

IN THE MATTER OF

AN APPLICATION TO REGISTER

LAND AT THE TRIANGLE, TICHBOURNE WAY, GOSPORT, HAMPSHIRE

AS A NEW TOWN OR VILLAGE GREEN

**APPLICANT'S SUBMISSIONS AFTER RECEIVING
THE ADVICE OF MORAG ELLIS QC**

I. INTRODUCTORY

1. Hampshire County Council as registration authority ("the Registration Authority") are entrusted by parliament with the duty to determine this application to register land known as "The Triangle" at Tichbourne Way, Gosport under the Commons Act 2006. Pursuant to this, Mr. Chapman QC was appointed as Inspector and a public inquiry was held on 1, 2, 5, 6 and 22 July 2010.
2. Hampshire County Council as landowner ("the objector") vehemently objected to the registration but "lost the public inquiry" when the Inspector advised partial registration of the land as a new town green. The applicant submits therefore that the Registration Authority ought to take the Inspector's Report as the starting point in coming to a decision.¹

¹ Accordingly, the applicant does not rehearse submissions about whether or not the Triangle ought to be considered a "recreational facility" within the meaning of the LG(MP)A 1976 and whether or not such a facility was provided.

3. Subsequent to the Inspector's Report and in response to a request from the objector, Mr. Austin of the Registration Authority then obtained a second opinion of Miss Ellis QC. At the same time Mr. Austin dispensed with the services of Mr. Chapman as Inspector.²
4. Miss Ellis subsequently advised, on grounds expanded upon below, that the Inspector was wrong in law and the application could be rejected.
5. One of the objector's criticisms, in his submissions dated 12/11/2010, of the Inspector's Report was that a user "as of right" must always be a trespasser. Ironically, Miss Ellis' advice is that whether user was trespassory is *not* determinative and instead offers an alternative "general principle" (succinctly put in paragraph 2.15 of her advice) which she argues can be derived from jurisprudence. The Registration Authority is without advice from the Inspector in respect of the new "general principle" which is also new to these proceedings.
6. The applicant has written correspondence to the Registration Authority regarding the fate of the Inspector - repeatedly requesting (to no avail) that the post-inquiry submissions of the parties and the advice of Miss Ellis are placed before him and the process allowed to continue to a conclusion in way that she legitimately expected: being additionally consistent with the approach, endorsed by the courts³, of every other Registration Authority that the applicant is aware of.
7. The applicant notes that, for these submissions, she has not been afforded parity in terms the time that was given to the objector's legal team to file submissions

² See e-mail of 05/01/11 from Mr. Austin: "Mr Chapman has fulfilled the terms of his original instructions. The commons registrations authority has now instructed Ms M Ellis QC... to review all the evidence and submissions received with a view to providing Advice to the commons registration authority on the application." See also e-mail of 16/03/2011 confirming this position.

³ *Regina (Whitmey) v Commons Commissioner* [2004] EWCA 951 (*per* Waller LG at paragraph 62); *R v Suffolk County Council ex parte Steed* [1995] 70 P&CE 102 (*per* Carnworth J at page 500)

following the Report of Mr. Chapman. Indeed, the applicant has only had partial answers to long standing procedural queries in an e-mail dated 16/03/11. The applicant therefore reserves the right to file additional submissions.

8. The applicant has been additionally hindered by the Registration Authority in that while she considers that the Inspector's views are persuasive and clearly reasoned it is possible that the Inspector (being an as Miss Ellis describes him: "an extremely experienced and eminent TVG expert⁴") may have chosen to explain the full ambit of his opinion in different terms to that expressed here by the applicant.

