but, nonetheless, I do not think your Lordships can avoid forming a view on it, as indeed my noble and learned friend has done, for the meaning to be attributed to the expression has a heavy bearing on the answers to be given to some of the questions that have arisen in this case."

16. He saw the absence of definition of town or village green in the Inclosure Acts 1845 and 1857, and in the Commons Act 1876, as showing that the expression could only have meant what the normal understanding and dictionary definition provided. S12 of the Inclosure Act 1857 and s29 of the Commons Act 1876 made provision for preventing nuisances on town and village greens in terms relating to soil, depositing manure and rubbish, driving cattle, and the like, which presupposed the green to be mainly land, albeit that it might have a pond or stream within its natural area. He considered a series of late nineteenth and early twentieth century cases.

17. Lord Scott then concluded that a customary right of recreation would not by itself have sufficed to allow the land to be described for legal purposes as a town or village green for the purposes of the Victorian statutes; something more would have been required. In paragraph 77, he said:

> "77. In my opinion, the "something more" would have been a quality in the land in question that would have accorded with the normal understanding of the nature of a town or village green, namely, an area of land, consisting mainly of grass, either in or in reasonable proximity to a town or village and suitable for use by the local inhabitants for normal recreational activities."

18. The Royal Commission on Common Land 1955-58 defined a town or village green as "A piece of open land in a village on which the inhabitants of the village (or town) have a customary right of playing lawful games and enjoying it for recreation." It proposed a more elaborate definition for the purposes of legislation, which, so far as relevant to this ground of challenge, was "…any place in which such inhabitants have a customary right to indulge in lawful sports and pastimes and in a rural parish any unenclosed open space which is wholly or mainly surrounded by houses or their curtilages….". Lord Scott took that to show that the Commissioners had in mind the normal traditional town or village greens.

19. However, the Commons Registration Act 1965 did not employ such a definition: a town or village green, so far as material to the Newhaven case, meant land, which included land covered by water, on which the inhabitants of any locality had indulged in sports or pastimes as of right for not less than twenty years. This feature of the definition was new in 1965, adding a third category to the previous two categories of land over which local inhabitants might be entitled to rights of exercise or recreation: land allotted for that purpose or land over which they had a customary right to indulge in such activities. The importance of this was expressed by Lord Scott in paragraph 77C-F in this way:

> "The important question for present purposes is whether this definition justifies classifying as a town or village green any land on which any form of lawful recreation is either the subject of a customary right or has been indulged in by the local inhabitants for at least 20 years. My instinctive reaction is to say that the definition was not intended to turn into a village green land subject to the exercise of customary rights that would not, pre the Act, have been regarded as a village green. The 160 acre Stockbridge Common Down was not, in my opinion, a town or village green before the enactment of the 1965 Act and did not become one afterwards. The landowner who owned arable land that, before the 1965 Act, had been subject to a customary right to course hares in the autumn would not after the enactment have found that he was the owner of a town or village green. And the addition of class (c) could not, in my opinion, have been intended to alter the status of land that had not previously been a town or village green or to turn into a town or village green land that had never previously been so regarded. The addition of class (c) was intended, in my opinion, in complete agreement on this point with Lord Hoffmann, to enable general recreational rights over town and village greens, as popularly understood, to be established without the necessity of proving user since time immemorial. Proof of 20 years user as of right, a formula borrowed from the Prescription Acts, would do."

20. Lord Scott was critical of a number of subsequent instances of registration as town or village greens, including rocks to which local inhabitants used to moor boats, and a piece of land on which Guy Fawkes bonfires had been held annually for twenty years.

> "81. It is, in my opinion, an error in construction of section 22(1) to suppose that any land, whatever the degree of divergence between the character of the land and a town or village green as normally understood, can be registered as a town or village green either in reliance on class (b) or in reliance on class (c) of the statutory definition. I do not think the problem would ever arise in relation to class (a) for I imagine that any land allocated by an inclosure award for general exercise and recreational purposes, would have been already or would soon have become a predominantly grassy area."

21. It would be wrong to insist on a literal application of the s22(1) definition of town or village green "so as to apply it to land that no one would recognise as a town or village green." A definition had to be approached bearing in mind the normal meaning of the word.

22. Lord Rodger had wished to interpret s22, if reasonably possible, in such a way as to confine it to "traditional" village greens, but saw the definition as a "formidable obstacle to such an approach", since he could not be sure that such a limitation was what Parliament intended. After the decision of the House of Lords in *R v Oxfordshire County Council ex p Sunningwell Parish Council* [2000] 1 AC 335, in June 1999, the potentially wide implications of the s22 definition had become clear but no steps were taken to amend it in the Countryside and Rights of Way Bill. Nor was such a restriction in the Bill then currently before Parliament.

23. The Countryside and Rights of Way Act 2000 altered the parts of the 1965 Act definition which related to the area from which the recreational users had to be drawn and their proportion, but did not alter the definition so far as it concerned the nature of the land itself.

24. Like Lord Rodger, Lord Walker felt uneasy at the way in which Lord Hoffmann's approach to the definition in s22 would put all customary recreational rights into a single one-size-fits–all category, but concluded that the force of his eight points was irresistible.

25. Baroness Hale sympathised more with Lord Scott's analysis, but thought that any view expressed on the issue was obiter, and better left until an occasion on which the issue had been properly fought out. She saw Lord Hoffmann's analysis as turning largely on events after the passing of the Act in 1965, rather than being drawn from the meaning of the phrase at the time of enactment.

26. Mr George dealt with each of Lord Hoffmann's eight points as follows:

> 1. The issue was not argued to any real extent; there was only brief oral argument on it in reply by Mr George for the City Council in opposition to the application.
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> 2. The absence of authority supporting Lord Scott's position was not surprising since the issue in the older cases was whether land was subject to customary rights of recreation, and not whether it was a village green; some areas like Stockbridge Down Common could not possibly have been intended to be village greens.
>
> 3. There was no difficulty in applying the traditional "green "or "grassy" meaning of town or village green to all three categories of land registrable as town or village greens under s22; recreational allotments would have been green and within a town or village; the twenty year user was a development of the customary right of user, and though the Royal Commission would not have thought that Stockbridge Down Common was a village green at common law, it plainly possessed the requirement of being grassy.

4. In reality, Parliament should not be seen as rejecting the Royal Commission's proposed restrictive definition of town or village green when enacting the 1965 Act without such restriction; it would have taken both the second and third categories, like recreational allotments, as being the traditional green areas within towns or villages, just as the Commission supposed inhabitants took them to be.

5. The examples of registrations after 1965 did not show in essence how the definition operated so as to warrant the inference that the absence of later amendment in this respect reflected Parliamentary contentment that the Act was operating as intended. Parliament does not interfere merely because of a few occasions when an Act may not operate as intended either, especially when an aggrieved person if any has not used legal opportunities to challenge decisions: the Ynys Mon mooring rocks registration was uncontested, but obviously wrong; whether or not the Guy Fawkes' bonfire green was properly registered as a village green, it obviously passed the "green" test and so was not an example adverse to the argument. The Windsor car park village green showed only that what was a customary green did not cease to be a customary green when it became used as a car park, a use inconsistent with its status; it did not decide that a car park can be a village or town green.

6. No inference as to Parliamentary contentment should be drawn from the absence of change in 2000, since the Countryside and Rights of Way Act was dealing with other matters, and the Commons Bill amendments were tacked on at the instigation of a private member in the House of Lords.

7. No inference could be drawn from the failure of Parliament to alter the definition of town or village green in the 2006 Act during its passage as a Bill, since there were no more than conflicting obiter from the House of Lords on an issue not raised in the pleadings or in the printed cases; Lord Rodger was right to treat the most that could be drawn from this as being that it did not assist in the resolution of the issue rather than positively showing that Parliamentary inaction proved that the courts were correctly interpreting its intentions. If the greenness test, which Lord Scott favoured, was correct before 2006, it was also correct afterwards.

8. There was no uncertainty about the greenness test; Lord Scott's proposed definition embodied what was required; a village or town green was "an area of land, consisting mainly of grass, either in or in reasonable proximity to a town or village and suitable for use by the local inhabitants for normal recreational activities".

27. The existence of two stretches of tidal beach which were registered as town or village greens should not be persuasive against the Claimant: at Praa Sands in Cornwall, the land was bounded on its seaward side by the high water mark, and was grassland on which sports were played, such as cricket and golf putting, as found on traditional village greens; in Shoreham in West Sussex, the landowner Port Authority had raised no objection and the application had proceeded uncontested; in Whitstable Kent, the area registered excluded the foreshore.

28. Although Mr George accepted that stretches of tidal beach remote from habitation would not be registrable, there were long stretches of coastline which would be registrable if the applicant here were correct, even beaches dominated by tourists from outside the locality.

29. Mr Sauvain QC for the County Council submitted that Parliament, on three occasions, in 1965, 2000 and again in 2006, had chosen to legislate in terms which did not incorporate the notion that the land to be registered had to be green, could not be covered for part of the time at least by water, or had to reflect, by whatever language, the traditional concept of a town or village green. It had focused on the activities, by whom carried out, for how long and on what basis. The criteria it had chosen did not necessarily accord with any traditional view of what a town or village green was. The Royal Commission's concept had clearly not been adopted, for whatever reasons, but it could clearly omit some greens which met all traditional concepts of what a village green should be, and it was clearly not the concept for which Mr George contended.

30. The sort of words which Mr George sought to imply were unwarranted, as illustrated by the very uncertainty over what those words should be. There was no need for such words to be implied. Their application would be uncertain, and they would apply to greens registered on the basis of allotment or customary right. The words Parliament had used were sufficiently clear to need no additions. The reasoning of the majority in the *Trap Grounds* case was to be preferred, even if it were not binding.

31. Mr Sauvain contended that the early parts of Lord Hoffmann's speech in the *Trap Grounds* case, paragraphs 4 and 6 for example, supported his contention that the law had always been more concerned with the character of the use than with the physical characteristics of the land over which the usage occurred. These are cases which Mr George contended were dealing with the establishment of customary rights of recreation, rather than their status as village greens. Mr Simpson for the Town Council adopted Mr Sauvain's arguments. These arguments had found favour with the Inspector.

32. In my judgment, Mr Sauvain's arguments are correct. I cannot conclude that their Lordships' views, on an issue in which the majority stated that what they said was obiter, were other than obiter and not binding. I am bound by the decision that they were obiter. They are closer to assumptions which are open to closer scrutiny later. Even though their Lordships' views are not strictly binding on me, and though I accept there was but limited argument on them, they are naturally authoritative and highly persuasive. I am not disposed to depart from the considered and reasoned conclusions of the clear majority. Besides, some of the points made by Lord Hoffman are themselves compelling, though not all of them. I can see no answer to the contention that the ordinary meaning of the words used by Parliament to define "town or village green" are broad enough to permit the registration of a tidal beach, provided that the nature, quality and duration of the recreational user satisfies the statutory test. The resultant registration can only be displaced by reading words into the Act.

33. I see no coherent legal basis for doing so. Parliament has chosen its words, on three occasions so as to exclude any notion of a requirement that the registered green be "grassy" or "traditional". It has clearly eschewed the Royal Commission's definition. It has not attempted to incorporate any other, such as that for example, essayed by Lord Scott.

34. There is no necessity for such words to be implied to avoid absurdity or to give effect to a clearly ascertained Parliamentary purpose.

