PLANNING AND REGULATORY COMMITTEE

DECEMBER 2024

LEACH GROVE WOODS TVG APPLICATION

ANNEX C 2016 HIGH COURT JUDICIAL REVIEW JUDGMENT

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Case No: CO/6227/2015

Neutral Citation Number: [2016] EWHC 1715 (Admin)

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 13/07/2016

Before :

MR JUSTICE GILBART

- -

Between :

THE QUEEN

on the application of

NHS PROPERTY SERVICES LIMITED

- and -

SURREY COUNTY COUNCIL

-and-

TIMOTHY JONES

- -

- -

Jonathan Clay and **Matthew Lewin** (instructed by **Capsticks LLP, Solicitors of Wimbledon**) for the **Claimant**

Douglas Edwards QC and **Katherine Barnes** (instructed **by Joanna Mortimer, Principal Solicitor, Surrey County Council**) for the **Defendant**

Dr Ashley Bowes (instructed via Direct Access) for the **Interested Party**

Hearing dates: 14th-16th June 2016

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Judgment

MR JUSTICE GILBART :

ACRONYMS AND ABBREVIATIONS USED IN THE JUDGEMENT

CA 2006	Commons Act 2006
C(RTV)Regs 2007	Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007
CR(E)Regs 2014	Commons Registration (England) Regulations 2014

ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (as set out in Human Rights Act 1998 Schedule 1)
RA	Registration Authority
NHSPS	NHS Property Services Limited
SCC	Surrey County Council
PCT	Primary Care Trust
IR	Inspector's Report and Recommendations

Introduction

1.
This claim relates to the registration on 6th October 2015 by SCC, as Registration Authority, of land known as Leach Grove Wood, Leatherhead, Surrey as a town or village green pursuant to s 15 of the CA 2006. It did so, having concluded that the criteria in s 15 of CA 2006 were met. Those criteria are that

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

2.
That land is owned by the Claimant NHSPS. The land was registered pursuant to an application made by Mrs Phillippa Cargill. She has now emigrated from this country. The Interested Party was a supporter of her application and has been made a Party without objection from the Claimant, so that the case for those who supported the application could be made to the Court.

3.
NHSPS objected to the application. A non-statutory inquiry was held by an Inspector, Mr William Webster, Barrister, who then reported to SCC that he recommended that the application be refused. He held that while there had been the indulgence as of right in lawful sports and pastimes for at least 20 years, the Applicant had not identified a "locality," or alternatively a "neighbourhood within a locality." He had rejected the Claimant NHSPS' case that there was a statutory incompatibility between the statutory purposes for which the land was held and registration pursuant to section 15 of the CA 2006. It is to be noted that while that is a matter of fundamental importance (see R (Newhaven Port and Properties Ltd) v East Sussex CC [2015] UKSC 7 ("Newhaven") at [91]- [93] per Lord Neuberger and Lord Hodge) it is not set out in s 15 CA 2006 as a criterion.

4.
The relevant Committee of SCC concluded that the criteria were met. The case for SCC was that it did so on the basis that the "neighbourhood within a locality" test was passed. The Committee's reasons for granting the application did not address the argument about statutory incompatibility at all.

5.
The issues raised in this case are:

(1)
was SCC under a duty to give reasons for its decision?

(2)
if so, what standard of reasoning was required?

(3)
did SCC give adequate reasons for finding that the criteria were met?

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(4)
was the finding that there was a “neighbourhood” one which SCC could reasonably make?

(5)
given the absence of any consideration or reasoning relating to the question of statutory incompatibility, has SCC shown that there was no basis for concluding that there was statutory incompatibility?

(6)
was the conduct by SCC of the meeting which considered the issue fair to the Claimant NHSPS?

6.
I shall deal with matters as follows

(a)
An overview of the system of registration;

(b)
The land in question and its ownership;

(c)
The “locality” and “neighbourhood within a locality” arguments;

(d)
The respective cases at inquiry;

(e)
The inquiry and the Inspector’s Report and Recommendations (IR);

(f)
SCC’s consideration of the Inspector’s Report and the decision to register the land;

(g)
The case for NHSPS;

(h)
The cases for SCC and the Interested Party;

(i)
Discussion

(j)
Conclusions

(k) Costs

(l) Permission to appeal

(a) An overview of the system of registration

7.

Many cases have grappled in the last 20 years with the meaning of the tests in what is now s 15 of CA 2006. Happily, this judgement does not need to explore them, as there was very considerable agreement on the tests and approach to registration. The issues in this litigation related to other issues relating to reasoning, and to the application of the test of statutory incompatibility in Newhaven.

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8.
This was an application under s 15(3) CA 2006 made to the Registration Authority (SCC). The relevant parts of s 15 read:

“15 Registration of greens

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) .....

(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 relevant period.”

9.
It follows that, subject to the one reservation noted below, if a significant number of the inhabitants of either a “locality” or a “neighbourhood within a locality” are shown to have used the land for informal recreation as of right (not by right – see R(Barkas) v North Yorkshire CC [2014] UKSC 31 [2015] 1 AC 195 [2014] 3 All ER 178) for a period of at least 20 years before the end date relevant to the application (here the 20 years ending on 9th January 2013), and the application was made within the relevant period, then the application must be granted.