II. ISSUES

9. The applicant's submissions are as follows:
 - (a) if the Registration Authority follow the advice of Miss Ellis without reverting to Mr. Chapman the Inspector then the decision will be unlawful in the public law sense: As to this the applicant relies on the submissions of PLS as set out in the letter of 26/01/2011 and the e-mail of 04/03/2011.
 - (b) the advice of Miss Ellis is based on the wrong facts.
 - (c) the advice of Miss Ellis is in any case plainly wrong in substantive law.
10. Accordingly, the following issues arise for the Registration Authority following the advice of Miss Ellis:
 - (a) the factual basis of Miss Ellis' advice

⁴ At paragraph 1.3

- (i) the intended use of the Triangle.
 - (ii) the *DPP v Jones* issue
- (b) the legal test, based on the outward appearance of matters from the viewpoint of a reasonable landowner which Miss Ellis has adopted.
- (c) how to compare the advice of Miss Ellis with that of the Inspector, Mr. Chapman?

III. THE FACTUAL BASIS OF MISS ELLIS' ADVICE

The advice is based on wrong facts

11. The advice of Miss Ellis proceeds on an incorrect factual basis. Miss Ellis advised (at paragraph 2.4) that “The land was acquired for housing purposes in 1957, but it appears that it was always intended to be used for recreation of one sort or another.” [emphasis added] This is simply wrong and introduces an error that was not present in the Inspector’s Report.
12. The applicant provided a full history of the land in Section III of Part II of her closing submissions to the Inspector at the inquiry.⁵ The decision-maker is asked to refer to this section and the documents identified therein. In short: the Triangle was in fact within a “blast zone” of an army munitions depot throughout the 1960s (paragraph 16); subject to an agricultural license between the years 1959-1976 (paragraph 15); subject to proposals for industry and then in turn protracted discussions over whether and how it could be developed for housing during the 1970s (paragraphs 17-21). In 1974 a planning application was made in relation to the land at Holbrooks, which included the Triangle, for a change of user to

⁵ Miss Ellis is not in the same position as the Inspector – see paragraph 2.2 of her advice: “Obviously I have not had the advantage of oral exposition of the documents at the public inquiry..”

housing (paragraph 22). In the same year a development brief considered the land to be the possible site of a new train station (paragraph 48(8)).⁶

13. Miss Ellis' comments in relation to the intended purpose of the Triangle appears to the applicant to have informed her later reference in her advice (at paragraph 2.14) to *Beresford* where she opines that: "although the land [in Beresford] was held for 'public law purposes', these had not included any recreational purpose, but rather the land had been seen for much of the relevant period as having development potential." [emphasis added]. It appears here that Miss Ellis has implicitly distinguished *Beresford* on the basis that the *intentions* of a local authority or moreover, the way in which the land is perceived (i.e. – for recreational purposes) is a determining factor in this application. In any case, 1) the erroneous factual finding about the Triangle and 2) comparing this to the situation in *Beresford* were relevant steps for Miss Ellis in the formulation of her view.

14. It may be that Miss Ellis has unfortunately taken the Inspector's comments at paragraph 78 of his Report in respect of minutes of the Open Spaces and Cemetery Committee of GBC between 1955 and 1957 out of the context. The history of Triangle is interwoven to that of the "land at Holbrooks" in general (including that land which is now the Holbrook Housing Estate.). It is not without irony that it was exceptionally difficult to find out the statutory purpose for which the Triangle was held: the reality is that it was, to large extent, simply forgotten about by Gosport Borough Council and was not marked as any kind of recreational facility on maps.

⁶ Paragraph numbers in this paragraph refer to Part II of the Applicant's Closing Submissions.

15. The applicant does not underestimate the task presented to Miss Ellis by the Registration Authority as being an extremely difficult and onerous one.⁷ However, as matters stand, a rejection of the Inspector's advice and the acceptance of the view of Miss Ellis is not a tenable decision for the Registration Authority.

The objector's criticism of the Inspector's approach to "the highway."

16. Miss Ellis has also advised in respect of the *DPP v Jones* issue raised by the objector. The applicant does not understand the continued objection on this point and adheres to the entirely sensible approach taken by the Inspector. Miss Ellis has very notably advised at paragraph 4.2 that "In view of the general interest in this matter and the possibility of litigation, I think it highly desirable to clarify the factual findings at this stage." Even the objector has requested some clarification from the Inspector as to the issue on "spot height" but this has not been done to date. With the determination date pending, it is difficult to see how the Registration Authority would be in a position to register the Triangle, even if that was the decision that was taken by the relevant committee. The applicant therefore considers there to be an unfortunate question-mark over whether or not the Registration Authority have already made up their minds not to register the Triangle.

