Appendix 11

In the Matter of

An Application to Register

Land at Argyll Rise, Hereford

As a New Town or Village Green

PRELIMINARY NOTE No. 2

of Mr. VIVIAN CHAPMAN Q.C.

re Meeting of Regulatory Committee on 11th January 2011 @ 1000am

---

Herefordshire Council,

Legal Services,

Blackfriars,

Blackfriars Street,

Hereford HR4 9ZR

Ref. PC/NMG

67651/VRC/10/151/wp/S4/Argyll Rise Note No 2

In the Matter of

An Application to Register

Land at Argyll Rise, Hereford

As a New Town or Village Green

PRELIMINARY NOTE No. 2

of Mr. VIVIAN CHAPMAN Q.C.

re Meeting of Regulatory Committee on 11th January 2011 @ 1000am

Introduction

[1] This Note is written to address the thoughtful comments dated 9th November 2010 of Mr. Peter Crilly of Herefordshire Council Legal Services. It appears to me that there are three points to consider, in increasing order of difficulty:

- The playground point
- The permission point
- The statutory right point

As before, the views expressed in this Note are purely provisional and this Note is subject to any evidence and arguments that may emerge before or during the adjourned meeting of the Regulatory Committee.

The playground point

[2] I think that this point arises from unclear language in my Preliminary Note, for which I apologise. There are four distinct events here:

- First, the play equipment was physically removed from the land which was subsequently comprised in the first application as a result of an accident suffered by a child on the equipment.
- Second, the area in which the play equipment had been situated was included within the land subject to the first application.
- Third, the applicants subsequently notified the inspector that they did not pursue registration of the former play equipment area as a new TVG.

- Fourth, the applicants did not include the former play equipment area in the second application.

[3] The practical consequence is that it is not necessary to consider the former play equipment area in relation to the second application.

The permission point

[4] The point here is whether there is a difference between (a) permission to use land and (b) a statutory right to use land in deciding whether user was "as of right" within CA 2006 s. 15. Looking at the point in principle, it seems to me that there is a conceptual difference. Permission is a voluntary act of the landowner. He is free to grant or withhold permission as he wishes. The right to use the land arises directly from the voluntary act of the landowner. By contrast, a statutory right to use land arises from the statute and not from the voluntary act of the landowner. It is true that the statutory right may be triggered by the voluntary act of the landowner. So, for example, if a landowner applies to register his own land as a new TVG under CA 2006 s.15(8), local people gain a right of access to the land. However, it seems to me that the right of access arises by an implied provision of the CA 2006 (in accordance with the reasoning in the *Trap Grounds* case[1]) and not by permission of the landowner, although it was the voluntary act of the landowner that triggered registration.

[5] I ought to draw attention to the case of *R v Secretary of State for the Environment ex parte Billson*[2]. An issue in that case was whether members of the public were using land "as of right" for the purposes of HA 1980 s. 31 in circumstances where the landowner had applied LPA 1925 s. 193 to the land by revocable deed. In this pre-*Beresford* case, the judge held that they were not using the land "as of right" because they were using the land by licence of the landowner. But that raises the difficult notion of a licence unknown to the licencee, since the users were unaware of the revocable deed. I would prefer to say that they were not using the land as of right because they were using it pursuant to a statutory right, i.e. LPA 1925 s. 193. If they had a statutory right to use the land, knowledge of the revocable deed would be irrelevant. I would respectfully say that the judge was right but for the wrong reason. The *Billson* case was overruled by the House of Lords in the *Godmanchester* case[3], but not on this point which was not in issue and was not considered by the House.

[6] It is now necessary to look at the *Beresford* case to see if the members of the House of Lords equated (a) a statutory right of access and (b) permission.

[7] It seems to me that Lord Bingham clearly distinguished between permission and statutory right. At para. 3, he commented that persons using land pursuant to a legal right are not using the

---

1 *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674

2 [1998] 2 All ER 587

3 *R (Godmanchester Town Council) v Sec. of State for Environment* [2008] 1 AC 221

land "as of right". He then went on to discuss whether user was by permission on the facts of case (paras. 4-8). Then, at para.9, he discussed the new point (raised after the first hearing of the appeal) whether user was pursuant to a statutory right, and concluded that it was not. It seems to me clear that he did not equate a statutory right with permission. In para. 9, he was clearly discussing a separate issue from that of permission, and the words "permission" or "licence" does not appear in para. 9.