10.
There is one important rider to be made as a result of the decision in Newhaven, which is that s 15 CA 2006 does not:

“.... apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green”

(per Lord Neuberger and Lord Hodge in Newhaven at [93]).

11.
The process is regulated in some areas by the C(RTV)Regs 2007. They apply to Surrey. By Regulation 5, the application must be sent by the RA to any landowner (and others with interests) and publicised otherwise, and a date set for the receipt of objections. By Regulation 6, the RA must decide to proceed to consider the application, and in doing so (a) must consider all objections made by the date when it elects to proceed further, and (b) may consider those received afterwards up to the time it finally disposes of the application (Regulation 6).

12.
Although there is no statutory provision for the holding of inquiries, it is now commonplace for an RA to arrange for an Inspector to hold one and report to it. That happened in this case. However, the decision on registration is made by the RA. When it has disposed of the application, it must give notice of that fact to, inter alios, the applicant, and every person who objected whose address is known (Regulation 9). That notice must include, where it has granted the application, details of the registration, and where it has rejected the application, the reasons for the rejection. That includes anyone who did object within time, or whose objection was considered.

13.
That can be contrasted with the CR(E)Regs 2014 which apply in some other areas, apparently as part of a pilot scheme, where the duty to give reasons applies whether the application has been granted or rejected (see Regulation 36(3)).

14.
I shall in due course consider whether there is a duty to give reasons to an objector when an application has succeeded, and if so the extent of the reasons which must be given.

(b) The land in question and its ownership

15.
The land in question is, according to the Inspector, a parcel of woodland containing a range of deciduous and evergreen trees. He described it as unkempt, run down, and as having had little management over the years. Some trees had fallen, and there are also some self-seeded trees on the land. The Claimant had also felled some trees recently as they presented a risk to health and safety. The tracks within the site are free of obstruction and easy to walk on, which showed that there had been heavy use. Some of the land is covered by impenetrable undergrowth. The land is criss-crossed by tracks. The Inspector's assessment was that 60-70% of the land was reasonably accessible for informal recreation. He found that the land was used both for recreation and as a place of transit between local roads, allotments, the former St Marys CE Primary School, and other local places. He described it as an attractive location for walking, with or without dogs, and for children's play. The unused areas were integral to the enjoyment of the area and formed part of the function and attractiveness of the area.

16.
On 9th January 2013 the Claimant erected a notice on the land stating that it was private land, and that the public had permission to enter it on foot, but that it could be withdrawn at any time.

17.
The IR sets out the history of the land. It also identified some, but by no means all, of the relevant statutes identifying the powers of the various NHS bodies which have held the land. It was also apparent to me at the hearing of this claim that neither the Claimant, nor SCC nor the Interested Party, had researched that issue thoroughly. What follows includes the known and agreed facts of ownership and transfers, but also identifies the relevant statutory powers.

18.
The land forms part of an area of land, which to put the matter loosely to begin with, is owned by part of the National Health Service. It forms part of a landholding related to the Leatherhead Hospital. In 1948 it was transferred by the Trustees of the Hospital to the Minister of Health pursuant to the National Health Service Act 1946. In 1968, by virtue of the Secretary of State for Social Services

Order 1968 No 1699 it was vested in that Secretary of State. On 30th January 1969, a parcel of land (including the application site) was sold to SCC. The recital recorded that it was then surplus to the Secretary of State's requirements. It was acquired by SCC under general powers.

19.
It was appropriated in 1971 by SCC to "Education, Health and Social Services" and was noted as being required for the purposes of a hostel for the confused elderly, and for a proposed junior training centre. It was not acquired for use as recreational open space. However, those uses were intended for 4.35 acres. The remaining area was shown as being for a proposed health centre. No health centre was in fact constructed. The application site, which comprises that land, remained (and remains) undeveloped.

20.
Under s 16(1) of the National Health Service Reorganisation Act 1973 all land held by local authorities for health functions was to be vested in the Secretary of State on a day to be appointed. When the 1973 Act came into force, the Secretary of State's powers were those in s 2 of that Act (now repealed)

"(1) Without prejudice to his powers apart from this subsection, the Secretary of State shall have power—

(a)
to provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by the Health Service Acts; and

(b)
to do any other thing whatsoever which is calculated to facilitate, or is conducive or incidental to, the discharge of such a duty.

(2) It shall be the duty of the Secretary of State to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements.—

(a)
hospital accommodation;

(b)
other accommodation for the purpose of any service provided under the Health Service Acts;

(c)
medical, dental, nursing and ambulance services;

(d)
such other facilities for the care of expectant and nursing mothers and young children as he considers are appropriate as part of the health service;

(e)
such facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service in place of arrangements of a kind which immediately before the passing of this Act it was the function of local health authorities to make in pursuance of section 12 of the Health Services and Public Health Act 1968;

(f)
such other services as are required for the diagnosis and treatment of illness; and regulations may provide for the making and recovery of charges in respect of facilities designated by the regulations as facilities provided in pursuance of paragraph (d) or (e) of this subsection."

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20.
He had the power to acquire and use land (s 53(1)) of the 1973 Act and s 58 of the 1946 Act). By virtue of section 53(3) of the 1973 Act:

"The Secretary of State may use, for the purposes of any of the functions conferred on him by the Health Service Acts, any property belonging to him by virtue of any of those Acts."