17. All of the above, yet again, throws into stark relief the problematic decision of the Registration Authority, to dispense with the Inspector.

⁷ As Mr. Austin relates in his e-mail of 05/01/11, the task was to: "review all the evidence and submissions."

Miscellaneous

18. The applicant also observes that, for some reason Miss Ellis refers to certain paragraphs as being in Part 1 of the applicant's closing submissions whereas they are actually contained within Part 2 of the closing submissions. It is suggested that this is perhaps rectified for ease of future reference.

IV. THE GENERAL PRINCIPLE THE REGISTRATION AUTHORITY HAVE BEEN ADVISED ON IS CONTRARY TO LAW

19. The advice of Miss Ellis is wrong in law where she advances the test to be applied at paragraph 2.15 of her advice in relation to the question the Registration Authority must ask themselves to determine whether user was "as of right:

Looking at the user from the standpoint of the landowner, therefore (as must be done post-Sunningwell), if the land is used recreationally in a fashion which is consistent with the statutory basis on which it holds the land for the time being, then it has no reason (and indeed no basis) for asserting its rights as landowner over those of the users because, as a matter of fact, user is consistent with and legally attributable to the statutory purpose. No question of acquiescence arise." [emphasis added]

20. The *Redcar* court decided that it is unnecessary to separately ask how matters would have appeared to the reasonable landowner. Thus, Miss Ellis has misdirected herself in her analysis of holding powers under section 19 of the Local Government (Miscellaneous Provisions Act) 1976 because it unmistakably starts by considering the outward appearance of matters from the viewpoint of a reasonable landowner.⁸

⁸ At the same time the applicant acknowledges *dicta* to the effect that the underpinning or foundations of the theory of prescription is rooted in how the matter would have appeared to the reasonable landowner. As Lord Walker said in *Redcar* at paragraph 36: "In the light of these and other authorities relied on by Mr Laurence I have no difficulty in accepting that Lord Hoffmann was absolutely right, in

21. In the *Redcar* case (which post-dates *Sunningwell*) Lord Hope defined “as of right” (at paragraph 67)

.... that is to say, openly and in the manner that a person rightfully entitled would have used it. If the user for at least 20 years was of such amount and in such manner as would **reasonably be regarded as being the assertion of a public right** (see *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 , paras 6, 77), the owner will be taken to have acquiesced in it- unless he can claim that **one of the three vitiating circumstances** applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way- either because it has not been asked, or because it has been answered against the owner- that is an end of the matter. There is no third question.”[emphasis added]

22. It is obvious from a reading of *Redcar* but Justice Roth quoted the same passage from Lord Hope’s speech in *London Tara Hotel Limited v Kensington Close Hotel Limited*⁹ adding (at paragraph 55) that the “the third question” was:

... a reference to the issue raised as to whether it was necessary to ask the further question, **“whether it would have appeared to a reasonable landowner that users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging”**: see at [53].

23. Justice Roth also summarised (at paragraph 56) Lord Rodger’s position in *Redcar*:

Lord Rodger JSC considered (at [87]) that the Latin expression *nec vi, nec clam, nec precario* “is perhaps best captured by putting the point more positively: the user must be peaceable, open and not based on any licence from the owner of the land.” **Since the use by the inhabitants fulfilled those criteria, “prima facie,** the inhabitants did everything that was necessary to bring home to the council, if they were reasonably alert, that the inhabitants were using the land for recreation ‘as of right’”: [93]. [emphasis added]

Sunningwell [2000] 1 AC 335, to say that the English theory of prescription is concerned with ‘how the matter would have appeared to the owner of the land’ (or if there was an absentee owner, to a reasonable owner who was on the spot)...”