[8] Lord Hutton did not deliver a reasoned speech and simply agreed with the speeches of Lords Walker, Bingham and Rodger.

[9] Lord Scott discussed the question of user pursuant to a statutory right in the most detail. In para. 16, Lord Scott identified the issue in *Beresford* as being whether user was *nec precario*. He then discussed the statutory background to the acquisition of the land in question in that case and a number of issues on which he made no ruling, bearing in mind counsel's reluctance to argue them. In para. 30, he discussed land held under s. 10 of the OSA 1906. He was clear that user would not be "as of right" but it is not entirely clear whether it was because of the statutory trust imposed by s. 10 or because the land was subject to regulation by the council/landowner. However, he did not say that user under s. 10 OSA 1906 is user with the permission of the landowner or under licence from the landowner. At para. 32, Lord Scott turned to the question whether user was with permission. The discussion at paras. 46-51 mentioned by Mr. Crilly was, to my mind, solely directed to the question of permission. He explained that permission must be revocable or time limited and that acts of facilitation or encouragement cannot amount to implied permission. I see nothing in this discussion which bears on the issue whether user is "as of right" if it is pursuant to a statutory right. So, for example, it seems to me that Lord Scott would have regarded user pursuant to a permission that was indefinite, in the sense that it was not expressed to be revocable or time-limited, to be user "as of right" but that he would have regarded user pursuant to a similarly indefinite statutory right as not being "as of right".

[10] In paras. 53-61, Lord Rodger considered whether user was *precario* and concluded that it was not. In para. 62, he turned to consider whether user was "of right" as opposed to "as of right" because it was pursuant to some statutory right and concluded that it was not. It seems to me clear that Lord Rodger was not treating user pursuant to a statutory right as being equivalent to user which was *precario*. Indeed, at paras. 57-58, he discussed the history of the concept of *precarium* back to Roman law and characterised it as the grant of a temporary right over land by the landowner.

[11] In paras. 70-86, Lord Walker discussed the distinction between acquiescence and permission. Then, at para. 87, he turned to the issue whether use was under a statutory right. He said that the consequence would be the same if land were appropriated for the purposes of public recreation. He found that, on the facts of that case, there was neither a statutory right nor an

appropriation for the purposes of public recreation. I see nothing in Lord Walker's speech which can be read as treating user pursuant to a statutory right as equivalent to user by permission.

[12] I conclude that there is nothing in the *Beresford* case which equates user pursuant to a statutory right with user by permission. User is "as of right" if it is user *nec vi nec clam nec precario*. But user is not "as of right" if it is user "by right" or "of right", i.e. pursuant to a legal right conferred by statute. It seems to me that issues turning on (a) the distinction between acquiescence and permission or (b) whether permission has to be revocable or time-limited or (c) whether permission has to be communicated to the user simply do not apply if the user is pursuant to a right conferred by statute.

The statutory right point

[13] This takes me to what I see as the central issue in this case, i.e. whether local people were using the application land pursuant to a legal right with the result that they were using the application land "of right" or "by right" rather than "as of right". I do not pretend that it is an easy point or that I am wholly confident that the answer that I prefer is the right one.

[14] There can be no doubt that statute can grant people a statutory right to use land for recreation. Thus, if land is acquired under the OSA 1906, the landowner holds the land on a statutory trust for public recreation under s. 10 of the 1906 Act. The public have a right of access to the land for recreation, subject to regulation by byelaws made under s. 15.

[15] There is the same result if statute does not contain an express trust for public recreation but states that the land is held for the purpose of public recreation. Thus in the *Brockwell Park* case[4], the LCC acquired Brockwell Park under the London Council (General Powers) Act 1890. The 1890 Act provided that the LCC should hold and maintain Brockwell Park as a park for the perpetual use thereof by the public for exercise and recreation. The issue was whether the LCC was in occupation of the park for rating purposes. It was held that it was not, being merely "custodians and trustees for the public" and bound to "allow the public the free and unrestricted use of it".