35. Parliament may very well have intended to permit the registration of conceptually non-traditional town or village greens on the basis that if their recreational user satisfied the same statutory criteria, their lack of traditional qualities was no adequate basis for distinguishing them from other land which was registrable. The same conflict between landowner and recreational user should be resolved in the same way. The nature, quality and duration of the use was crucial; the quality of the land was unimportant.

36. Parliament may also have concluded that it was difficult to produce a workable definition of a conceptually traditional green, and that the difficulty of drawing the line meant that avoiding arbitrary distinctions was more important than avoiding registrations, surprising only because of their statutory title.

37. Although I accept that Lord Scott addressed the definition which would distinguish traditional from non-traditional greens, I am wholly unpersuaded that Parliament should be taken to have accepted that definition – whether by necessary implication or to give effect to its statutory purpose – and no other.

38. It is important that Parliament has not so legislated in the three Acts, although it had some indication that non-traditional greens were being registered. I accept that Parliament does not necessarily respond to a handful of examples of oddities, in the application of a statute, but it cannot be said that, in 2005-6, the effect of the unconstrained definition was beyond its ken.

39. Accordingly, I am of the view that West Beach is not excluded from registration because it is not a traditional green or grassy. Nor is it excluded because it is wholly covered in water for part of the day and wholly uncovered for only a very short period of the day, as I shall come on to later.

**The absence of a fixed boundary to the land used by local people**

40. Mr George made three points under this head: the ebb and flow of the tides meant that the area over which sports and pastimes could lawfully take place varied with the state of the tides; the seaward boundary, the mean low water mark itself, varied between mean low water Neaps and mean low water Spring tides, and indeed over time could vary more significantly. Although there was a fixed boundary line on the application, referable to mean low water, that did not answer the point that the fixed line and the boundary of the area used by local people were different. The boundary on the application map had to reflect the boundary of the recreational area on the ground, which could not be fixed.

41. The Inspector dealt with this in paragraph 6.15:

> "6.15 It seems to me that the mean low water mark is a sufficient boundary for the purposes of registered land. Although it is not precisely fixed in the sense that it is dependent upon the tide, the changes in the line from time to time will be relatively minor. In essence, it is the best representation of the average position of the low tide and hence, the average extent of the uncovered beach at low tides. I also note that both Newhaven Town Council's administrative area and the Objector's registered land ownership are fixed in that particular area by reference to the mean low water mark. The mean low water mark is thus regarded as an acceptable boundary for administrative and ownership purposes. Similarly, it is my view that it would be an acceptable boundary in principle for a registered town or village green and I so find."

42. Mr George disputed the two supporting points relied on by the Inspector in addition to contending that she had missed the point which he primarily sought to make: the Town Council's boundary is affected by s72(2) of the Local Government Act 1972 so that it varies as mean low water mark changes; Newhaven Port's boundary in relation to its registered title likewise can vary, not on a monthly basis but through accretion or diluvion over years. In the absence of express agreement, the extent of ownership is determined by the position on the ground and not by the line on a map. An estate can grow or diminish with the advancing or receding high water mark.

43. The Crown Estate was served as a possible interested party by order of Collins J. It did not participate beyond writing a letter to the court. It had not been served with notice of the application to register the land and thought that it might own at least part of West Beach. It made the same point about how the intervention of works of coastal protection for another purpose, as well as natural forces, can alter the boundaries of a beach, increase or even remove the whole beach, just as happened with the original creation of West Beach.

44. Mr Sauvain, supported by Mr Simpson, submitted that it was sufficient for the boundary to be fixed on the application map; the only other question was whether the area so delineated matched the requirements of the statute as to its use, which was not the issue raised under this ground. The ebb and flow of the tide did not alter the extent to which at low tide the whole area was available for and to a greater or lesser extent was used for lawful sports and pastimes. The same problem could arise in respect of greens registered above the high water mark.

45. In my judgment, Mr George is right to say that the boundary of the Town Council can vary, as would District and County Councils' boundaries. I accept also that accretion and diluvion, through natural or man-made interventions, can alter low, or high, water mark and ownership and local authority boundaries. I also accept that mean low water mark varies over the year. Accordingly, the usual seaward boundary of the area actually used for lawful sports and pastimes has itself varied on a daily or seasonal basis over twenty years, and will likewise vary in future; and indeed with future accretion or diluvion could vary more markedly.

46. However, Mr George is wrong in submitting that this shows that a tidal beach is incapable in law of registration as a village green, if it falls within the statutory definition, as I have concluded it does, and if the statutory tests are satisfied.

47. Of course, the Inspector could not rationally find, nor did she do so, that the recreational use stopped at the notional line on the ground which would be represented by the boundary to the application site shown on the application. The lawful recreational use extended to wherever the receding or incoming tide had reached, and to its greatest extent at mean low water springs, over twenty years during which the rights were established.

48. A fixed line on a map is required for the application. The judgment that mean low water was an acceptable line is a rational reflection of the usage of the land. Fixing that line on a map cannot lead to the registration of any land over which lawful recreational user did not occur. There may be areas beyond it which would have been so used but which are not included within the registered area, but that possibility cannot be a sound legal objection to the registrability of the rest.

49. If the low water mark recedes through accretion, the further land exposed will not form part of the registered green. If the beach is eroded, the lawful recreational use of what has hitherto been so used will become impossible; part of the registration may be redundant, and of historic interest only. That does not tell against the lawfulness of registration now.

50. I also take the view that such possible future problems do not preclude in law the registration of a tidal beach now, with future changes to be the subject of future consideration.

51. This is not an issue of legal certainty since that is provided for by the line on the map, the location of which on the ground is ascertainable.

52. The fact that lawful sports and pastimes cannot be engaged in over the whole of the registered land all the time, is not a reason for refusing to register all the land over which at times of the day, depending on the state of the tide, the public can and do engage as of right in lawful sports and pastimes; but that is more a matter for consideration as part of the next ground.

53. I see no comfort for Mr George in the inclusion in the definition of a town or village green of “land covered by water”. The definition does not require the land covered by water to be part of a larger, dry area. This seems to me to contemplate not just the registration of land permanently under water but also the registration of land not always covered by water, because the levels of a village pond or inland lake can vary with rain or the fullness of feeder streams. The registrability of an area cannot depend on the permanence of its watery coverage, nor can land be excluded from registrability because of the inevitable natural variability of the extent of its watery coverage. It cannot have been intended, in the use of that language, that a steady, permanent water level, was required for the water area to be registrable.

**If a tidal beach can be registered as a town or village green, is West Beach lawfully to be registered as one?**

54. In this ground, the Claimant contends that the reasoning of the Inspector, adopted by the County Council in the decision under challenge, was legally inadequate, and indeed produced an irrational decision. The distinction between the first two grounds and this ground was that the former focused on the physical characteristics required of land to be a town or village green, whereas this ground focuses on the nature of the use it must have. In this case, the overlap between the two points is considerable, since the watery characteristic of this land affects, along with byelaws, the use which may actually and lawfully be made of it.

55. Byelaws had been made in 1931 by the Southern Railway Company, as the predecessor port authority, under the Harbours Docks and Piers Clauses Act 1847, the Newhaven Harbour Improvement Acts 1863 and 1878, and under the Southern Railway Act 1926. S83 of the 1847 Act gave a wide power for the making of byelaws for the regulation of the harbour. The byelaws it made were confirmed by the Minister of Transport. They govern the recreational activities which can take place in Newhaven Harbour as delineated. Byelaw 66 bars intoxication, and obscene language and offensive conduct which interferes with the use of the harbour. Byelaw 68 forbids fishing in the harbour without permission, and bathing within part of it, which covered West Beach. Throwing stones or missiles or using catapults, or having a firearm without written permission, is forbidden by byelaw 69. Byelaw 70 provides that "No person shall engage in or play any sport or game so as to obstruct or impede the use of the harbour or any part thereof, or any person thereon….". Dogs cannot be brought within the harbour unless properly secured or controlled; byelaw 71. Betting and playing or gambling with cards is contrary to byelaw 72. Byelaw 80 made breaching the byelaws a criminal offence, and by byelaw 81, those breaching them could be removed from the harbour after a warning.

56. The upshot of this was, as the Inspector accepted, that there were no water based sports or pastimes which could lawfully be undertaken, since fishing and swimming were forbidden or could not come into the reckoning for other reasons. So the only lawful sports and pastimes, subject to the other restrictions, were land based. In this case, the land was covered by water and so wholly unusable for lawful sport or pastimes for 42 per cent of the time, was wholly usable for only a few minutes in each 24 hours, and for varying periods in between depending on the state of the ebb and flow of the tide. These facts alone made registration irrational, submitted Mr George.

57. It is necessary to set out parts of the Inspector's report at this stage. I say straightaway, that whatever criticisms may be made of the reasoning in the report, it dealt with a very unusual situation carefully, made the necessary factual findings, grappled with the issues, and produced a clear and reasoned recommendation which, in my view, dealt with the issues raised. I found it very helpful in dealing with the legal issues raised before me. The Inspector's report is thorough, careful, and it was accepted that the court should be slow to interfere with the judgment of the experienced and expert Inspector.

58. The Inspector summarised the evidence she had heard of the recreational activities, concluding that it was apparent that the application land had been used for various recreational activities. Indeed, it was common ground that it had been used for lawful sports and pastimes, and the Claimant had not been able to dispute the Applicant's evidence of considerable use of the land for such activities. Before discounting those activities which conflicted with the byelaws, she found that:

> 6.19…Typical activities were sunbathing, beach games, picnicking, paddling, swimming, fishing, bait digging, walking with and without dogs and kite flying"

59. She then concluded that fishing, swimming and other water-based activities were forbidden by the byelaws and so could not count in the assessment of lawful sports and pastimes. However, the land-based activities were not affected by the byelaws since there was no evidence that the playing of games had impeded the use of the harbour, nor that dogs had been out of control, and she was accordingly satisfied that the application land had been used for some lawful sports and pastimes during the relevant 20 year period.

60. But there were other activities or users which also fell to be discounted in her judgment of the extent and continuity of use for lawful sports and pastimes. Some baiting on the land was for business purposes. Approximately 40 per cent of the users lived outside the locality of Newhaven. Use of the beach was significantly reduced in winter, but the users then were more local. The use in winter was not trivial or sporadic, so the beach was in use all year round for lawful sports and pastimes.

61. The Inspector then turned to the effect of the tides in paragraph 6.33-4:

> "6.33 Fifthly, and particularly significantly, as the Land comprises a tidal beach, it is not available for lawful land-based activities for significant periods dependent upon the state of the tide. The unchallenged expert evidence of Mr Marks was that, on average, the Land is completely covered by water for 42% of the time and is uncovered to some extent for 58% of the time. It is only completely uncovered for a few minutes. Putting that into actual times, he indicated that the average period of time between low tide to when the Land is covered by water is 3.6 hours. It is then a similar 3.6 hour period between the Land first being uncovered to low tide. The tidal cycle from high tide to high tide or from low tide to low tide is approximately 12 hours and 35 minutes. Therefore, in round terms, in every 12½ hour tidal cycle, the land is uncovered to some extent for 7¼ hours and is completely covered for 5¼ hours. Given the water-based activities are not lawful sports and pastimes, the Land is not usable for lawful sports and pastimes for around 5¼ hours in every tidal cycle and then is usable to variable extents for around 7¼ hours.
>
> 6.34 Sixthly, and linked to the above, an effect of the tidal cycle is that parts of the Land, namely those parts nearest to the mean low water mark, would not be usable for the majority of the time for

> lawful sports and pastimes as they would only be available for a limited part of each 7¼ hours of each tidal cycle to a decreasing extent the nearer the area was to the mean low water mark."