21.
However, some health functions were discharged under the aegis of the Secretary of State for Social Services. On reorganisation of the Government Departments in 1988, such functions were transferred to the Secretary of State for Health – see the Transfer of Functions (Health and Social Security) Order 1988 Article 2. (It should be noted that the effect of that Order is misdescribed in the IR at [87]).

22.
In 1993 the land was vested in the Secretary of State for Health by SCC. As at that date the relevant statute affecting the Secretary of State's duties and powers was the National Health Service Act 1977. I should refer to ss 1(1), 2, 3(1) and 87(1) and (2):

"1 Secretary of State's duty as to health service

(1)
It is the Secretary of State's duty to continue the promotion in England and Wales of a comprehensive health service designed to secure improvement—

(a)
in the physical and mental health of the people of those countries, and

(b)
in the prevention, diagnosis and treatment of illness,

and for that purpose to provide or secure the effective provision of services in accordance with this Act.

2 Secretary of State's general power as to services

Without prejudice to the Secretary of State's powers apart from this section, he has power—

(a)
to provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by this Act; and

(b)
to do any other thing whatsoever which is calculated to facilitate, or is conducive or incidental to, the discharge of such a duty.

.....

3 Services generally

It is the Secretary of State's duty to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements—

(a)
hospital accommodation;

(b)
other accommodation for the purpose of any service provided under this Act;

(c)
medical, dental, nursing and ambulance services;

(d)
such other facilities for the care of expectant and nursing mothers and young children as he considers are appropriate as part of the health service;

(e)
such facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service;

(f)
such other services as are required for the diagnosis and treatment of illness."

.....

87 Acquisition, use and maintenance of property.

(1)
The Secretary of State may acquire—

(a)
any land, either by agreement or compulsorily,

(b)
any other property,

required by him for the purposes of this Act; and (without prejudice to the generality of paragraph (a) above) land may be so acquired to provide residential accommodation for persons employed for any of those purposes.

(2)
The Secretary of State may use for the purposes of any of the functions conferred on him by this Act any property belonging to him by virtue of this Act, and he has power to maintain all such property."

(It is also important to note the terms of that Act after the passage of the Health Care Act 1999 (which established PCTs) and the National Health Service Reform and Health Care Professions Act 2002, whose terms are dealt with below.)

23.
By the National Health Service Community Care Act 1990, NHS Trusts were created. By s 5:

"5 NHS trusts

(1)
Subject to subsection (2) or, as the case may be, subsection (3) below the Secretary of State may by order establish bodies, to be known as National Health Service trusts (in this Act referred to as NHS trusts), —

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(a)
to assume responsibility, in accordance with this Act, for the ownership and management of hospitals or other establishments or facilities which were previously managed or provided by Regional, District or Special Health Authorities; or

(b)
to provide and manage hospitals or other establishments or facilities."

(Under the predecessor legislation, there were Regional and Area Health Authorities, which would carry out the functions of the Secretary of State on his directions (see 1977 Act ss 8, 13.)

24.
By section 8 of the 1990 Act

"The Secretary of State may by order transfer or provide for the transfer to an NHS trust, with effect from such date as may be specified in the order, of such of the property, rights and liabilities of a health authority or of the Secretary of State as, in his opinion, need to be transferred to the trust for the purpose of enabling it to carry out its functions."

25.
The Epsom Health Care NHS Trust was created by statutory instrument in 1990 for the purpose of section 5(1) of the 1990 Act. Its functions under Article 3(2) of the Epsom Health Care National Health Service Trust (Establishment) Order 1990 were as follows:

(2)
"The trust's functions (which include functions which the Secretary of State considers appropriate in relation to the provision of services by the trust for one or more health authorities) shall be–

(a)
to own and manage hospital accommodation and services at the Epsom District Hospital" (address given) "and associated hospitals;

(b)
to manage community health services provided from Epsom District Hospital" (address given) "and to own the premises there from which those services are to be provided and any associated premises.

26.
The Leatherhead Hospital site, including the application site, was transferred to the Epsom Health Care NHS Trust on 20th September 1993. That Trust was dissolved in 1999 and its land and assets transferred to the Epsom and St Helier NHS Trust. In April 2002 Leatherhead Hospital (including the land) was transferred to the East Elmbridge and Mid Surrey PCT, and in 2006 was transferred to the Surrey PCT pursuant to statutory instrument.

27.
PCTs had been established under s 16A of the National Health Service Act 1977, which was inserted by s 2 of the Health Act 1999 and subsequently amended by s 2 of the National Health Service Reform and Health Care Professions Act 2002. By s 16A (3) of the amended Act of 1977

“(3) A Primary Care Trust shall be established for the area ……specified in its PCT order and shall exercise its functions in accordance with any prohibitions or restrictions in the order.”

Schedule 5A was also inserted into the 1977 act by the 2002 Act. It defines the powers of a PCT as follows in Part III:

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“Powers and Duties

General powers

“12(1) A Primary Care Trust may do anything which appears to it to be necessary or expedient for the purpose of or in connection with the exercise of its functions.

