

15/12/10

Gosport Triangle TVG Application

***SUBMISSIONS OF THE APPLICANT IN RESPONSE TO THE OBJECTOR'S
CRITICISMS OF THE REPORT OF MR CHAPMAN QC IN SUBMISSIONS DATED
12/11/2010***

I: OVERVIEW

1. The applicant files these submissions, coming after the non-statutory public inquiry and a report tendered by Mr Vivian Chapman QC as they do, in response to submissions made to the Registration Authority by the objector dated 12 November 2010.
2. The applicant does not contest the right of the objector to make these further submissions where he disagrees with the Inspector's findings or interpretation of the law. The demands of natural justice would appear to permit it. In addition, the applicant does not resist a request for the Inspector to clarify his advice in relation to the spot height mentioned in paragraph 1 ("Introductory") of the objector's submissions. The applicant also asks for the procedural items at [10] to be approved as soon as possible.
3. However, in relation to the substantive criticisms levelled at the report, the Registration Authority may consider that there ought to be a sensible process that allows each side to argue its case but which also facilitates resolution in good time and in a definite manner. The applicant respectfully submits that, following these post-inquiry submissions, such a point has now arrived.

4. The applicant does not respond to the objector or rehearse prior submissions below where she considers that nothing can usefully be added (i.e. – on the statutory interpretation of s.19 LG(MP)A 1976¹ and the *DPP v Jones* issue²). It is hoped that what follows is of assistance to the Registration Authority.

5. It is not understood on what basis the objector seeks to argue, contrary to [99], that use of the Triangle by those *lacking any legal right*³ to do so was “of right.” (or as perhaps better described: “by right”⁴). To reduce the tripartite test outlined by Lord Rodger in *Redcar*⁵ as “peaceable, open *and not based on any licence from the owner of the land*” to a different one of “peaceable, open *and always a trespasser*”⁶ is incorrect as a matter of law as applied to town village greens. The complexity in the objector’s current submissions derives from asking the wrong question.

II: FUTURE PROCEDURE

6. The applicant expects that the Registration Authority, Hampshire County Council, will scarcely need reminding of the process that has brought this contested TVG application to near conclusion. The applicant does respectfully request however, that those individual decision-makers who may not be so personally familiar are reminded that: 1)

The Registration Authority are a different entity from Hampshire County Council as

¹ See below at footnote 10.

² The Registration Authority are referred to the Inspector’s report at [101]

³ Which, the applicant submits, is the necessary result of the argument advanced by the objector if, as the Inspector correctly decided, s. 19 of the LG(MP)A 1976 conferred no legal right to use the land.

⁴ As counsel for the appellant in the *Redcar* case put it the Supreme Court: “As of right means as if of right and therefore any use which was by right can be disregarded.”

⁵ At paragraph 87.

⁶ The applicant acknowledges that her submissions to the Inspector were, at the time of the inquiry, premised on the basis that the user on the Triangle were *not* trespassers because the applicant’s view was, contrary to the Inspector’s findings at [99], that no “recreational facility” had been made available by GBC to the public pursuant to s. 19(1) of the LG(MP)A 1976.

objector; 2) The Registration Authority appointed Mr Chapman QC as an independent expert in the law to conduct, as Inspector, a non-statutory public inquiry; 3) The burden of proof, as applied by the Inspector, was on the applicant; 4) The evidence of a significant number of witnesses was heard on 1, 2, 5 and 6 July 2010; 5) After a short interval to allow opposing parties to prepare written legal arguments⁷ a final day was set aside for oral submissions on 22 July 2010.

7. Therefore, while it is the Inspector's independent advice that a partial registration⁸ of the Triangle should be made, it should not be thought that he is the principal proponent of the applicant's case or the opponent of Hampshire County Council as objector. The suggestion at paragraph 16 of the objector's submissions of 12/11/2010 that "the Registration Authority should consider for itself which version of the legal position it prefers" and at paragraph 17 that the advice of the Inspector should not be adopted "merely because he is the appointed independent non-statutory inspector" need to be severely tempered by the context outlined above. The applicant would also respectfully remind the Registration Authority that matters irrelevant to the Commons Act 2006, such as those related to the Bus Rapid Transit ("BRT") scheme, should in no circumstances form part of the decision-making process.
8. The applicant submits that, in the first instance, the best approach would be to ask the Inspector as to whether he considers that it is necessary for him to further advise and/or for a second opinion to be obtained.

⁷ The Inspector said at [99] that these arguments were "very detailed and elaborate" on both sides.