62. She drew her conclusions on the effect of that evidence on the registrability of the land in paragraphs 6.39-6.40:

> "6.39 Turning to the tidal effects, the expert evidence of Mr Marks which I accept is that the Beach is entirely covered by the sea for 42% of the time. Given my finding that all water-based activities were unlawful, lawful sports and pastimes could only take place on the Land for a maximum of up to 58% of the time. Further, different parts of the Land would be available for such lawful sports and pastimes for only a limited part of that 58% of the time, such periods decreasing the nearer the area of the Land is to the mean low water mark. In considering that evidence, the fundamental issue remains whether, in the light of such circumstances, the use of the Land was of such a nature that it would show to a landowner that rights were being asserted. Although the Land was only available for use for a maximum of 58% of the time, gradually reducing towards the mean low water mark, as there are just short of two tidal cycles in every 24 hours, the Land was nonetheless available for use for land-based recreational activities for a material period of time each day. Further, I note that evidence that local people tended to be aware of the times of the tides and so knew when the Land would be available for such uses. My impression of the evidence was that although the Land was not available for such uses for material periods, its use at other times was of such a nature and with such regularity that it was sufficient to indicate to a landowner that rights were being asserted. The mere fact that, due to natural causes, the Land was not available for lawful sports and pastimes for material periods of time would not seem to me to be a reason in itself for the Land being incapable of registration.
>
> 6.40 Further, I recognise that some parts of the land were unavailable for use for lawful sports and pastimes for substantial periods in that they are covered by water for the majority of the time. Nonetheless, it seems to me that it is necessary to apply the same consideration, namely whether the use of the land as a whole was of such a nature and extent that it would show to a landowner that rights were being asserted over the Land as a whole. In that regard, I accept the unchallenged evidence of users that the Land was used generally. It was evident that if users went to the Land to sit and/or sunbathe, they would generally seek to find a spot close to the harbour wall if possible as that would be available for the longest period before the tide covered that area. However, if those areas were not available, other areas would be used. … Mrs Carver would look for a space near to the wall but could not always find one whilst Mrs Giles always sought the area near to the steps which was the first area uncovered and the last area covered by the tide. Moreover, for the more active pursuits, the area seems to have been used generally,

> such as for dog walking, beach games and kite flying. It therefore appears to me that the Land in its entirety has been used for lawful sports and pastimes, albeit some areas have been used more frequently than others, namely those areas closest to the harbour wall. Nonetheless, the impression I gained from the user evidence was that when it was available, the area of the Beach that was uncovered by water was used for lawful sports and pastimes. Further, it seems to me that the use was such that it would have been apparent to a landowner that the Beach as a whole was used for lawful sports and pastimes as and when it was uncovered."

63. The Claimant contended that there was an illogicality in this analysis. On the Inspector's findings, none of the land was available for lawful sports and pastimes for 42 per cent of the time. Only a small part of the land was fully available for use for 58 per cent of the time. That 58 per cent of time also covered periods in the tidal cycles when very little of the beach would have been exposed as sand for lawful sports and pastimes. The Claimant's evidence on tides, which she accepted, showed that half or more of the beach was exposed for no more than 30 per cent of the time; and that no more than one tenth of the beach was exposed for more than 50 per cent of the time. She should have concluded that for most of the time, most of the land was not available for lawful sports and pastimes. On the basis of that inevitable conclusion, she could not rationally have found that the land, as a whole, was used for lawful sports and pastimes. The requisite continuity of use was broken by the tides daily, even though there was no need for land to be used 24 hours a day for use as of right to arise.

64. It was necessary for there to be recreational use of the application land as a whole, although Mr George accepted that that did not mean that the actual activities had to extend or be capable of extending to every square foot. Sullivan J had so held in *R (Cheltenham Builders Ltd) v South Gloucestershire Council* [2004] JPL 975. The area of the Trap Grounds usable for recreation was no more than 25 per cent of its surface area, but Lord Hoffmann did not regard that as inconsistent with recreational use of the scrubland as a while. He drew an analogy with the flower beds and shrubberies commonly found in a public garden, which were part of the recreational area but not directly available for recreational activities. This was different from the temporal constraints on the lawful use of land here.

65. Mr Sauvain submitted, in the light of those authorities, that whether there was sufficient usage of the whole application site was a matter of fact and degree for the judgment of the Registration Authority, which had here adopted the report of the Inspector, and the Court should be very slow to interfere with that judgement. The Inspector had addressed the particular issues logically and carefully; she had accepted and appreciated the evidence given by the Claimant, but had reached a different judgement as to its significance for her recommendation. This was essentially an issue of rationality, and the Act contemplated that land covered by water could be registered as a village green. It was for the County Council, guided by the Inspector, to judge whether there was sufficient lawful use. It did not have to be non-stop. Breaks in use would not without more break continuity of use. The level and nature of use simply had to be that which, judged objectively, would make a landowner aware that the public were asserting a right; see *R (Lewis) v Redcar and*

*Cleveland BC (No 2* [2010] UKSC 11, [2010] 2 AC 70 at para 32-33, citing *Hollins v Verney* [1894] 13 QBD 304. The measure of that could be seen in the facts of *Lewis*.

66. Mr Simpson pointed out that a duck pond or stream in a village green would be covered in water all the time, yet the fact that that part might not be usable for lawful sports and pastimes could not preclude the registration of the area within which it fell as a village green.

67. Mr George's submission in essence is that on the findings of fact made by the Inspector, which are unchallengeable, no reasonable Inspector could have recommended and no reasonable Registration Authority could have accepted that this land was used for sports or pastimes, in view of the area and time for which lawful sports and pastimes were impossible. I disagree, treating this as an issue of fact, degree and rationality for the Registration Authority on the primary findings of fact made by the Inspector.

68. It is not a prerequisite of registration of land as a village green that lawful recreational use be physically possible over all of it; the *Traps Ground* case illustrates that. I do not see a relevant distinction in law or rationality between the registration of an area most of which is physically unused and was unusable for recreation, but all of which sensibly is regarded as constituting a single identifiable area, and the registration of an area all of which is physically used and usable for recreation but only for variable, and in part exceedingly short, parts of the day.

69. The limited extent of physical lawful use is a constant in one and a variable in the other, but that difference does not found a legal distinction, to my mind.

70. The lawful recreational use does not have to be the sole or even dominant use of the land. The dominant use of the land is what happens when it is wholly or partly covered by water. Its dominant characteristic is that most of it is covered by water most of the time. But it is not of the essence of a registrable village green that the qualifying recreational use be the sole or dominant use, or that it has any characteristic beyond that it has lawfully occurred as of right for the requisite period. That suffices to bring in whatever requisite degree of use is required. The decision in *R (Lewis) v Redcar and Cleveland Borough Council* (No2) [2010] UKSC 11, [2010] 2 AC 70 illustrates this. Local inhabitants claimed successfully that they used part of a golf course for sport and recreation as of right, notwithstanding that they had "overwhelmingly deferred" to the golfers playing on the course, owned by a private club. Often there would be no golfers about or the delay would only be very short. The dominant use of the land when registered was, and I expect will remain, that of a private golf course. The public will exercise rights over it.

71. The impossibility of lawful use when covered by water of the land was created by the combination of tide and byelaw. The effect of the tides is not entirely akin to the possible analogous effect of nightfall on an inland green because the effect of the tides, coupled with byelaws, did make lawful recreational use of the land covered in water impossible, whereas darkness might only make lawful recreational use awkward or dangerous. But I do not see that as preventing a rational conclusion

that when, where and to the extent that lawful use was possible, there was a sufficient degree of it to satisfy the criterion that use be as of right and so to permit registration. Whether or not there was sufficient is a different albeit related issue.

72. In my judgment, the Defendant's conclusion on this issue is both rational and adequately reasoned.

73. All parties treated this as a question to be answered by a consideration of whether the Inspector's recommendation was rational, thus showing the County Council's decision adopting it to be rational. I have accepted that approach. But I question its correctness: the scope of the phrase "town or village green" is a matter of law; whether the facts found showed that an area of land falls within it, is not left by statute to the reasonable judgment of the decision-maker. The land either is or is not a village green on certain primary facts – that seems more a matter for the Court to decide, when a challenge is brought, and not a matter for determination by reference to the reasonableness of the registration authority. That is not the same test as recognising that a Court should be slow to interfere with the judgment of an experienced and expert Inspector.

**Use as of right: the effect of the byelaws**

74. The next issue for the Inspector was whether the use was as of right, or to put it in the common Latin phrase: nec vi, nec clam, nec precario.

75. She found, and there is no issue, that the use was not secret nor by force. The question, as she saw it, was whether, since the use was not by express permission, "in order for the use of the Land to have thereby been pursuant to an implied permission, some overt act had been communicated to inhabitants to demonstrate to them that their use of the Land was pursuant to such permission. That could have arisen, for example, by means of appropriate notices and/or by the active enforcement of the Byelaws in relation to the Land." (para 6.62). She derived that test from *R (Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 AC 889.

76. She described the position of notices alerting people to these byelaws. There were no signs or notices on the application land itself, which did not include the Promenade or breakwater. "Along the harbour wall railings are a number of sets of two prohibition signs prohibiting fishing, diving and swimming and warning of deep water. In addition, close to the top of the steps leading down to the Land are two byelaw notices, once of which is no longer legible."; para 3.4. She concluded that neither of the byelaw notices near the steps leading down to the application land were in place during any part of the 20 year period, nor were any in place at the entrance to the car park on the Promenade; paras 6.64-5. There had been merely a warning sign about the danger from the wash created by the passage of ships. So she concluded "that there were no signs in place during the relevant 20 year period which would have indicated to users of the Land that their use was regulated by Byelaws or otherwise by the Landowner"; para 6.68.

77. Nor was there any evidence of the enforcement of any of the byelaws, including the byelaw prohibiting swimming in the harbour, or of some other act regulating

sports or pastimes, whether the application land was exposed or covered in water. There was no suggestion of any other overt act on the part of Newhaven Port to demonstrate that it was granting an implied permission for local inhabitants to use the Land. "Consequently, applying the law as set out in *Beresford*, it is my view that the mere existence of the Byelaws which governed the Land without any indication of that fact being communicated to users at any time during the relevant 20 year period was insufficient to result in the use being carried out with implied permission and I so find."

78. The Addendum Report maintained those findings of fact.

79. The Inspector rejected the Claimant's submission that the mere existence of byelaws resulted in the Land being regulated and so its use consequently could not be as of right, because, whilst regulation could, in principle, prevent use as of right, on the facts of this case the 1931 Byelaws did not have that effect. First, she said in para 6.74:

> "For a use to be regulated, it seems to me that it must be actively controlled in some way, such as by the erection of appropriate signs or notices or by active enforcement. In contrast, the mere making of byelaws nearly 80 years ago without any notice being erected informing the public of their existence or any active enforcement of those byelaws or any other indication being given to the public that those byelaws existed does not appear to me to amount to a regulation of the use of land to which they related. On the contrary, it seems to me that the use of the Land was not in fact being regulated. Although it was capable of regulation given the making of the Byelaws, no such regulation of the use in fact took place during the relevant 20 year period."