⁹ [2010] EWHC 2749 (Ch)

24. Lord Brown was also in agreement with his brethren at paragraph 107 of *Redcar* where he said:

I see no good reason whatever to superimpose upon the conventional tripartite test for the registration of land which has been extensively used by local inhabitants for recreational purposes a further requirement that it would appear to a reasonable landowner that the users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging. As Lord Walker of Gestingthorpe JSC has explained, there is nothing in the extensive jurisprudence on this subject to compel the imposition of any such additional test. Rather, as Lord Hope of Craighead DPSC, Lord Walker and Lord Kerr of Tonaghmore JJSC make plain, the focus must always be on the way the land has been used by the locals and, above all, the quality of that user." [emphasis added].

25. It is hoped that the Registration Authority will see the force of the submissions made here which rely on the explicit rulings of the Justices of the Supreme Court. The applicant is puzzled as to how the viewpoint of a reasonable landowner can be an relevant consideration for the Registration Authority in this case. It follows therefore that the "as of right" falls to be determined by reference to the tripartite test: *nec vi, nec clam, nec precario* and not with reference to the test outlined by Miss Ellis at paragraph 2.15.

26. The analysis outlined above is the context in which Miss Ellis then approaches the statutory interpretation (at paragraphs 2.16 and 2.17) of the LG(MP)A 1976. Given that Miss Ellis appears to not to consider that the as of right issue has anything to do with legal rights at all, but rather the outward appearance to the landowner, the exercise is rendered somewhat redundant. The applicant requests that the decision-maker review the closing submissions of the applicant at Part II

paragraphs 39 to 41 and compare this with the Inspector's findings at paragraph 99 of his Report.

27. Miss Ellis concludes by opining that the question of acquiescence does not arise.

Courts have been clear that the question always arises, albeit not expressly, through the tripartite test: *nec vi, nec clam, nec precario*.¹⁰ The general thrust of the advice appears to be that user was *by right* merely because the 1976 Act broadly refers to recreation¹¹ and members of the public have recreated upon the land. But this proposition is wholly divorced from the *question* of whether the 1976 Act conferred on members of the public a legal right to use the land. The argument of Miss Ellis appears to be premised on entirely different fundamentals than that of Mr Leslie Blohm QC (to which Miss Ellis refers) in his *Rumney Recreation Ground* Report (tendered as Inspector). There is a greater degree of similarity in terms of approach between the Inspector and Mr. Blohm (see paragraph 105 of his Report) when the latter is compared with Miss Ellis. Notwithstanding, on the matter of statutory construction, Mr Blohm came to a different result (at paragraph 105) by, *inter alia*, construing "may" to mean "must." (without seemingly opining that the draftsman made an error in this regard). Such a construction, the applicant contends, is a very curious one indeed. Mr. Blohm does appear to acknowledge (also at paragraph 105) however that on its face section 19 LG(MP)A 1976 does not confer any right on members of the public to use the facility.

¹⁰ See Lord Hope in *Redcar* at paragraphs 67 and 69.

¹¹ In this respect Miss Ellis appears to have referred to statutory purpose at 2.14 in a partially different sense to that which is used by the Inspector. If the question is asked for which statutory purpose did GBC hold the land during the qualifying period the answer should be a) s.19 of the Local Government (Miscellaneous Provisions) Act 1976 and not b) "recreation."

V. COMPARING THE ADVICE OF MISS ELIIS WITH THAT OF THE INSPECTOR

28. Once the Registration Authority realise that Miss Ellis does not adequately address the question of legal rights in her advice they may take comfort in the Report of the Inspector. A trespasser may nearly always be *nec precario*. But the tripartite test for *as of right* is not one of whether user had been “peaceable, open, and always a trespasser.” Therefore, while the Inspector may have been correct in his analysis that there was no trespassory activity, in focusing his mind on the question of legal right and construing section 19 of the 1976 Act accordingly, his reasoning has been impeccable and consistent with case law.¹²

29. The law has sometimes, for various historical and other reasons connected to the particular context in which the perceived need arose, attempted to place a definitional label on visitors to land. A “trespasser” is just one of those categories. Moreover, it is possible for a user to fall between strict categories or to have overlapping characteristics. This is the context in which Lord Scott’s analysis in *Beresford* (at paragraph 37) of the use of equitable easements by those lacking a legal right can be readily understood. In this case the Inspector held that members of the public using the Triangle were neither licensees nor trespassers. From this proposition it follows, the applicant says, that this means their presence was, by virtue of the landowner holding the land pursuant to statute, neither sought nor forbidden.