[16] The same principle has been held to apply to land held under s. 164 of the PHA 1875 "for the purpose of being used as public walks and pleasure grounds". In *Hall v Beckenham Corporation*[5] the issue was whether the Corporation was in occupation of a park held under s. 164 PHA 1875 for the purposes of liability in the tort of nuisance. Section 164 contains power to make byelaws for the regulation of the park, including power to remove people infringing the byelaws. The park was closed at certain times during which the public had no access. The court held that the Corporation was not in occupation of the park. The Corporation was "the trustees

4 *The Churchwardens & Overseers of Lambeth Parish v LCC* [1897] AC 625

5 [1949] 1 All ER 423

and guardians of the park…bound to admit to that park any citizen who wants to enter within the times that it is open."

[17] Even where the statute does not spell out the purpose for which the land is held, the court may infer that it is intended that there should be a public right of access. Thus, in the *Trap Grounds* case, the House of Lords held that registration of a new green under s. 13 of the CRA 1965 (the predecessor of CA 2006 s. 15) conferred on local inhabitants the right to use the land generally for sports and pastimes. See Lord Hoffmann at paras. 45-53. There is nothing in the statute which expressly explains the consequence of registration as a new green. The right was inferred as a matter of statutory interpretation.

[18] In the present case, the inspector found that the application land had been acquired by the council in 1959 under Part V of the Housing Act 1957. Part V of the HA 1957 conferred power upon the local authority to provide housing accommodation within its district. By s. 96, the local authority had power to acquire land for the purposes of Part V. By s. 93(1), the local authority had power, with the consent of the Minister, to provide "in connection with any such housing accommodation any building adapted for use as a shop, any recreation grounds, or other buildings or land which in the opinion of the Minister will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided." By s. 107, "a local authority may lay out and construct public streets or roads and open spaces on land acquired by them for the purposes of this Part of this Act…" Ministerial consent was not required under s. 107. Section 9 of the Local Government (Miscellaneous Provisions) Act 1976 empowered a local authority to make byelaws in relation to land held under HA 1957 s. 93. These provisions were consolidated in the Housing Act 1985. HA 1957 s. 93(1) was repeated in HA 1985 s. 12(1). HA 1957 s. 107 was repeated in HA 1985 s. 13(1). LG(MP)A 1976 s. 9 was repeated in HA 1985 s. 23 (2).

[19] It was established in the case of *HE Green v Minister of Health*[6] that the power conferred by HA 1957 s. 93[7] authorised the provision of a facility that benefitted other people as well as the class of persons who were the primary beneficiaries. Thus, so it seems to me, a local authority can establish a recreation ground open to the public under housing powers if that benefits the council tenants.

[20] In the present case there was no evidence of ministerial consent but the inspector (who mistakenly thought that such consent was required both under HA 1957 s. 93 and s. 107) inferred that such consent had been granted.

[21] The first question that arises is whether it is implicit in HA1957 s. 93 that local people have a right to use a recreation ground provided by a local authority for recreation. The

---

6 [1948] 1 KB 34

7 The case concerned HA 1936 s. 80 which was the direct predecessor of HA 1957 s. 93.

expression "recreation ground" is not defined by the statute. The dictionary definition of a recreation ground is "a public ground with facilities for games etc."[8]. We all have a concept of a typical urban recreation ground. It is usually an enclosed expanse of grass on which local children play. There is usually an area with swings and slides. It is type of public park. Local children go to play in "the park" or "the rec." The whole point of a recreation ground is that local people can use it for recreation. I have never heard of a recreation ground that is not open to local people for recreation. It seems to me implicit in the concept of a recreation ground that local people have a right of access to it for recreational purposes. The park in *Liverpool Corporation v West Derby Union*[9] was described in the case stated as "a public park or recreation ground". The PHA 1875 s. 164 park in *Hall v Beckenham Corporation*[10] was called "The Blake Recreation Ground".

[22] It is true that s. 93 authorises a local authority to provide other facilities, such as shops, to which the local people clearly have no legal right of access. However, I do not see why that logically means that local people have no right of access to a recreation ground provided under that section. The section authorizes the provision of different sorts of facilities. It seems to me that one must examine each facility individually to decide whether it is implicit that local people have a right of access to it. Say for example that a section authorized a local authority to provide a variety of facilities including (a) an abattoir and (b) a public park. No one would claim a right of access to the abattoir but surely the public would have a right of access to the public park? The same reasoning applies to the council's power to provide housing. No one would suggest that the public have a right of access to the housing, but it does not follow that the public have no right of access to a different facility which the local housing authority are empowered to provide by statute in connection with the provision of housing.