80. Second, and alternatively, she held that the tripartite phrase "nec vi nec clam nec precario" covered the concept of a use that was "as of right", and considered that there was no authority to justify the addition of another separate basis on which a use is not "as of right". . Therefore, regulation sufficed to preclude the use being "as of right" if and only if it showed to the local inhabitants that their use was subject to the owner's revocable licence, and was accordingly "precario". But an overt act communicating that fact to the users was required.

81. Mr George first contended that where a use was or was liable to be regulated by byelaws, it was necessarily "precario". Mr Sauvain, to the contrary, submitted that any area of land might be subject to general or local laws such as byelaws restricting the use which might be made of it, but that did not mean that the use of the land for recreation could not satisfy the test laid down in the Act for its to be as of right.

82. Mr George submitted that the Inspector, at para 6.78, had missed the significance of what Lord Scott said in paragraph 30 of *Beresford* about land acquired under the Open Spaces Act 1906, and held under a public trust. What Lord Scott said, obiter, was:

> " 30 It is, I think, accepted that if the respondent council acquired the sports arena "under the 1906 Act", the local inhabitants' use of the land for recreation would have been a use under the trust imposed by section 10 of the Act. The use would have been subject to regulation by the council and would not have been a use "as of right" for the purposes of class c of section 22(I) of the Commons Registration Act 1965. "

83. It was not, as she had held, the fact or nature of the trust which meant that the use of that land could not be as of right, but rather the fact that the use of such trust land was subject to regulation by byelaw. Land acquired under the 1906 Act was held on trust to be administered for public enjoyment as an open space, and regulated and controlled for that purpose.

84. I accept that, as Mr Sauvain submitted, this case is not authority for the proposition that because land is subject to regulation by byelaws, it is incapable of being used for sports and pastimes as of right. The question raised late, see Lord Bingham at paragraph 9, was whether land which had been acquired pursuant to the Open Spaces Act 1906, and was subject to the public trust created by s10 of that Act, could be used for recreational purposes as of right. Their Lordships held that it could not. I appreciate that Lord Scott uses the language of land subject to regulation to describe such land, and is echoed in that by the Inspector, but he is clearly referring to land the regulation of which is so that it can be used for public recreation, rather than any piece of land which is regulated or capable of being regulated in some way as to affect its recreational use. To my mind, Lord Scott regarded the combination of the status of the land held under that particular trust and the regulatory power or the latter alone as bringing about that result. That is not to say that it answers all the points to which the existence of byelaws or byelaw-making powers give rise.

85. A power to regulate land by byelaws can arise in a variety of ways, as I discuss later in a little more detail, under the Local Government Act 1972, and Acts relating to commons or to statutory undertakers. The existence of such a power may mean that the actual use can be regulated by the making of byelaws for the purposes for which the land is held or for other purposes for which the power to make byelaws has been given. But I cannot see that the mere existence of such a power means that the recreational use must always be with the implied licence of the landowner (if it is the byelaw-making authority). Its actual exercise may of course have other effects. The status of the land, which attracts a regulatory power, may suffice to show its use is by licence; this was so in the case of land held under the Open Spaces Act 1906. But a mere byelaw making power, regardless of its exercise and the effect of its exercise cannot constitute an implied licence. A well-publicised notice that a byelaw-making power exists cannot evidence a licence any more than could a sign saying that the land was private land.

86. Mr George next submitted that the exercise of the byelaw-making power here prohibiting water-based recreation and regulating the use of the land showed that user was by the implied licence or determinable consent of Newhaven Port: it had shown both a prohibitory and permissive power. The prohibition on bathing

evidenced implied consent for the other activities. Communication or enforcement were not necessary for the implication of a licence.

87. Mr George suggested that there was an inconsistency in the Inspector's approach to the byelaw prohibiting bathing in the harbour: she accepted that it made such bathing an unlawful pastime which therefore could not be counted for the purpose of judging what lawful pastimes were pursued on West Beach, but she rejected the contention that, despite non-communication, it showed that lawful use for other purposes was by permission. The Inspector had accepted that in principle the regulation of land by byelaws was capable of preventing its recreational use being "as of right".

88. Since the Inspector accepted that, if the byelaws had been communicated, even though they did not make all sports and pastimes on the exposed beach unlawful, the use would not have been as of right, but by licence or "precario", the question was whether that absence of communication should make any difference.

89. Mr George submitted that absence of knowledge of the byelaws made no difference to their enforceability, nor did the absence of enforcement mean that they could be regarded as unenforceable, and that had not been the Inspector's approach to the lawfulness of the activities regulated by them either. Nor, at least since 1994, did the absence of publication go to their enforceability. The byelaw making power in s83 of the Harbours, Docks and Piers Act 1847 required byelaws to be "reduced into writing"; by s88, a copy had to be displayed in a conspicuous place in the harbour; by s89, as originally enacted, byelaws were binding when "published and put up". S89 was repealed by the Statute Laws (Repeals) Act 1993 which brought harbour byelaws into the same position as byelaws generally under the Local Government Act 1972. So, submitted Mr George, as from 1994, and so during the bulk of the twenty year period up to 2006 relied on by the applicant Town Council, any failure to communicate the byelaws would not have rendered them ineffective and they could have been enforced against any persons, however ignorant of them. They were put up in the Harbour Master's Office.

90. A reasonable landowner, submitted Mr George, would not conclude that a right was being asserted by users when he retained the power by byelaw to prevent that use, and had prohibited some and regulated others of the activities in which they were engaging anyway. That was not a power which would on the face of it come to an end merely because it had not been used to deal with particular activities. It was important to ask what the reasonable landowner would have thought.

91. Mr Sauvain submitted that byelaws could show that there was a revocable permission to use the land, but if byelaws were to have that effect, they had to be communicated to users. There was no evidence here of active regulation. There was nothing over a period of 20 years to suggest that these activities were contentious. Nor had there been a closure, even for a day, to assert by that overt act that user was by permission. Nor could awareness of the mere existence of a power to make byelaws which could restrict or prevent, for whatever reason, the use of the land for sports and pastimes be a sufficient communication of a permission or its revocability.

92. Mr Sauvain also contended that the byelaws, other than those which related to water-based activities, did not show that usage for sports and pastimes, could be revoked at will, since they provided for removal only after a breach and a warning.

93. In my judgment, on the second issue under this head, the Inspector's approach was correct in law. The making of byelaws can have the effect of making some sports and pastimes unlawful, or unlawful at certain times or in part of a potentially registrable village green. Any activities carried on in breach of the byelaws, whether the byelaws are enforced against them or not, are unlawful and have to be discounted, as the Inspector discounted for example, the bathing.

94. There is no inherent inconsistency between discounting activities which are unlawful by virtue of the byelaws when considering what lawful sports and pastimes have been carried on for twenty years and treating uncommunicated byelaws as incapable of evidencing an implied permission or revocable licence.

95. No challenge can be made to the factual finding that the existence or content of byelaws regulating activities on West Beach, whether in the water or on the exposed land, was not publicly communicated by sign, notice or active or indeed any actual enforcement.

96. The Inspector also found that, although the mere uncommunicated existence of the byelaws could not evidence an implied permission, a notice or sign referring to them erected in an appropriate place would have sufficed to evidence an implied permission. That is important because she accepts in paragraph 6.68 that it is the existence of byelaws regulating sports and pastimes rather than their specific content which matters. Mr Sauvain may be right that there was no evidence that the recreational use of the exposed beach ever contravened the byelaws. But, as I understand the Inspector's reasoning, the fact that lawful sports and pastimes could be and were carried on without contravening the byelaws would not have shown that they were as of right. The very existence of the byelaws communicated in some way, would have shown that the recreational use was by implied, revocable permission. I agree that that aspect of her approach is legally correct.

97. *R (Beresford) v Sunderland City Council* above is an important case, relied on by the Inspector: a landowner can assert his rights by conduct and not only by statement or notice, but mere inaction with knowledge of the use does not provide a basis from which permission should be inferred. Lord Bingham, in paragraph 5, as Mr Sauvain submitted, held that the landowner must make clear through his acts that he is permitting the use on those occasions when he does not exclude the users. To put it another way, he has to make clear that his licence is revocable. Once qualifying user has been proved, toleration, even encouragement, was not sufficient to found the inference of permission; as Lord Rodger said, the grant of a licence required a positive act by the landowner. In that case, the fact that the landowner mowed the grass or provided benches for the users did not show that recreational user was by its permission. Lord Walker, para 79, emphasised that in this area of law "it would be quite wrong 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." Consent was not a synonym for acquiescence, but almost its antithesis: "the former negatives user as of right, whereas the latter is an essential ingredient of prescription by user as of right." (para 81).

98. In *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* above, the Supreme Court rejected the argument that there was a further requirement, in addition to the need for the user to be neither by force, or in secret or by permission, i.e as of right, that it should appear to a reasonable landowner that the users were asserting a right to use the land. These three vitiating circumstances were unified by the feature that in each case it would not have been reasonable to expect the owner to resist what was later claimed as the exercise of the right.

99. What was required was that the user for at least twenty years be of such amount and in such manner as would reasonably be regarded as the assertion of a public right, so that it was reasonable to expect the landowner to resist or restrict the use if he wished to avoid the possibility of registration as a village green.

100. That case illustrated that a reasonably alert landowner could not have failed to recognise that local inhabitants had regularly and in large numbers continued to cross the golf course to pursue their lawful sports and pastimes, in the assertion of a right which would mature into an established right were he to take no steps to stop it. He could not have concluded that they gave way to golfers merely out of deference in their use of the land. Too much weight had been attached by the Court of Appeal to perfectly natural and courteous behaviour. Lord Hope emphasised the critical question as being the quality of the user; the quality of user was what the reasonable landowner had to consider. Lord Brown emphasised that the focus must always be on the way the land has been used by the locals, and above all, the quality of that user.

101. The crucial question is whether the Inspector is right that some form of communication of the existence of the byelaws was necessary. To my mind, that is effectively answered by *Beresford* and *Lewis*. The former draws a clear distinction between passive acquiescence, even encouragement or facilitation - in that case through mowing grass and providing benches - and permission overtly communicated. The latter is required; use is otherwise nec precario. The apparent quality of the use can only be affected by action and not by a silent thought.

102. The decision in *Lewis* does not help Newhaven Port. The quality of the user tests whether a reasonable landowner would realise a right was being asserted, and could therefore reasonably be expected to resist or restrict it, if acquiescence were not to permit a right to be established. This requires an objective analysis and so excludes any role in that respect for the declaration of intent not made to the users or licence hidden in a drawer, or as here the unannounced but still enforceable byelaws.

103. Byelaws, albeit unannounced and unenforced, are relevant to a prior aspect on which the Inspector concluded in favour of Newham Port. If they had prohibited all the activities relied on by the inhabitants to establish their recreational user rights,

there would have been no lawful sports and pastimes. The issue of user as of right would not even have been reached. But that was not the position here.

104. In *R v Secretary of State for the Environment, ex p Billson* 1999 QB 374, Sullivan J had held that where a right of access for air and exercise was created by a revocable licence granted under s193 of the Law of Property Act 1925, of which the users were ignorant, their use was by licence, or precario; even though they believed that it was as of right, in fact it was not. The judge also concluded, see pp393-4, that the deed, though not published, was "sufficient evidence" that the landowner had no intention to dedicate it as a right of way for the purposes of s31 of the Highways Act 1980. It was objective evidence even if not made public.