(2) That includes, in particular—

(a) acquiring and disposing of land and other property,

(b) entering into contracts,

(c) accepting gifts of money, land and other property, including

money, land or other property held on trust, either for the general

or any specific purposes of the Primary Care Trust or for all or

any purposes relating to the health service.”

28.
When PCTs were abolished in 2013 pursuant to the Health and Social Care Act 2012, the Hospital (including the land) was transferred to the Claimant under the Surrey PCT Property Transfer Scheme 2013. The land is held by the Claimant for the NHS Surrey Downs Clinical Commissioning Group, which operates Leatherhead Hospital.

29.
As a Clinical Commissioning Group (CCG) which is a creation of the 2012 Act, which amended the National Health Service Act 2006, its role as a CCG by virtue of the amended s 1I (2) of the 2006 Act, is:

“Each clinical commissioning group has the function of arranging for the provision of services for the purposes of the health service in England in accordance with this Act”

30.
By the amended s 2 of the 2006 it has the following “general power”:

“The Secretary of State, the Board or a clinical commissioning group may do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any function conferred on that person by this Act.”

31.
By the amended s 14A (also inserted in 2012) any provider of primary medical services is a member of a Clinical Commissioning Group, none of whose areas overlap. By paragraph 20 of the amended Schedule 1A, (also by the 2012 Act) a Clinical Commissioning Group has “incidental powers” as follows:

“20 The power conferred on a clinical commissioning group by section 2 includes, in particular, power to—

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(1)
enter into agreements,

(2)
acquire and dispose of property, and

(3)
accept gifts (including property to be held on trust for the purposes of the clinical commissioning group).”

32.
The Claimant owns the freehold title of land which is the site of Leatherhead Hospital. The Claimant was set up pursuant to the power in s 223 of the National Health Service Act 2006 whereby

(1)
“The Secretary of State may form, or participate in forming, companies to provide facilities or services to persons or bodies exercising functions, or otherwise providing services, under this Act.”

33.
The It follows from the above that at all relevant times, the land has formed a part of the land held by one of the various NHS bodies, and held for defined statutory purposes. There has at no time relevant to the application been a general power to hold the land for anything other than the statutory purposes set out above. I shall in due course compare and contrast the scope of those powers to those applying to other public bodies.

(c) The “locality” and “neighbourhood within a locality” arguments

34.
As is apparent from s 15 of the CA 2006, an applicant for registration must demonstrate either (a) that a significant number of the inhabitants of any locality, or (b) a significant number of the inhabitants 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. At one time it was thought that the second limb required one to show that the “neighbourhood” fell within the defined locality (see R (Cheltenham Builders Ltd) v s Gloucestershire DC [2003] EWHC 2803 [2004] JPL 975 per Sullivan J at [88]). However, since that was criticised by Lord Hoffman in Oxfordshire CC v Oxford City Council [2006] UKHL 25 [2006] 2 AC 674 at [27], it has been accepted that a neighbourhood can extend across the boundaries of a locality, as was made clear by Sullivan LJ in Adamson v Paddico 262 Ltd, Kirklees MBC and others [2012] EWCA Civ 262 [2012] 2 P & CR 1, at [23] (a decision reversed in the Supreme Court, but not on this point).

35.
Here the Applicant for Registration argued both limbs, i.e. she alleged use by a significant number of residents in (a) a locality, or (b) a neighbourhood within a locality. On the application form, the title of Box 6 is

“Locality or neighbourhood within a locality in respect of which the application is made”

to which she gave the answer

“South Leatherhead Neighbourhood based on polling districts Leatherhead South 1 and 2 lying within South Leatherhead Ward”

while in answer to Box 7, which sought justification for the application, she stated that the land at Leach Grove Wood had been:

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“used as of right by a significant number of the inhabitants of the South Leatherhead neighbourhood within the South Leatherhead ward on the Mole Valley District Council.....”

36.
The plans attached showed the boundary of the area which was said to constitute the “neighbourhood.” It covered a large area, consisting of a rough rectangle running from SSE to NNW. The area of the South Leatherhead neighbourhood was shown edged in red and running west along the A 24 Leatherhead by pass to the south from its junction with B 2033 Reigate Road. To the west it ran up Dorking Road as far north as its junction in the Town centre with High Street, and then westwards along Bridge Street within the Town centre to North Street until it met Leret Way. At that point it turned northeastwards along Upper Fairfield Road, St Johns Avenue and thence to the A243 Leatherhead Bypass, where it turned south. That bypass becomes the A 24 after the junction with Epsom Road at the Knoll Roundabout. The boundary then followed the A 24 across its junction with Headley Road, which crosses it from east to west, and then to its junction with Reigate Road.

37.
However, that original case was changed at the inquiry before the Inspector. In his opening submission before the Inspector, Dr Bowes described Mrs Cargill’s case thus:

“The Applicant advanced her case on two alternative propositions. Either, a significant number of users come from the locality of the Polling District XB or they come from the neighbourhood bounded by the roads B 2122, A 24, B 2033 within the locality of Leatherhead South Ward of Mole Valley District Council.”