⁸ "The grassy part of the Triangle" and the "eastern grassy part of the embankment" (i.e. as identified at [110])

III: “AS OF RIGHT”

9. The Inspector correctly identified in his report that:

[25] “As of right” means “as if of right”. If user is in fact pursuant to a legal right, e.g. under a statutory right of public recreation under s. 164 of the Public Health Act 1875 or s. 10 of the Open Spaces Act 1906, it is “by right” or “of right” rather than “as of right”. This point was discussed *obiter* by the House of Lords in the *Beresford* case....

10. The objector seeks to propose a proposition of law based on this *obiter dicta* in *Beresford* by going a stage further and implying from the speeches of Lord Bingham, Rodger and Walker that all of their Lordships save Lord Scott held that the users of the Washington sports arena were trespassers. Further, that this was a necessary condition of their success.

11. The applicant’s current view is that whether or not, based on this stretched jurisprudence, users in *Beresford* were trespassers is not determinative. It is clear that on any reading of *Beresford* that the tenor of all of their Lordships judgements is that the starting point in assessing whether user is *nec precario* is to enquire as to whether or not there is a licence (express or implied⁹). Lord Bingham’s remarks at paragraph 3 support this: “In this case there was no question of force or stealth. So the only question is whether the inhabitants' user was by the licence of the owner [emphasis added].”

⁹ The applicant says this includes implied from statute.

12. Lord Scott adopted, at paragraph 16, the following a citation from Lord Hoffman in *Sunningwell* (at p. 355):

"the words 'as of right' import **the absence of any of the three characteristics** of compulsion, secrecy or **licence**—'nec vi, nec clam, nec precario', phraseology borrowed from the law of easements ..." (per Scott LJ in *Jones v Bates* [1938] 2 All ER 237). [emphasis added]

It is useful to note here that the *Redcar* case also confirms that there are only three vitiating circumstances. There is no decided case the applicant knows of requiring the Registration Authority to go any further once, as the Inspector does, it is established that there is no legal right or entitlement to use the land under s.19 of the LG(MP) Act 1976.

13. In *Beresford* Lord Roger addressed the Roman law origins of "precarium" at paragraph 57 and then addressed the factual question as to whether or not there was an implied licence. He did not start the inquiry by asking whether they were trespassers. If he had done so it would have subverted the true test of *nec precario* (and the question asked there – was there an implied license from the cutting of the grass and the provision of the benches?). The Registration Authority may find it useful to consider why their Lordships felt able to decide *Beresford* without expounding a "trespasser test." The applicant suggests that in the context of publicly owned land to apply such a test would produce a numbing formula.

14. The objector calls attention to Lord Walker's statement at paragraph 72: "It has often been pointed out that "as of right" does not mean 'of right' ... This leads at once to the paradox that a trespasser (so long as he acts peaceably and openly) is in a position to

acquire rights by prescription, whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights.” In the present case there was no licence or “legal right” derived from statute to use the land. It is obvious that there will be many cases in which TVG user is incidentally trespassory but that does not alter the question to be asked; for these purposes whether use is trespassory or not is merely a curiosity of legal history.

15. It follows that non-trespassers do not automatically have a species of legal entitlement as this is a matter of construction of the relevant statute. The Registration Authority is referred to the Inspector's findings at [99] and to the Applicant's prior submissions on the effect of s.19 LG(MP)A 1976.¹⁰

16. When assessing whether land subject to local authority holding powers has been used “as of right” it is also important to recognise, as Lord Scott did in *Beresford* at paragraph 34:

There are important differences between private easements over land and public rights over land and between the ways in which a public right of way can come into existence and the ways in which a town or village green can come into existence. To apply principles applicable to one type of right to another type of right without taking account of their differences is dangerous.¹¹

The applicant notes that the recently decided case of *London Tara Hotel Ltd* [2010] EWHC was a case about the acquisition of an easement. On a reading of paragraphs 44 and 59, Mr Justice Roth appears to have cautioned himself that there is a difference

¹⁰ Part 2 of the applicant's submissions in closing at paragraphs 38 – 41.

¹¹ It is perhaps with this in mind that Lord Scott undertakes his exposition of permission in relation to easements at paragraphs 36-40.

between the registration of a village green under statute and private rights of way. It further appears to the applicant that the *Tara Hotel* case lays down no new principle of law and merely summarises those TVG cases of the highest authority.¹² More particularly, it does not advance the objector's submission that qualifying TVG user must always be trespassory. It cannot. It is not even a TVG case.

17. The conclusion that ought to be drawn is that the acquisition of private easements is very far removed from the registration of a green and acquisition by qualifying user of legal rights to recreate upon it. The Registration Authority may consider that it should follow the safer legal principles (i.e. – the correct tripartite test) and implement the recommendations in the Inspector's report. Principally, to register the land identified under the Commons Act 2006 at the next meeting of committee in January 2011.

Paul Wilmshurst

Counsel of the Applicant

12 College Place

15/12/2010

¹² See paragraph 44.