105. Mr George contended that he could still rely on this case in the light of the decision of the House of Lords in *R (Godmanchester Town Council) v Secretary of State for the Environment* [2007] UKHL 28, [2008] 1AC 221. It expressly disapproved of Sullivan J's conclusion, but, said Mr George, that was only in the context of what was required for sufficient overt and published evidence that a landowner had no intention to dedicate land as a right of way. It did not disapprove of what he said in the context of what was required to show that use was as of right.

106. It seems to me that what Sullivan J said about the revocable licence and proof of intention was held to be wrong; the effect if any on use as of right was not directly ruled on. This distinction was not to the fore in Sullivan J's reasoning; the two seemed to go hand in hand.

107. I recognise that the distinction urged by Mr George between intention to dedicate and a licence to use may be a valid one. But I do not think that *Billson* (on communication of a licence) upon which he relies, really survived *Beresford*, even if it survived on intention to dedicate until *Godmanchester*.

108. Mr George put overmuch weight on a short passage in what Lord Hoffmann said in *R v Oxfordshire County Council ex p Sunningwell Parish Council* [2000]1 AC 335, at p352H-353A. The real issue in that case was whether or not the registration of land as a village green required the recreational users to have a subjective belief in the existence of a right to use it for that purpose. The House of Lords concluded that they did not. Toleration by a landowner was not fatal to establishing that user was as of right. The establishment of the class c rights within s22 of the 1965 Commons Registration Act, the same class as at issue in this case, required no grant or dedication; user as of right was sufficient; user as of right was user which was neither by force or in secret or by permission.

109. The reference, at p352H-353A, to how the owner would have seen matters related to what was required in the nineteenth century in the related but different area of rights of way; it cannot be read as requiring any analysis of the subjective reaction of the individual landowner. The question here is how matters would have appeared objectively to the reasonable landowner observing what was taking place over the years.

110. In reality, the objective test applies to both sides in this dispute: it is irrelevant whether the recreational public had any subjective intent to assert a right; what

matters is the quality of their use as apparent to the reasonable landowner. Conversely, the subjective intent of the landowner is irrelevant; what matters is the objective nature of his overt response to that user, and not the subjective intent with which he does the acts said to constitute or to evidence the licence he relies on.

111. Accordingly on this issue, I see no bar to registration.

## Crown and foreshore

112. Mr George submitted, by amendment to Ground 3, that use by the public of the foreshore was subject to a rebuttable presumption that it was by permission of the Crown or its successors in title. It was not necessary to demonstrate either express communication to users by the owner nor conduct by the owner which made clear that the inhabitants' use of the foreshore was pursuant to the owner's permission. He relied *on Alfred Beckett Ltd v Lyons* [1967] 1 Ch 449(CA), as explained in *Mills v Silver* [1991] Ch 271 (CA). Foreshore was different from other land in respect of the need for communication of permission, if its communication was necessary for land other than foreshore. On that basis, the Inspector should have found that the use was by permission and not as of right.

113. Mr Sauvain submitted that those cases did not support any such presumption at least in favour of successors in title to the Crown. The Acts of 1965 and 2006 were expressed to apply to the Crown, creating a form of statutory prescription against the Crown.

114. *Beckett v Lyons* concerned an action for trespass brought by a coal company, which held a lease of nine miles of foreshore in the County Palatine of Durham from the Crown. It claimed that the defendants, who were local inhabitants, could not go on to the foreshore to collect sea-coal. They asserted in their defence a right to do so, a right which had its lawful origin, so far as material, in lost grant or custom. The headnote adequately sums up the point which Mr George derives from it.

> "*Blewett v Tregonning* (1835) 3 Ad. & EI. 554 applied. *Per curiam obiter*. The claim at common law that the public at large had a right to take this sea-coal could not succeed, for the only rights of the public in the foreshore are the rights of fishing and navigating and rights ancillary thereto. It is well known that in relation to the English foreshore that many activities, including walking thereon, bathing therefrom, and beachcombing, have been generally tolerated by the Crown as owner of the foreshore, without at any time giving rise to any legal right in the public to continue them."

115. This is borne out by Harman LJ at p468G, 469G - 470D, by Russell LJ at p 475E-G, and by Winn LJ at p486A-D. The learning included reliance on *Blundell v Catterall* 5 B & Al 268 at 300, which decided that there was no customary right to cross the foreshore in a bathing machine for the purposes of bathing. The Crown, as parens patriae, would not impose unnecessary and injurious restraints on the enjoyment of the public, where no mischief or injury was likely to arise. The same applied to shooting wildfowl in the channel of navigable rivers. These were

privileges, enjoyed by a permission implied through assumed natural benevolence from the Crown towards the subject.

116. *Beckett v Lyons* merits a degree of caution however, and not just for the variety of points to which various observations may have been specifically addressed and which in consequence are not to be applied more generally. First, the judgments contain many references to toleration by the Crown as the explanation for the general use made by the public of the foreshore, without rights being acquired. But unless there is some special rule for the Crown or the owner of the foreshore, this form of toleration cannot rebut a claim of right by showing an implied licence; see *Beresford* above, which must have overruled *Beckett* if they conflict.

117. Second, *Mills v Silver* contains warnings against taking parts of *Beckett v Lyons* and stringing them together to make a sum greater than their specific parts. What the Court of Appeal said in *Mills v Silver* about toleration was specifically approved by Lord Walker in *Beresford* at paras 80-83. It is clear that, to the extent that on this issue there is conflict between the two Court of Appeal decisions, it is the latter which is to be preferred, according to the House of Lords.

118. Third, to the extent that the Court in *Beckett v Lyons* relied on the want of a subjective belief in the asserted right, it was imposing a requirement which the House of Lords held in *Sunningwell*, above, did not exist. No subjective belief was required.

119. I do not accept Mr George's arguments. He does not go so far as to say that no rights can be obtained over the foreshore because of Crown ownership. Any presumption of consent is rebuttable. It is clear that the Crown could not interfere, without more, with rights of navigation and fishing; so there is nothing odd about rights being asserted against the Crown as owner of the foreshore. There is no reason to hold that rights to use land for sports and pastimes cannot be asserted against the Crown as landowner, including rights over the foreshore.

120. What is said about the Crown in *Beckett v Lyons* would have applied to the owner of any land to which the public had access and of which the owner made no complaint because he was not inconvenienced, and had no immediate reason to interfere with their enjoyment.

121. But unless there is to be some special rule for the foreshore, the consequence of landowner tolerance and users' subjective belief is the same as for any other land. I see no basis for any special rule. There is no authority to support a proposition that what would amount to mere toleration by any other landowner amounts to a permission where the Crown is landowner. Nor does reason, principle, established historical fact or established legal fiction support such a distinction.

122. If rights to use land for sport and pastimes can be asserted against the Crown, there is nothing in the Acts of 1965 or 2006 to suggest a special regime. Quite the reverse, since the Acts apply to the Crown without such special rules, yet Parliament must have known who owned most of the foreshore. Parliament has clearly accepted that this form of statutory prescription can arise against the Crown.

Whether Parliament could have conceived that the foreshore could be a village green is another issue.

123. Even were Mr George right that there were particular evidential difficulties in asserting rights to use land for lawful sports and pastimes against the Crown itself, that is no reason to treat the Claimant as enjoying all the advantages which the Crown has. The Crown has granted to the Newhaven Port a lease of the land to use for that undertaking's own purposes. That may give rise to its own difficulties, but they are not difficulties because of the ownership of the foreshore.

**Conflicting statutory regimes**

124. After the hearing, Mr George made further submissions in writing to which Mr Sauvain responded in December. He developed an incipient argument that registration of the land as a village green would not be compatible with its being operational port land. There would be a conflict inherent between registration as a village green, and the consequential power to make byelaws under the Commons Act 1899, and the power to make byelaws under the Harbours Docks and Piers Clauses Act 1847, among other statutory powers. He drew a parallel between these circumstances and a decision of mine in *Western Power Distribution Investments Ltd v Cardiff County Council* [2011] EWHC 300 (Admin), in which I had held that it was unlawful for a local authority to use its powers to designate land as a nature reserve under the National Parks and Access to the Countryside Act 1949, to be managed primarily in the interest of nature conservation, when that land was held by the local authority under the public trust created by s164 of the Public Health Act 1875 for the purposes of public access and recreation; the two regimes were incompatible at least in that case.

125. There is no dispute but that the land is part of the operational land of the port, and that it is subject to the byelaw making powers of the Claimant as harbour authority. Subject to the effect which registration of the land as a village green might have, the Claimant could make byelaws under the 1847 Act, so long as they were exercised for the lawful purposes of the undertaking, which would prevent public access to the land, or the playing of games. Byelaw 70 already prohibits the playing of any sport or game so as to obstruct or impede the use of any part of the harbour or the doing of any other act which might risk danger to someone else.

126. The Claimant is concerned about the safety of the steps down from the harbour wall to the beach, and ferry wash over the Application area. The registration of the area as a village green could, it fears, carry with it an obligation to permit access to the beach and thus to make the route safe; and it could carry a public liability to ensure the safety of those exercising rights, with consequent effects on the operation of the port.

127. As port authority, it has plans for the future development of the port: extending the outer harbour, widening and deepening the approach channel, creating a larger turning area for ships. This, it says, is likely to require works extending into the Application area. It might want to reconfigure the breakwater to extend wave protection to the outer harbour, to replace the ageing breakwater and to deepen the application area to provide berths of turning areas for ships. It might want to permit

boats to moor against the promenade wall. It gave evidence about its safety concerns and future plans to the Inspector. The registration of the area as a village green could prevent it exercising those powers, were that to interfere with the exercise of the recreational rights. It might however be that such recreational rights could not lawfully interfere with the exercise of the statutory powers of the port authority.

128. If registration as a village green were to prevent or inhibit the Claimant's powers as port authority to make and enforce byelaws for the purposes of the operation of the port, registration would have a severe impact on the future operation of the port. Parliament could not have intended registration to be available for such land. However, if registration only meant that sports and pastimes could continue subject to the restrictions which the Claimant might impose for the purposes of the operation of the port, registration could become largely ineffective in protecting the right to engage in sports and pastimes. Either way, there was a conflict, which supported the argument that this was not land which could be registered. The sports and pastimes might also be restricted to those which were lawful and undertaken as at the cessation of the use or at the time of application.

129. Mr Sauvain distinguished the compatibility of registration as a village green itself with the statutory purpose for which the land was held, from the compatibility of the exercise of byelaw making powers under the Commons Act 1899 with that statutory purpose.

130. S1 of the Commons Act 1899 permits a district council to make a scheme for the regulation and management of a common with a view, among other matters, to making byelaws and regulations for the prevention of nuisances and the preservation of order on the common. A common includes a village green for this Act.

131. S12 of the Inclosure Act 1857 makes it a summary offence to damage fences, drive cattle, throw rubbish on a village green "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". S29 of the Commons Act 1876 makes a public nuisance of any "occupation of the soil [of a village green with a defined boundary] which is made otherwise than with a view to the better enjoyment of" the green. So restriction by criminal sanction of acts which interfere with recreational activities is compatible with such rights; one might say self-evidently so, but the prohibited acts could cover various sports and recreational activities.