38.
The effect of that, as shown on a plan put into the inquiry by Dr Bowes (and in the trial bundle at page 157A) was to identify three areas:

(a)
the Polling District XB. That abuts the northern boundary of the ward, but its NW to NE boundary runs south along Linden Pit Path and Linden Gardens (which lie south of the boundary line marked on the original application). Its eastern boundary is formed by the A 243 north of the junction with A 24, and then the A 24 southwards until the junction with Headley Road. The polling district boundary then turned westwards along Headley Road and then Highlands Road until it reached Church Road to the west, where it turned north, skirted the eastern side of the Town centre via Church Street and Linden Road and reached St Johns Avenue and followed the boundary described above north eastwards.

(b)
The ward contains all of that polling district, and much more as well. It extends as far east as the M 25 motorway, which runs from NW to SE to the NE side of the Town centre, but also includes land to the south and west of the built up area;

(c)
The neighbourhood boundary relied on is coincident with the extent of the polling district boundary, except that

(i)
it extends further west so as to include the small area bounded by the B 2122 and B 2250 south of the shopping centre, and

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(ii)
it excludes the area in the polling district north of Epsom Road, which it follows eastwards from its junction with Church Street to the A 24 at the Knoll roundabout.

39.
Thus one had a ward, which contained a polling district. The neighbourhood relied on covered part of the polling district area, together with a small area to its west. Both fell entirely within the ward boundary.

(d) The respective cases at inquiry

40.
The Claimant addressed the inquiry to resist both alternative ways of the Applicant putting her case in their submissions to the Inspector. In essence the two cases on this issue at the inquiry were:

(a)
The Applicant argued that:

(i)
The polling district was a “locality”, and a significant number of its inhabitants indulged as of right in lawful sports and pastimes on it for over 20 years;

(ii)
Alternatively, the area described above at paragraph 35 (c) was a neighbourhood, which fell within a locality, which for this purpose was the electoral ward, and a significant number of its inhabitants indulged as of right in lawful sports and pastimes on it for over 20 years;

(iii)
There was no statutory incompatibility preventing the land’s registration;

(b)
The Claimant argued that:

(i)
The polling district was not a “locality;”

(ii)
The area described above did not have the qualities of a “neighbourhood;”

(iii)
The activities on the land did not amount to twenty years’ user as of right for lawful sports and pastimes by significant numbers;

(iv)
The purposes for which the land was held prevented registration.

41.
As I shall describe below in more detail, the Inspector

a.
rejected the polling district as constituting a “locality;”

b.
rejected the Claimant’s arguments about statutory incompatibility;

c.
accepted the Applicant’s case that a significant number of the local inhabitants of the claimed neighbourhood (as amended) and falling within the locality of Leatherhead South ward indulged as of right in lawful sports and pastimes on the whole of the land for the period of at least 20 years ending on or about 9th January 2013;

d.
considered that it was not a neighbourhood for the purposes of s 15 CA 2006;

e.
recommended that the application to register the land as a village green be rejected.

42.
As noted above, the relevant Committee of SCC as RA held that the criteria for registration had been met. It had apparently addressed itself to the issues of whether the area identified was a “neighbourhood.” As will become apparent the Claimant did not raise issue before this Court on the issues of:

a.
whether there were lawful sports and pastimes;

b.
whether the number of users was significant;

c.
whether the user took place for at least 20 years until 2013;

d.
whether it was as of right.

43.
The live issues for the Court were therefore:

a.
whether the RA’s determination that there was a “neighbourhood” for the purposes of the s 15 test was unlawful, whether on the basis that its reasons it gave for doing so were improper, and/or on the basis that it gave no adequate reasons for rejecting the IR’s conclusions;

b.
given the absence of any apparent consideration by the RA of the Claimant’s case on statutory incompatibility, whether its decision was deficient unless the case on that topic was unarguable;

c.
whether the RA’s consideration of the application and objections thereto was fair.

(e) The inquiry and the Inspector’s Report and Recommendations

44.
I shall refer only to his conclusions unless some other part of his report requires mention in the context of those issues. I have included his conclusions on the issue of statutory incompatibility. For clarity, I emphasise that this aspect of the case was not dealt with by the RA, but as a matter of fairness to the Interested Party and generally, it is right that I set out his approach, which supported the Applicant's case for registration, and rejected the Claimant's objection on that ground.

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45.
I have already referred to the alternative bases upon which the Applicant argued her case. It was common ground before me that the Inspector had rightly rejected the first claimed basis, and Dr Bowes did not argue for it before me. That was wise, as it had no discernible merit, and it is hard to understand why it was ever advanced.

46.
The Inspector's observations on his site visit appear at paragraphs [114]- [119], and after reciting the evidence and submissions he heard, his conclusions appear at paragraphs [177]- [179].

"The claimed neighbourhood

114.
I have been around the claimed neighbourhood and the surrounding areas, partly on foot as well as in the car. I have also revisited the area as a desk top exercise on Google Earth street view which is now an indispensable tool in these cases. I am confident that I have, for present purposes, seen enough of the claimed neighbourhood and the surrounding areas.

115.
If one refers to App/1 one can see that we are dealing with a roughly triangular shaped area bounded by (running anti-clockwise) (a) Epsom Road (B2122) where it leaves the roundabout on the Leatherhead bypass; (b) The Crescent; (c) Church Street; and (d) Church Road until the road forks onto Highlands Road (B2033); and (e) thence into Headley Road until it meets the bypass. Dr Bowes clarified that the red line boundary is intended to be a mid-point in the affected carriageways.