[23] The next question is whether local people have a right of access to an "open space" laid out under HA 1957 s. 107. "Open space" is not defined for the purposes of Part V of the HA 1957. However, as Mr. Whitmey points out, it is defined for the purposes of HA 1957 s. 150 as "any land laid out as a public garden or used for the purposes of public recreation and any disused burial ground". This is the definition used for planning purposes: see TCPA 1990 s. 336(1) repeating a definition going back at least as far as the TCPA 1947. Although differently defined by s. 20 of the OSA 1906, open space held under that Act is held by virtue of s. 10 on trust for public recreation. I would read the word "public" in s. 107 as qualifying "open space" as well as "streets or roads". However, even if I were wrong about that, it seems to me that, in the context of the HA 1957, "open space" carries with it the connotation of unenclosed land to be used for public recreation. So, for example, Paul Clayden's book on "The Law of Parks and Open Spaces" is so entitled because "open space" is understood to mean unenclosed public

---

8 SOED

9 [1908] 2 KB 647

10 [1949] 1 All ER 423

recreational land. I would therefore construe s. 107 as authorizing a local housing authority to lay out open unenclosed areas for public recreation as part of council estates. If the statute authorizes the laying out of land for public recreation, it seems to me implicit that the public have a right of access for recreation. It would be very odd if what the draftsman had in mind in HA 1957 s. 107 was that the local housing authority should be empowered to lay out vacant land to which the local people had no right of access.

[24] The side note to s. 107 reads "Powers relating to the development of land". I do not find this to be inconsistent with my construction of the section. In building council housing estates ("development") the local housing authority has "power" to lay out "open spaces". The laying out of open spaces was ancillary to the development of land as a council housing estate. In any event, the House of Lords have held that sidenotes are of very little weight in construing a statute: *DPP v Schildkamp*[11]

[25] Mr. Crilley suggests that this construction of ss. 93 and 107 would involve "an implication upon an implication". However, I do not see that there are two stages of implication. The only questions are whether one can infer a public right of access from the power to lay out "recreation grounds" and "[public] open spaces"

[26] Mr. Crilley discusses the meaning of the last sentence of para. 87 of Lord Walker's speech in *Beresford*. I find that Lord Walker's remarks are complex but my understanding of what he said in para. 87 is as follows. First, he says that if land is held on the express statutory trusts of s. 10 OSA 1906, the inhabitants of the locality have a statutory right of access to the land, they are not trespassers and they are using the land "of right" or "by right" and not "as of right". Then he says that the position would be the same if "land had been appropriated for the purposes of public recreation". Now Lord Walker must have been aware that land can only be appropriated under LGA 1972 s. 122 to some specific statutory purpose for which the land could have been acquired. I know of no statute which expressly authorizes land to be acquired "for the purposes of public recreation". I think therefore that what Lord Walker meant was that if land is appropriated to a statutory purpose which is implicitly for public recreation, it would have the same consequence (so far as user "as of right" is concerned) as an appropriation to the purposes of the OSA 1906. An example might be an appropriation to PHA 1875 s. 164. I would say that Lord Walker's remarks would apply to an appropriation to the purposes of a recreation ground under HA 1957 s. 93 or to the purposes of "open space" under HA 1957 s. 107. This is what I meant by referring to holding land for a purpose which involves public recreational use of the land. In the present case, there is (so far) no evidence that the land was appropriated to any purpose. Nor is there evidence that the application land was specifically earmarked as a site for a recreation ground or open space when it was acquired. The land was acquired for housing purposes and then laid out and held as a recreation ground or open space pursuant to housing

[11] [1969] 3 All ER 1640

powers. What I draw from Lord Walker's remarks is that if land is held by a local authority for a statutory purpose which impliedly confers on local people a right of access to that land, the use of the land is "of right" or "by right" and not "as of right".

[27] Then Mr. Crilly discusses the rating cases of *Sheffield Corporation v Tranter* and *Blake v Hendon Corporation.* The actual issue in those cases was whether the local authority landowner was in rateable "occupation" of a park held under s. 164 of the PHA 1875. There were two threads in the judgments which call for comment:

- The court spoke of the park's being in the "beneficial ownership" of the public. But this was just a metaphor because, of course, "the public" is not a legal entity and cannot own land legally or beneficially. The underlying basis for the metaphor is the proposition that the public have a right of access to the land and that the landowner can only use the land for purposes ancillary to the public right. The cases are therefore authority for the proposition that the public have a right of access to a park laid out for public use under PHA 1875 s. 164. I agree with Mr. Crilly that the question of "beneficial ownership" is not directly relevant in the present case.