132. District councils have other more general byelaw making powers under s 235 of the Local Government Act 1972, for the good rule and government of any part of their areas. So, suggested Mr Sauvain, all land could be said to be potentially subject to regulation.

133. Mr Sauvain submitted that where there was no likely or actual incompatibility, no issue could arise which could prevent registration as a village green. Alternatively, the acts which the owner wished to carry out would be unlawful for example under the 1857 or 1876 Acts. In that case, it would have to seek to deregister the land as a

village green, and provide exchange land in return under s16 of the 2006 Act. It might be that the offending operations could give rise to the defence of statutory authority, essentially the proper exercise of statutory powers for the purpose of the undertaking would override the protection of the green. A variant could be that new recreational activities could not thwart the operational use of the land, whereas those which were the basis for the establishment of the right would override operational use; see the difference between Lords Brown and Walker in *Lewis*. Give and take in practice could solve issues which might arise. But those possibilities provided no reason to preclude registration at all, by reading into the Act some exception to registration which was not there.

134. *British Transport Commission v Westmoreland County Council* [1958] AC 126 held that a private right of way over land held for a special statutory purpose under a private Act of Parliament could be presumed to have become dedicated as a public right of way, as a result of public use; the special status of the land did not of itself prevent dedication, so long as dedication in that way was not incompatible with the statutory purpose. Whether it was or not compatible did not turn on the status of the land but on the facts of the case: the test was whether there was a likelihood of actual incompatibility arising.

135. The question in that case however, submitted Mr Sauvain, related to the power or capacity of the Commission to dedicate such land. It did not concern the statutorily imposed consequences of a set of facts proved to have occurred, which is what registration as a village green involves.

136. Nothing in *Western Power* or *British Transport Commission* suggested that registration of itself could be incompatible with that statutory purpose. There was no evidence either that the operational use of the port had been affected by the recreational use of the land since 1930, or over the twenty years relied on; the Claimant would have taken action had it actually interfered with the port. Byelaw 70, for example permitted games to be played so long as that did not interfere with the operation of the port. Nor indeed was fishing forbidden at all times and in all places in the port. So there was nothing inherently incompatible between operational port use and the rights which registration would reflect.

137. Moreover, the designation of the land in the *Western Power* case as a local nature reserve was the result of the exercise of a statutory but discretionary power which could not lawfully be exercised where that would create inevitable conflict with an existing trust. Here, however, registration as a village green was the legal consequence of the satisfaction of the statutory tests, and not the exercise of discretion.

138. I have found this the most difficult of the issues to be resolved. It was not an issue addressed by the Inspector since it was not raised for her consideration. But that cannot prevent it being raised before me as a legal bar to registration, nor was that suggested.

139. The decision in *BTC v Westmoreland CC* provided a test for resolving whether footpath rights could be created over accommodation bridges which might conflict with the statutory undertaker-landowner's lack of capacity to grant rights of way or

other easements in the absence of an express statutory power, or its lack of power to make an agreement or disposition effective in law by which it abdicated its freedom to exercise its powers at any further time. The House of Lords did not accept that the absence of express statutory powers, in either respect, necessarily created absolute bars on such a disposition or on the grant of such an easement. It recognised that such absolute bars would be simply unrealistic where there were a large number of such bridges on the railway network in relation to which footpaths would have been established without any foreseeable interference in the railway undertaker's operations.

140. The test, it held, was whether, on an examination of the specific facts, there was at least a likelihood, or putting it another way, it was reasonably foreseeable that such a grant would conflict with the statutory objects for which the land was held, so that the two interests would be in conflict. Mr Sauvain did not suggest that the beach would be registrable in those circumstances.

141. Mr Sauvain drew a distinction between whether registration of itself was incompatible with the statutory powers, and the consequences of future byelaws placing recreational and operational use in conflict. There is much sense in such a distinction. He is right that there has been no actual conflict in the use of the beach for recreational purposes; the byelaws do not forbid it, save, and I simplify, to the extent that it interferes with the operations of the port. There is no evidence that it has done so over twenty years. There is some sense in the distinction since, for so long as Newhaven Port has no need to change the way in which the port operates, the public could continue as of right to use the beach. If the beach were to cease to be operational land or to be disposed of, their rights would be protected, and there would be no conflict to guard against.

142. This approach would leave for later resolution what would be the effect of further byelaws made by Newhaven Port for the purposes of the operation of the port but interfering with the recreational rights. There would also be two groups of potentially conflicting byelaw-making powers, one group under the Commons and Inclosure Acts, and indeed the Local Government Act 1972, and one under the Harbour Docks and Piers Clauses Act 1847. The upshot could be a serious impediment to the operation of the port, or a serious infringement of the public rights of user, unless the resolution were achieved by the provision of exchange land, which because of the statutory restraints, is far from a readily available option for the port authority, although adopted in one instance at Shoreham.

143. I do not think that, conformably with *BTC v Westmoreland CC*, the distinction urged by Mr Sauvain can be drawn, and the land registered as a village green, with the consequences left to be worked out in the future. A judgment is now required on what is reasonably foreseeable. If there is a likelihood, or if it is reasonably foreseeable, that the operational use of the port land would be compromised, the port operator would lack capacity to permit the recreational user to arise, or the power to abdicate its rights to use the land for the purposes of the statutory functions for which it was leased. The decision in *BTC* does not permit the decision on registration to wait and see what conflicts there are, not knowing how they are to be resolved.

144. The land could only be registered now, conformably with *BTC*, if it were clear that the future conflicts would be resolved in favour of the retention by the port authority of its full powers for the operation of the statutory undertaking. In that way, it would be clear that no conflict with the port's power was reasonably foreseeable. However, that is not the outcome which emerges from *BTC*. It did not hold that the rights once granted could be defeated by the exercise by the railway undertaking of its existing powers, and therefore the issue of the foreseeability of conflict did not arise. The grant or implied permission cannot be effective if there are any reasonably foreseeable circumstances in which it would hinder or conflict with the statutory functions for which the land is held. It is only where that is not reasonably foreseeable that no conflict exists in law.

145. I accept that the evidence of Newhaven Port given to the Inspector shows that conflict is likely in the future. There is evidence of its plans for the future, which on the face of it are proper purposes for the use of the operational land, are on the face of them not unduly ambitious or unfeasible, and are not got up for the purposes of defeating the application, to fall back into the bottom drawer once they have served that purpose. I see nothing in the fact that conflict has not existed for many years to lead me to the conclusion that that is not now reasonably foreseeable. There is evidence that repairs will be needed to the harbour wall and breakwater, and it is not to be supposed that the power and manoeuvrability of vessels will remain as it was in the twenty years to 2006.

146. I do not think that the evidence was given as if it was looking forward from 2006, but I would be very surprised if that was not also the position as at that time. The time horizon for reasonable foreseeability in this context is necessarily a long one since the question is whether the port authority has power or capacity consistent with its statutory functions, to grant rights over its land in that way. If it does grant such rights, as I understand the approach in *BTC*, the grant is permanent, rather than reversible under the undertaking's statutory powers.

147. For those reasons, and whether expressed as a question of statutory capacity or powers, or the unlawful fettering of its powers, Newhaven Port cannot permit the use of this land as of right for recreational purposes because it is reasonable foreseeable that that would conflict with its statutory functions. It has no power to give an actual or implied consent to this use, and appearances to the contrary, cannot be taken to have done so. There are other ways of putting it: rights cannot arise by twenty years user to the likely detriment of the statutory functions pursuant to which the landowner owns the land in the public interest. One group of the public cannot acquire rights against the general public interest measured by the existence of statutory powers which are reasonably foreseeably inconsistent with the rights they assert.

148. For that reason, no rights have been lawfully acquired or no use of the land carried on without a necessarily implied permission. The land cannot be registered as a village green.

149. I would have preferred to hold that the land was registrable but that the effect of registration did not prevent the full operation of the port authority's powers for the proper purposes of the undertaking. But that option is not open on the authority of

*BTC*, and there are in any event difficulties as to how it would actually operate under two sets of byelaws.

**Use of land to which there was no right of access could not be as of right**

150. The Claimant contended at the public inquiry that there was no public right of way to the asserted village green, and that there could be no right to use for sport or pastimes any area of land which the public had no right to access. It followed that such a use had to be precario, by permission of the owner of the access, the Claimant in this case. The landowner could not be subject to restrictions in the interests of rights which no one could lawfully access the land to exercise.

151. The Inspector considered the Definitive Map of public footpaths which by virtue of s56(1)(a) of the Wildlife and Countryside Act 1981 provides conclusive evidence of the existence of a right of way at the relevant date, where it is shown on the Map. The converse does not apply, so that the absence of a right of way on the Map is not conclusive evidence that it does not exist.

152. In a version of the Map dated 1953, which may or may not have been more than a draft, Footpath 16 was shown passing along and covering the whole or nearly whole width of the promenade atop the harbour wall at the rear of the beach. There may be a gap parallel to its seaward edge. It would have been conclusive evidence of a public right of access. The current version of the Map showed the route to lie along the promenade but with no indication as to its width; its line, according to the Inspector showed a "material gap" between the line of the footpath and the edge of the harbour wall to which access would have been required to reach the steps down to the beach. The Definitive Statement gave the commencement of FP16 as Fort Road, and its termination, after 0.35 miles as "Beach, west of breakwater." It did not indicate its width. The stated terminal point lies to the west of West Beach and cannot be reached via West Beach because of the breakwater.

153. She concluded:

> "No justifiable explanation has been able to be identified as to the reason for the 1953 version of the Definitive Map showing Footpath 16 across most of the width of the Promenade and the current version not doing so. Nonetheless, my interpretation of the current Definitive Map is that it shows Footpath 16 as passing along the back of the Promenade only and leading to the shingle beach to the west of the Breakwater. It follows that it does not appear to identify a definitive right of way to the steps leading down to the Land. "

154. Neither she nor the Registration Authority was able to rule on the contention by the Town Council that there was a right of way created by implied dedication or under s31 of the Highways Act 1980, nor was she able to reach a view on the prospect of such an argument leading to a modification to the Definitive Map. She approached the Claimant's argument on the basis therefore that there was no current definitive public right of way to the application land.

155. She recognised that the Claimant could prevent access to the land even were it to be registered as a village green, but did not see that as a reason to refuse registration. That was because she saw no reason to add what she considered to be a separate and additional requirement for registration to those set out in the statute. The practical access difficulties were not a basis for refusing to register land which met the express criteria.

156. She also noted that, in view of her conclusions as to the facts of public access to the beach and rights of user, that there might be grounds for an application to modify the Definitive Map, failing which the local authority might use its powers in s26 of the Highways Act to create a public footpath compulsorily.

157. The Town Council in June 2011 made an application to East Sussex County Council to modify the Definitive Map so as to show a right of way over the full width of the promenade, and the steps to the beach. This application relies on the evidence of user of the beach accepted by the Inspector, and evidence that there was a mistake in the reproduction of the current Definitive Map from the 1953 version which it contends was more than a draft. This application is as yet unresolved.

158. Mr George's approach was not that he was erecting a further criterion to those in the statute, but was demonstrating the failure of the applicant's argument that the land was not used by permission. A user who broke down fences to use a path to the green would use it by force; someone or who used the path by stealth would not use the green which they had thus accessed as of right, nor could those who used a route by permission then use their point of destination as of right.