116.
Within the neighbourhood there are a number of community buildings/facilities which I have already identified in paragraph 85, in addition to the recreation ground at Fortyfoot Road and the Church Hall on the north side of Church Road, all of which are used by individuals from a much wider area.

117.
For reasons which I do not understand, whereas the Church Hall lies within the claimed neighbourhood, the Parish Church of St Nicholas & St Mary, which is just across the road, falls just outside it. Nor are there any shops or convenience stores or the like within the claimed neighbourhood other than, within The Crescent, where one finds two takeaways, an opticians, a dental practice and a health shop of some description, all of which are bound to be frequented by people living within the town as a whole. The same applies in the case of the estate agents located on the corner of Church Street and Church Road. There is, for instance, no parade of shops which could be said to mainly serve the needs of an identifiable local community within the town of Leatherhead.

118.
The land lies roughly in the middle of the claimed neighbourhood and is, I think, a cohesive feature, but possibly the only one within the claimed neighbourhood. I suspect that most people using the

land, either as a place of transit or as a destination in itself for informal recreation, live in the nearby streets and would include many living in the streets to the south of Highlands Road which appear to me to comprise a number of separate developments of mainly detached dwellings, some of high value. The town of Leatherhead seems to be expanding in the gap between Highlands Roads and the bypass where there has been much residential development in recent years. One witness said that this was the 'posh area' of town.

119.
The major features in the gap between the north of the land and the railway line are St John's School and its extensive grounds, the two sports grounds on either side of Garlands Road, the Catholic Church of Our Lady and St Peter and Trinity Primary School. On the north-west side of the land we have the town centre which is, I think, mainly pedestrianised and, on the west side, we have, downslope, the River Mole (dominated by a heavily wooded weir area mid-stream) and the Bridge Street crossing. I have to say that without a much closer examination of the central area of Leatherhead (perhaps with the assistance of expert evidence) I have found it very difficult indeed to identify separate neighbourhoods within the town (in other words, where the characteristics of one area distinguish it from surrounding areas) as the area as a whole contains a good deal of residential and other development of varying I ages and styles which are not specific to the claimed neighbourhood although, in light of the evidence I heard, I do not doubt that within it, or at least in parts of it, there is a local community spirit."

(119-174) .....

175. Statutory incompatibility

(a) Put shortly, the issue is whether land held for the statutory purposes of the NHS falls within the same category as land held by a statutory undertaker for the purposes of its operations such that, consistently with the decision in Newhaven, the land in this instance would not be registrable as a matter of law.

(b) I have set out the competing submissions of the parties on this issue at [171] and, having considered the matter carefully, I prefer those of the applicant under this head.

(c) I agree with the applicant that the fact that the application land forms part of the same freehold title as the hospital site should not mean that it must be treated as part of the working hospital site when, as a matter of fact, it plainly is not and never has been.

(d) I also agree with the applicant's submission that the objector's case on statutory interpretation would in practice emasculate the provisions of the 2006 Act when it came to land held by public bodies for specific statutory functions. This can hardly have been parliament's intention and support for what the applicant argues can clearly be found from what was said by Lord Neuberger at [101] in Newhaven:

'The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour.
'

(e) Dr Bowes rightly draws attention to what Lord Neuberger said at [93], namely that the doctrine was held to apply only to land that was acquired and held by a statutory undertaker (which does not

apply in this instance) whose continuing use (because of the conflict between the applicable statutory regimes) would be inconsistent with its registration as a TVG. In Newhaven the operational land of the harbour (of which the beach formed part) was subject to statutory provisions which imposed on the undertaker a positive duty to maintain and support the operational land of the harbour which, in the event that works had to be executed in a way which affected the public's use of the beach were it registered as a TVG, there would be an obvious and irreconcilable clash as between the conflicting statutory regimes. The position of the NHS is quite different in that no positive duty (analogous to that imposed on the undertaker in Newhaven) arises on the part of the landowner to do anything in the case of the land (in contrast to Newhaven) and the general duty imposed on the Secretary of State to promote a comprehensive health service is wholly unaffected.

(f) It seems to me that it is irrelevant that the land may be held under the same title as the remainder of the hospital site. The fact that the relevant NHS bodies had (and still has) the capacity to use the land for health and ancillary purposes is no different to any other public body holding land for a purpose which they do not choose to exercise for the time being. As Dr Bowes says, in Barkas at [66] Lord Carnwath explained that land in public ownership is not outside the 2006 Act and to suggest that any land held for purposes inimical to TVG rights would be outside the 2006 Act would be absurd, not least as it might give rise to unnecessary speculation and debate about what the landowner's future intentions were for the land in contrast to the wholly proper analysis which, in my view, arises from Newhaven which focuses on the specific duty or duties which are imposed on a landowner (in its capacity as a statutory undertaker) with regard to its holding and management of the land which would clash with registration of the land as a TVG. As indicated, no such conflict impacts on the holding of the land in this instance in the performance of the statutory health functions of the NHS and those bodies through whom they are discharged.