- Then there was a discussion in *Blake* as to whether it made any difference whether the land was held for the purposes of PHA 1875 s. 164 for ever or indefinitely. The court held that it made no difference to the question whether the landowner was in rateable occupation. Equally, it seems to me that it makes no difference to the question whether use by the public was "as of right". If and so long as the public use the land pursuant to a statutory right they are using the land "by right" or "of right" and not "as of right". Indeed, I do not see that it would make any difference to the "as of right" point if the statute conferred a right to use the land for a limited period only. For that period the public would not be using the land "as of right"

[28] Nor does the implication of a public right of access to a recreation ground or open space create difficulties with management of the land as a place for public recreation. The public cannot assert their right of access to overcome proper management of the land as a place for public recreation:

- In *Liverpool Corporation v West Derby Union*[12] a public park was held not to be in the rateable occupation of the corporation although there were byelaws which entitled the corporation to close the park and charge for admission on a limited number of days a year. The right to close the park periodically did not prevent the public from having a right of access when it was open.

[12] [1908] 2 KB 647

- In *Hall v Beckenham Corporation*, the park was closed at night and on certain days (presumably for management purpose) but that did not stop the judge from finding that there was a public right of access when it was open.

- In *Burnell v Downham Market UDC*[13] a public park was held under the OSA 1906. It was held that the public had free and unrestricted use of the park notwithstanding that it could be closed periodically in the interests of good management and that the council landowner allowed parts of it to be used by football, cricket and tennis clubs.

- In *Blake v Hendon Corporation*[14] the earlier cases were discussed and approved. The public had a right to free and unrestricted access to a park held under PHA 1875 s. 164 and that right was not affected by the ancillary powers of the council landowner to manage the park

[29] It seems to me that one always comes back to one simple issue, i.e. whether the public have an implied statutory right of access to a recreation ground laid out and maintained under HA 1957 s. 93 or a [public] open space laid out under HA 1957 s. 107. My view is that they do have such a right because it is implicit in the nature of a recreation ground or open space (just as in the nature of a TVG under s. 13 of the CRA 1965 or s. 15 CA 2006 or of public walks and pleasure grounds under s. 164 PHA 1875) that the public should have a right of access. But, clearly, informed views can differ on that point.

Action

[30] I consider that Herefordshire Council has three possible courses of action.

[31] The first course of action would be to accept the advice of Mr. Crilly and to register the application land as a new green. But that would involve rejecting the legal advice of the inspector, Mr. Petchey and me. Of course, the council is not bound by that advice but it seems to me that it would be a very unusual course of action to go against the advice of the three counsel who have been instructed to advise in the case. I advise against this course of action.

[32] The second course of action would be to seek the directions of the court before making a decision. In the *Trap Grounds* case the House of Lords was unenthusiastic about applications for directions by commons registration authorities. Generally, the commons registration authority should decide the application and leave it to the parties to challenge the decision by judicial review. However, the House of Lords did recognize the propriety of an application for declaratory relief where (a) a difficult question of law had to be decided which is relevant to the decision to be made and (b) where the commons registration authority had a personal interest in the outcome of the case. See Lord Scott at paras. 91-103 and Baroness Hale at paras. 131-138. In

[13] [1952] 1 All ER 601
[14] [1961] 3 All ER 601

the present case, both circumstances apply. There is clearly a difficult question of law which is fundamental to the decision whether to accept or reject the application. Also, Herefordshire Council is a member and director of the objector. I consider that an application to the court for directions is a possible course of action in this case.

[33] The third course of action would be to accept the legal advice of the inspector, Mr. Petchey and me and to reject the application. This is the course of action that I would prefer. The applicant can then challenge the decision by judicial review and the point of law can be decided in the judicial review proceedings. The objector will be represented as an interested party and the applicant and objector can put their rival arguments to the court.

[34] Once again, I emphasis that my advice is provisional and is subject to such further evidence and arguments as emerge before or during the meeting of the Regulatory Committee.

Vivian Chapman QC
23rd November 2010
9, Stone Buildings,
Lincoln's Inn,
London WC2A 3NN