159. Tolerated use of the path here, with an absence of intention to dedicate it as a footpath/highway, would be use by permission, or precarious. There was no evidence either of any specific path across the promenade from the north edge where the footpath was shown to the southern edge by the steps. There could have been any number of routes across the intervening area.

160. The possibility of a modification to the Definitive Map or of some implied right being found was irrelevant. Absent a positive finding by the Inspector that there was a public right of way to the beach, registration would not be lawful since the use of the beach was necessarily not as of right. A decision had to be reached by the County Council; it could not defer it and it had not found a right of way to exist.

161. Mr Sauvain, supported by Mr Simpson, contended that in the light of the findings made by the Inspector as to the usage of the beach and her conclusions that it was as of right, the Claimant's argument sought illegitimately to add a further criterion of a public right of access. There was no absurdity in the absence of such a criterion, such that one should be implied. Nor was there any evidence that the landowner of the access to the application land had taken any action, during the twenty year period relied on, to show that access to the beach over the promenade was by its permission. Without that, the Claimant could not begin to make out this argument.

162. The Defendant was entitled to rely on the Inspector's findings and analysis. If there was evidence, as the Inspector's findings suggested strongly that there was, that there had been twenty years usage as of right of the access to the beach over the

promenade, that created a rebuttable presumption that a public right of way had been dedicated, which by virtue of s31(1) Highways Act 1981, it was for the landowner to rebut by showing that there was no intention to dedicate; see ***Godmanchester***. Intention to dedicate, albeit presumed and rebuttable, was an additional requirement to twenty years user as of right. S31(8) of the Highways Act 1980 preserved the effect of the incapacity of a corporation in possession of land for public or statutory purposes to dedicate a way over land if that would be incompatible with those public or statutory purposes. It was not for the court to pre-empt any decision on the lawfulness of the Claimant's attempts to prevent public access to the beach. The County Council would defer its decision on registration if its decision on the existence of rights of way were crucial to registration, but the absence of such a decision could not mean that the land was not registrable.

163. In my judgment, the Claimant's arguments do not seek to erect an additional statutory criterion, and to the extent that that is the Defendant's riposte, it misses its mark. The Claimant's arguments relate the alleged absence of or uncertainty over rights of access to the asserted rights of recreational uses. The absence of a right of access, it says, evidences the absence of any rights of use. Such uses can simply be terminated. In the absence of access rights and an intention to dedicate, the use of the access and hence of the land must be permissive. In the absence of certainty as to the right of access, there could be no sufficient certainty as to the right of recreational use. Of course, if it had been established that rights of access existed over the promenade to the steps down to the beach this argument could not have been mounted. Indeed the existence of such rights would have been strong supporting evidence for the rights of recreational use.

164. If it had been established that no rights of access to the beach existed, that would have been strong evidence that no rights of recreational use exists, but it would not have been determinative. The requirements in relation to rights of way, in s31 of the Highways Act 1980, are that there be both twenty years use as of right and an absence of intention to dedicate. Use as of right introduces the same test as for recreational use. The negative requirement of a proven absence of intention to dedicate is additional. Use as of right could be proven for both, even if the highway were proven not to have been dedicated. So the proven absence of a highway, and more so the absence of a proven highway could not show the recreational use to have been otherwise than by right.

165. The real issue, in my judgment, is whether on the facts found, the County Council was bound to refuse to register or to defer the decision until certainty over the existence of the rights of access had been reached, one way or the other.

166. The County Council was not in my view barred from registering the land. The Inspector considered the evidence of actual recreational use and of use of the promenade to access the beach. There was nothing in the evidence of the use of the promenade to contradict her conclusion about use of the beach, for example by appropriate signs, occasional fencing off, communicated byelaws, or access from the sea for most users. As I have said, the absence of a proven highway, or even proof of an intention not to dedicate, cannot show the recreational user not to have been as of right.

167. The Inspector and County Council are also right that the application for registration is not, of itself, the appropriate mechanism for the resolution of the question of whether rights of way to the beach exist over the promenade.

168. Here, the evidence that a right of way exists is at least arguable, in view of the period and purpose of user without objection, and what is shown on what may or may not be a draft definitive map in 1953. There is nothing unlawful in registering land as a village green where the requirements for use as of rights are established, and where the factual evidence on rights of access has been considered for what it may tell of the nature of the rights of recreational user.

169. Even if a right of access did not exist, the landowner of the way might not object to its use to access the green. There is no reason in principle to differentiate between an acquiescing landowner of the way who could lawfully prevent access to the green owned by another and an objecting landowner of the way who could lawfully prevent access to the registered green he himself owns.

170. If it turns out that there is a right of way over the promenade to the beach, there will have been no reason to refuse registration. It would be wrong to refuse registration on this ground now with the consequence that the establishment of the rights of way could come too late to permit a further application for registration following the cessation of use in 2006.

171. If it turns out that there is no right of way over the promenade, then unless and until such a right is created, the recreational rights will be unusable since the Claimant here will not permit access.

172. I see nothing unlawful in the registration of the land as a village green, on this account. Indeed, once the uncertainty over the right of access has been shown not to preclude registration as a village green, whether because on the facts it does not sufficiently tell against user as of right or because there is no legal impossibility in registering as a village green land to which there is no public right of access, there is no reason to refuse registration. To do so would indeed add an unwarranted criterion to the statute.

173. It would be wrong for rights which on the evidence have been proved to exist not to be registered as required by the statute, simply because they could not be exercised. Access rights can be created by compulsion, if not created by agreement. Non-registration would make that pointless and so the absence of rights of access, legally and evidentially irrelevant to the existence of the rights, would have prevented their exercise.

174. Accordingly, this ground of challenge fails.

**The retrospectivity of s15(4) of the 2006 Act and its incompatibility with Article 1 Protocol I ECHR**

175. Mr George accepted that the compatibility of the system of the registration of town and village greens with Article 1 Protocol 1, A1P1, ECHR as a legitimate

control on the use of property in the public interest was decided by authority which bound me; *R (Whitney) v Commons Commissioners* [2004] EWCA Civ 951, [2005] QB 282. In the *Trap Grounds* case, at paragraph 59, Lord Hoffmann held that there was no incompatibility since the landowner retained ownership, "and his right to use it in any way which does not prevent its use by the inhabitants for recreation...", and there was a legitimate public interest in the preservation of open spaces for recreation.

176. Mr George had to put his case before me on a narrower front: it was s15(4) of the Commons Act 2006 which was incompatible with A1P1. Sections 15 (3) and (4) permitted successful applications for registration of town and village greens to be made, and I simplify, where twenty years recreational use of land as of right had accrued, but had then ceased before any application for its registration had been made. S15(3) applied where the cessation of user occurred within two years *after* the commencement of section 15 of the 2006 Act, which was 6 April 2007, whereas s15(4) applied where the cessation of user occurred *before* the commencement of the section on 6 April 2007, but within the period of five years from the cessation of use. There was a period between April 2006, when the recreational user of the land ceased, and 6 April 2007 when no application for registration could successfully have been made, yet the effect of s15(4) was to recreate such a right, or, to put it another way, was retrospectively to deprive the landowner of an insuperable defence to such an application. Although the system of registration of town and village greens was overall compatible with A1P1, it nonetheless was a system of control which engaged A1P1, and this particular provision, transitional and time limited though it was, required justification as a proportionate and legitimate aim pursued in the public interest. There was no rational or evidenced justification for such a transitional provision or at any rate for a five year one, or one long enough to permit the current application to succeed.

177. I do not accept this contention at all. I consider it on the basis that registration would not permit the Claimant to make byelaws which would interfere with recreational user, and its operation of the port could not lawfully interfere with recreational use either. The provision under attack needs to be understood as part of the evolution of statutory provisions dealing with the registration of town and village greens. S22 (1) of the Commons Registration Act 1965 defined a town or village green as including a place in which the inhabitants of the locality had indulged in lawful sports and pastimes for not less than twenty years. It was not explicit as to the effect of the cessation of such a use before the application for registration was made but after the twenty years use had occurred.

178. An amendment was made to the 1965 Act by the Countryside and Rights of Way Act 2000, which introduced into it s22(1A). This provision was in force from 30 January 2001 to 5 April 2007. This added to the definition of town and village green:

> "(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 of right, and either-
>
> (a) continue to do so, or

> (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions. ”

179. It is clear that Parliament required that the use continue after the twenty years necessary to establish the right, unless the regulations which it empowered had prescribed a period of cessation of user after the twenty years which would not debar the application or the registration of the land. No regulations were in fact made. But that left unclear whether the user, which, absent regulations now clearly had to continue, had to continue to registration or to application for registration.

180. The passage of the *Trap Grounds* case through the courts demonstrated the different views taken by Lightman J in 2003/4, (cessation was irrelevant where the twenty years user had already occurred), the Court of Appeal in 2005, (user had to continue to the date of registration, whenever the twenty years user had been completed), and the House of Lords (that user had to continue to the date of application).

181. What is now the Commons Act 2006, in force on 6 April 2007, was a Bill in Parliament when the *Trap Grounds* case was in the Court of Appeal and in the House of Lords. S15(4) was a late amendment in the House of Lords.

182. S15 creates three groups of potential applications, each of which require the twenty year period of use relied on to have been completed, though the effect of a period of statutory prohibition on carrying on the use is to be disregarded. In subsection (2), the twenty years use continues at the date of application. (By subsection (7), after the twenty years use, a statutory prohibition on the use and a grant of permission by the landowner to indulge in sports and pastimes (sometimes in the form of a “welcome to use” notice) are ineffective to prevent the use continuing to the date of application). Subsection (3), applies where the use has ceased *after* 6 April 2007 but the application for registration is made within 2 years from the cessation. Subsection (4) applies where the use ceased *before* 6 April 2007, as here, but the application was made within 5 years of the cessation, as here. (This does not apply where planning permission was granted before 23 June 2006 and construction works pursuant to it had started before that date, of such a nature as permanently to prevent the use for sports and pastimes).

183. Thus, as Mr George correctly points out, where a user ceased on 7 April 2007, the application would have to be made by 6 April 2009. But where it ceased on 5 April 2007, an application can be made up to 5 April 2012. He is also right that, on the true construction of s22(1A) of the 1965 Act, and in the absence of regulations made under it, the applicant in this case could not have applied for registration after the use ceased in April 2006, and the opportunity to do so did not exist until 6 April 2007, when the 2006 Act created the right to do so, thus eliminating what was, on the true interpretation of the 1965 Act, the Claimant’s right to the unfettered use of its land.

184. However, the provisions in subsections (3) and (4) are transitional provisions designed to deal with the effect of the clarification of the law by the 2006 Act.

There had been room for debate, as Lightman J's judgment in the *Trap Grounds* case showed, about whether the twenty year period needed to continue once it had been completed, since rights had accrued and registration merely confirmed that legal position. That had been made clear by the 2000 amendment, so the public whose use had ceased lost out to the landowner in the balance struck between them, subject to the prospect of a period of cessation being prescribed which would still permit an application to be made.

185. The uncertainty over that persisted for many years. But it is clear that Parliament, landowners and the public users could have expected from 2000 that a period of cessation would not necessarily mean the end of these rights if already established by twenty years user. So from 2000 to 2006, the Claimants would have been aware that if twenty years user was completed in that period, there would be a risk that its cessation would not prevent a successful application for registration.