(g) Nor do I accept either that the principle in Newhaven applies only to those public bodies which have no power to hold land for public recreation since it might mean in practice that all or most publicly held land is outside the 2006 Act. This is because land held for statutory purposes which embraces the principle in Barkas, or which otherwise entitle local inhabitants to use the land for recreation, would be nonqualifying, as would land held by public bodies with no powers to permit recreation such as might apply, for instance, in the case of land held for education. In my view, if registration was to have been avoided during the relevant qualifying period in this instance then the answer was permissive signage or making user contentious.

(h) I therefore take the view that the doctrine of statutory incompatibility has no application in this case.

176.....

177. Neighbourhood

(a) The term 'neighbourhood' is an ambiguous term. It may mean 'the vicinity' of a place or a person (see e.g. Stride v Martin [1897] 77 LT 600) but it may also refer to an area that is recognisable as having a degree of coherence such that people would recognise it as being separate or different from the areas immediately surrounding it. It is, in this sense, that the term 'neighbourhood' is used in the 2006 Act. It seems plain to me that a neighbourhood must be understood as meaning a cohesive area which is capable of meaningful description in some way. But beyond that it has no particular requirement, and whether the claimed neighbourhood is made out is a question of fact.

(b) In my view, it must, I think, be substantially a matter of impression whether the claimed area is a neighbourhood or not. My impression and my considered view having heard the evidence and visited the area, is that the claimed neighbourhood is not a neighbourhood within the meaning of the 2006 Act. Whilst it is correct that it is enclosed within busy, or relatively busy, roads, it did not seem to me that the character of the residential areas differed substantially or significantly from that within the adjoining areas.

(c) The residential properties comprised a mix of styles and ages and there was nothing in the way of facilities (that is, with the exception of the land itself) serving predominantly the claimed neighbourhood and none other. There are undoubtedly a number of community facilities located within the claimed neighbourhood but without exception these facilities serve (or rather served in the case of St Mary's Primary School) a much wider catchment. In these cases, one is always on the lookout for local shops or true community facilities such a small parade of shops with a post office, licensed premises, local schools, churches and the like, in other words, the sort of facilities that create a self-contained small community. It is the absence of those features which would indicate that one would need to see some other factor indicating cohesiveness but, with the exception of the land itself and perhaps the allotments as well, there is very really nothing beyond the fact that many of the applicant's witnesses, when asked to cast their mind to it, considered that their neighbourhood was simply the area in their own particular vicinity or where their friends mainly lived. I also think that most of the applicant's oral witnesses were unduly influenced by being presented with App/1 in their support of the claimed neighbourhood.

(d) It was also significant that a number of the applicant's witnesses took the view that the neighbourhood should in fact have been more extensive than claimed. In other words, there was no unanimity amongst the applicant's witnesses that App/1 was the true neighbourhood. See, for instance, the evidence of the applicant herself (who it seemed to me - as she herself accepted - did not really have a correct understanding of the terms neighbourhood and locality) and that of Sandra Sullivan, Julia Jarrett, Ken Ellis, Les Prescott, Heather Ward, Michael Brian and David Brett. For instance, more than one witness was puzzled as to why the church was not included within the claimed neighbourhood (whereas the church hall on the other side of the road was) which struck me as a bizarre omission. Indeed, it was the evidence of Imani Ayimba- Golding that she attended a Sunday club at the church hall in Church Road. Evidently they would all troop across the road to the church at the end of the morning service.

(e) Lastly, this neighbourhood had no name. That is not a necessary requirement, but if there is historical cohesiveness in respect of an area, one might expect it to have acquired some form of collective description.

(f) I have also borne in mind that when Parliament amended the Commons Registration Act 1965 to permit registrations to take place by reference to 'a neighbourhood within a locality' it intended to make it easier to register TVGs, and did so by allowing them to be registered by reference to a concept that was not precise either as to definition, or as to boundary (see Oxfordshire per Lord Hoffmann at [27]). However, notwithstanding this, my conclusion for the reasons I have set out above (i.e. because the area does not have sufficient individual cohesiveness or community identity) is that the claimed neighbourhood is not a 'neighbourhood' within the meaning of the 2006 Act.

(g) It seems to me that if Parliament had intended that a neighbourhood should be interpreted to mean the area in which the recreational users reside, then it would have said so. Moreover, whilst I accept that the bar is set low in the Leeds Group litigation, having been to the area in this case and

heard the evidence, I take the view that, as a matter of fact and degree, the applicant has fallen well short of what is required to be proved in order to satisfy the neighbourhood element."

8

47.
The Inspector then passed to his findings of fact and recommendation. They read as set out below:

"178. Findings of fact and recommendation

(a) I find that a significant number of the local inhabitants of the claimed locality shown within the blue dashed lines on App/1 (being the polling district XB within the Leatherhead South ward of MVDC) indulged as of right in LSP on the whole of the land for the period of at least 20 years ending on or about 9/01/2013.

(b) I find that a significant number of the local inhabitants of the claimed neighbourhood shown within the red lines on Appl1 and falling within the locality of Leatherhead South ward also indulged as of right in LSP on the whole of the land for the period of at least 20 years ending on or about 9/01/2013.

(c) I find that the objection advanced by the objector that the land was not registrable on the ground of statutory incompatibility was not made out.

(d) I find that the claimed locality is not a locality within the meaning of section 15 of the 2006 Act.