30. Miss Ellis asserts, at paragraph 2.14 that as for the Triangle: “There is no assertion or assumption of right against the owner, since the body concerned holds it for the

¹² See Lord Bingham’s remarks in *Beresford* (at paragraph 3): “the question is whether a party who lacks a legal right has acquired one by user for a stipulated period.”

very purpose for which it is being used.” Further, she considers that there was no basis for any such assertion of landowner rights. But the Downsiders could have been asked to leave to Triangle at any time, they had no enforceable legal right (*cf Hall v Beckenham Corporation* [1949] 1 KB 716 at 727) and in that respect they share this feature with trespassers.

31. At first blush, it may be attractive to be lured into a false trespasser/licensee dichotomy where user must be either one or the other. There is a long jurisprudential history in relation to the labels (and sub-labels) that the law has sometimes sought to apply to visitors to land. Much of the underlying justification for this derives from tort law and the differing duty an occupier may have had to different categories of user. For example, trespassers have been “tolerated”; licensees are either express or implied; and business visitors or invitees are another category again. It is often useful to compare and contrast these defined status categories: and that is exactly what Lord Walker was doing in *Beresford* where he said, at paragraph 72:

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. Conversely a landowner who puts up a notice stating "Private Land—Keep Out" is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: "The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time.”

32. By way of further example, until Parliament intervened to abolish some of the distinctions by virtue of the Occupiers Liability Act 1957 liability to visitors had been determined upon whether user fell within one of four classes: invitees, licensees, trespassers and those who entered the land by virtue of contract. No

doubt before the introduction of this Act there had been much judicial ink wasted on determining the exact category users fell into depending upon the particular facts in each case.

33. As Lord Rodger recognised in *Beresford* (at paragraph 85) in reality the distinction between trespasser and licensee has in the past involved the creation of legal fiction. The result is that a trespasser is merely one type of user who lacks a legal right to be there they are not necessarily the only sort. Thus, Lord Scott's analysis in *Beresford* (at paragraph 37) of 20 years use of an equitable easement acquired under proprietary estoppel which thereafter hardens into a legal right is just another example of this.

34. However, it is not necessary to identify a legal label of the user to determine whether they were *as of right*. The applicant recalls (despite the argument that has ensued) that the Inspector merely noted (at paragraph 99) that the "members of the public were not trespassers." He did not embark on the task of categorising or defining them - other than that they were using the land *as of right*. In short, the applicant contends that there is no enforceable legal right, in this case and on these facts, contained within the LG(MP)A 1976 for members of the public to use the land. But the Downsiders have, by using the land as if there were such a public right, and in tandem with the long acquiescence of the landowner, acquired a right that ought to be registered under the Commons Act 2006.

VI. CONCLUSIONS

35. The Registration Authority are implored to adopt lawful procedures in the resolution of this application. Having taken further advice from Miss Ellis it is apparent that matters must now be referred back to Mr. Chapman, the Inspector.

Not only are there novel legal arguments that have been raised by Miss Ellis but there are points of fact that need clarification by the Inspector. Moreover, it is plain that the Registration Authority cannot rely on the advice of Miss Ellis as it proceeds on an erroneous factual basis (that was not present in the Inspector's Report). In any event, the approach argued for by Miss Ellis is contrary to the Supreme Court's decision in *Redcar*.

36. Given that the Registration Authority: 1) ought to take the Inspector's Report as a starting point and 2) the approach taken by the Inspector is consistent with case law (and is safer), it follows that the partial registration of the Triangle should be a very attractive option for those councillors who sit on the determination committee. The applicant urges this matter to be referred back to the Inspector - who is best placed to clarify matters of law and fact before any final decision is taken.

37. All of which is respectfully submitted on behalf of the applicant.

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18/03/11