186. The *Trap Grounds* case showed up the uncertainty in the 2000 Act over the point up to which, application or registration, the use needed to continue before the cessation provisions had to be relied on. The 2006 Act dealt with both issues. It provided that the use had to continue to application and not registration. Subsection (3) gives a two year period of grace after cessation once the Act was in force. No one quarrelled with that as a lawful period of grace, especially as the use otherwise had to continue to the date of application. Subsection (4) dealt with those cases where the twenty years had accrued but use had ceased before the 2006 Act came into force, and where, without any transitional period, users would have been deprived of the two year period of grace, and would have lost out on the prospect of regulations providing for one, since that power had also been repealed.

187. Mr George does not and, in my view, could not realistically suggest that there was any problematic retrospectivity in such a transitional provision in principle. His submission is in reality directed to its length, especially once it exceeds the two year period in subsection (3) and endures for pre-Act cessations longer than that for the early post–Act cessations. It is however, a period of grace which ends on 6 April 2012, which could never have covered a cessation before April 2002 and, as the years go by, which ceases to be available to those who do nothing about applications which they could have made. The applicant here, for example, could not have made its application after April 2011.

188. I do not think that the appropriate analysis is to try to decide whether or not this legislation should be pigeonholed as "retrospective" with particular consequences following from that particular description of it, with others of a quite different stripe following if it were not. The nature, degree and effect of any retrospectivity has to be understood. This provision has to be understood as part of a legislative sequence in which Parliament dealt with the practical problems which its earlier legislation has thrown up.

189. It takes away a right which the combined effect of the *Trap Grounds* case and the absence of the expected regulations accorded, opportunistically, to the Claimant. It may in that way alter the previous legal consequences of past events. It does not take away a right in another sense; up to April 2006, the applicant might have had an accrued right. The way in which legislation would deal with the cessation

brought about by the landowner was uncertain, since regulations could still have been made. The lack of finality about the legal consequences at any given date, was well known. Any landowner must have anticipated that, if regulations were not to be made, other transitional provisions could follow in new legislation to govern the effect of cessation after 2000, since that had been Parliament's intention since 2000.

190. This act is an interference in the rights of the owner but it proceeds on a narrow front, in a system of interference which is compliant with A1P1.

191. It is perfectly obvious that a legitimate aim is pursued by a transitional provision for those sites where the public user ceased before 2007, though that can with no more than partial accuracy be described as altering the legal effect of past acts. The question of how long that should be for is a matter for legitimate debate, since there are conflicting interests: those of landowners, and their legitimate need for certainty so that they can deal with the land they own, and those of the public who had enjoyed twenty years of user as of right, where use had ceased because of the intervention of the landowner, but at a time when the known intention of Parliament was that the effect of such intervention would be remediable. I do not see why a period of grace which covers almost all of that period of uncertainty by resolving it in favour of the public rights should be regarded as pursuing an illegitimate aim.

192. I reject the notion that a court should not conclude that a legislative aim was legitimate in the absence of evidence in support from a Government Department, making the executive responsible for expressing and justifying the views of Parliament, as expressed in primary legislation. Rather, a court should see in what Parliament has enacted a legitimate and proportionate aim unless the contrary is unequivocally proved. The wording of the Act itself, legitimately construed in its legislative context and in the light of decided cases, should enable the intentions of Parliament to be inferred; see *Wilson v First County Trust Ltd (N0 2)* [2003] UKHL 40, [2004] 1 AC 816.

193. It is obvious that Parliament took the view that, against the legislative background which I have adumbrated, such a period was necessary rather than a shorter one. It was entitled to conclude that the time of cessation which would not debar an application should cover most of the period of uncertainty when regulations could have been expected. It was entitled to conclude that the period from April 2007 within which the application would be made should not be two but five years. It is reasonable to suppose this decision reflected the effect of the period since 2000 when the public would have expected legislation to provide for a period of grace after cessation, but which could no longer exist at all in the absence of this provision. It may also have reflected the greater difficulties which the public faced in working out whether it had a case and gathering the supporting evidence where use had ceased before 2007. A line had to be drawn, expressed in a period of time. There were a variety of legislative options; Parliament's choice was legitimate. It is clear that a choice was made; the effects are not the bizarre result of some unappreciated legislative lacuna. The fact that for a period a person whose user expires before April 2007 is better off than someone whose user expires after it, does not show arbitrariness in an objectionable sense. These are two different cases. A sliding scale could have been introduced to create some perfect alignment of the periods but the absence of that legislative sophistication cannot show that those

landowners whose cases fall on the wrong side of the line have had their human rights breached. After all the allegedly arbitrary distinction could have been eliminated by increasing the period of grace in subsection (3). The period of grace would have had to be less than 2 years from commencement to exclude this application.

194. Those same reasons persuade me that the five year period was proportionate to the aim of providing for a transitional period of grace to cover those who might have expected legislative intervention in the period since 2000. I agree with Mr Sauvain and Mr Forsdick who appeared on this issue for the Secretary of State for Environment, Food and Rural Affairs, that the provision shares a greater resemblance to the unchallenged provision in AXA *General Insurance Ltd v the Lord Advocate* [2011] UKSC 46. This provided retrospectively for claims not to be statute-barred between an earlier House of Lords' decision and the Act which removed the effect of that decision.

195. I accept that there is no explicit material in the published Commons Regulatory Impact Assessment, or in the Explanatory Notes to the Bill, since this was a late amendment, or in those to the Act, for the choice of a five year period in the new 15(4). I also accept that in a case such as this, a court is not to apply quite the restrictive approach in *Pepper v Hart* [1993] AC 593, but can have a slightly readier resort to Parliamentary materials to ascertain the purpose which Parliament had. I accept that the Parliamentary debates in neither House reveal much on this point. In the House of Lords in November 2005, Lord Bach, the promoting minister said of the five years that there had been a considerable see-sawing in case law; the seemingly welcoming notice put up by landowners might not have been appreciated by local inhabitants as a threat to their recreational user as of right. That is consistent with the view I formed, without that information, as to the purpose of the provision and the selection of the five year period. Mr George may well be right that a shorter period, with the enacted provision which covers such notices, could have dealt adequately with the perceived problem, and it would have had less impact on landowners. But he has not remotely persuaded me that the decision taken was incompatible with the human rights of the Claimant or other landowners.

196. I note that a two year period from the commencement of s15(4) would also not have helped the Claimant here, since the application was made only a few months more than two years after cessation.

197. I do not attribute significance to the Government's promise in the Common Land Policy Statement 2002 that it would consult on the period of grace in any regulations put forward under s22(1A), for the absence of consultation about the period inserted into primary legislation. Parliamentary process is not subject to such legitimate expectations, as Mr George recognised; and there was no actual failure in any promise made by government at all. The absence of such consultation cannot show that an otherwise legitimate interference with A1P1 rights was illegitimate. It could reinforce an argument that no reasonable aim existed or that the asserted aim was not the one pursued. But that is not the position here.

198. Mr George rightly points to the rejection in that 2002 Statement of a five year period, as was enacted in 2006, because of the uncertainty it would create for

landowners. But that is no more than one view of how the balance should be struck; and by 2006 there had been a longer period of uncertainty for the both sides, either of which could say that their expectations had been left unfulfilled. There is a modest degree of protection for landowners where the land has been developed pursuant to a planning permission since June 2006 which makes a return to recreational use impossible. I agree with Mr George that that will be no protection in most cases, but it cannot be ignored in judging the proportionality of the balance struck by Parliament.

199. Mr George takes issue with the domestic courts according to Parliament a "wide margin of appreciation" since that concept reflects the relationship between the ECtHR and a national institution. That may be so, but the courts ought to afford to Parliament full respect for its constitutional role and not take on the role of making legislative choices which it is for Parliament to make. Its judgments expressed in primary legislation are to respected as being reasonable and proportionate unless clearly shown to be otherwise. The ability of a court to reach such a conclusion is the more limited in spheres of social policy, as here, than in some others. This is clear from, for example, *AXA General*, above.

200. I should add, in view of the Defendant's citation from what Lord Brown said in *AXA General*, para 80, that the judgment on proportionality stands or falls on the effect of the legislation generally, that that is not, as I read it, to be taken as meaning that legislation is compatible with the ECHR if, on its true interpretation, it breaches human rights on only a few occasions. If legislation, properly interpreted, breaches human rights on however few occasions, it is incompatible with the ECHR. Lord Brown's comments are not meant to say the opposite.

201. Since the conclusion of argument in this case, the Court of Appeal, on 2 December 2011, delivered its judgment in *Leeds Group PLC and Leeds City Council v SSEFRA and Jones* [2011] EWCA Civ 1447. I have received written submission on this, as agreed during the hearing. The Court of Appeal decided that an interpretation of s98 of the Countryside and Rights of Way Act 2000, which introduced s22(1A) into the 1965 Act, so as to give it "retrospective effect" was compatible with the rights of landowners under A1P1. The contention it rejected was that, since twenty years user by inhabitants of a neighbourhood could not ripen into a registrable right until this provision was enacted, the twenty year period could only start from enactment, to be compatible with A1P1. Otherwise there would have been only a very short space of time in which the well-advised landowner would have had the opportunity to prevent the accrual of the newly registrable rights based on periods which had passed before the enactment of s22(1A).

202. Of course, there is nothing in this decision which bears directly upon the issue which I have to decide. I did not find it of any assistance indirectly either, nor was it intended to be, save that it shows a proper reluctance to reach absurd interpretations of Acts in order to avoid somewhat fanciful breaches of A1P1, and a proper determination to give full weight to Parliament's judgment of what the general interest requires. There was a difference in emphasis between what Arden LJ and Sullivan LJ said about the effect of the absence of a transitional period, but that does not help either side here.

203. There can be and was no argument here but that a transitional period to cover the position of those whose user had ceased after 20 years but before 2007 was compatible with ECHR rights. The only issue was whether one as long as five years was disproportionate, and whether a two year one from commencement, which would only just have benefited the Claimant, was the maximum which could be regarded as proportionate. Nothing in that case supports an argument here that the five year period was "manifestly without reasonable foundation". As Mr Forsdick pointed out, whatever the length of the transitional period, there would always be landowners who would have no new opportunity to stop time running and prevent applications.

204. *Leeds* did not decide that such a transitional period was always required. It did not have this particular problem in mind, since the issues it dealt with, though close in subject matter, were further away in legal nature. It does perhaps highlight that the Claimant had a short period between November and 30 January 2001, if the twenty year period had already run, in which it could have taken steps to cease the user, which would have been effective and not changed by the introduction of s22(1A) and the threat of periods of grace introduced by regulation. Arden LJ does not suggest that a period of transition was required, but she accepted that the short window was sufficient in that case. She is right that the enactment of a transitional period will be relevant to, but not determinative of, the judgment on proportionality. If one were required here, I do not see that the short window that sufficed there would not also suffice here. But I prefer to say that this transitional period itself required no transitional period since the risk of this sort of change had been highlighted since 2000, and steps to end the use, if twenty years had been completed, could have been taken up to April 2002 which would have prevented any application for registration being made successfully.

205. For those reasons, I reject the application for a declaration of incompatibility.

206. However, since registration is not compatible with the statutory purpose for which the land is held by the Claimant, it cannot be registered and I allow the claim, and quash the County Council's decision.