(e) I find that the claimed neighbourhood is not a neighbourhood within the meaning of section 15 of the 2006 Act.

(f) Because the applicant has failed to satisfy all the elements necessary to justify the registration of the land as a TVG, my recommendation to the registration authority is that the application to register (under application number 1869) should be rejected .

179 Under reg.9(2) of the 2007 Regulations, the registration authority must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be ' the reasons set out in the inspector's report dated 9/06/2015. '"

(f) SCC's consideration of the Inspector's Report and its decision to register the land

48.
As will become apparent, some issues arise about the way in which the application was addressed by SCC as RA.

49.
The matter was due to be considered by the Planning and Regulatory Committee of SCC on the morning of 23rd September 2015. Before the date of that meeting, the Head of Legal and Democratic Services distributed a report written by Ms Helen Gilbert, SCC's Commons Registration Officer. It recommended that the application for registration be rejected.

50.
Her report recited the application and the fact of the Claimant's objection. It stated that after a legal opinion had been sought, it was decided to arrange for a non-statutory public inquiry. It then included an analysis and commentary. It addressed the arguments on the meaning of "locality" and "neighbourhood," and recited the Inspector's findings of fact and recommendations at IR [178] (set out above). However, it never addressed any of the argument relating to statutory incompatibility, nor advised members of the terms of the Claimant's objection on this issue, nor of the cases put before the

Inspector at the inquiry, nor of his conclusions, save for the short finding at paragraph 178(c). The Inspector's report was listed as an Annex to Ms Gilbert's report.

51.
As to the issue of neighbourhood, she quoted paragraph [177 (b)] of the IR, and some but not all of paragraph [177(c)]. She then went on to set out the Inspector's Conclusions and Recommendations on all the issues as he had set out at IR [178], set out above, and then went on

"20 Village Green status is acquired over land where a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years. The evidence provided with this application, and the subsequent investigations, show that this criteria" (sic) "has not been met.

21 Therefore, Officers recommend that the application be REJECTED. "

52.
At this stage, Dr Bowes, acting on behalf of the Applicant, sent representations to the Chairman and members of the Committee by email on the morning of 21st September 2015. The email was sent directly to the Chairman, Councillor Hall, and copied to the email addresses of the Committee members and of the officers. A copy was also sent to Messrs Capsticks, who were acting on behalf of the Claimant. Dr Bowes, who is a Councillor on a Borough Council in another part of Surrey, addressed the email to "members of the Planning and Regulatory Committee" and signed it "Ashley." It appears that he and Councillor Hall know one another. The representations which accompanied it, which were on his Chambers' headed notepaper, set out reasons why he contended that the members should disagree with the recommendation of Ms Gilbert in her report.

53.
That representation sought to support the claim that the "neighbourhood" relied on by the Applicant met the relevant criteria. It did not deal with the statutory incompatibility issue. While I am critical of Dr Bowes for addressing representations to the Councillors making the decision in an email signed with his first name, the representations were properly drawn and argued. Dr Bowes accepted frankly before the court that his use of his first name was unwise.

54.
Understandably the Claimant was concerned. On 22nd September 2015 its solicitor sent an email to the same addresses. Attached to it was a representation which sought to rebut that of Dr Bowes. It sought to endorse the Inspector's conclusions on the neighbourhood issue. It did not deal with the statutory incompatibility point.

55.
There is no doubt that at the meeting, the members, or at least some of them, had a copy of Dr Bowes' representation, and it was referred to during the meeting. However, there was no reference at all to the representation from Capsticks, the Claimant's solicitor. Understandably the Claimant was concerned about this, and the Court was also concerned to find out whether the Council or Councillors had received it. Some information was given to the Court by the SCC officers, but it was acknowledged to be incomplete. With the agreement of all parties, SCC has since the hearing explored what happened to the emails and representations. The Court is very grateful to the officers of SCC for their investigation. The Court has now been informed that:

"On day three of the hearing of the above claim Mr. Justice Gilbart requested that the Defendant confirm whether the letter of Dr. Ashley Bowes dated 22 September 2015 (at Claim Bundle ("CB") p. 338) and/or the letter of Messrs. Capsticks of 22 September 2015 (CB 348) were provided in paper copy to the Planning and Regulatory Committee at the meeting held on 23 September 2016.

We have now taken intructions with regards this matter. We are instructed that Dr. Bowes' letter was provided to the Committee in paper copy at the meeting; Capsticks' letter was not.

We are instructed that the reasons for this are as follows.

Dr. Bowes' letter was sent under an email of 21 September at 10:59 (CB 336), two days before the Committee meeting. It was sent to all members of the Planning and Regulatory Committee, together with Helen Gilbert, the Defendant's Commons Registration Officer and Claimant's solicitors Rachel Whale and Abi Condry of Capsticks. Dr. Bowes also sent an email to the Committee Clerks on 21 September 2015 at 11:15. In that latter email he requested that his letter be printed off and distributed to each Member at the meeting. Both Committee Clerks have now left the employment of the Defendant and their written records, which have been checked, do not confirm that Dr. Bowes letter was in fact distributed to the Committee. However, Mrs. Nancy El-Shatoury, a solicitor of the Defendant who attended the Committee, has been contacted by telephone whilst on leave and she has stated that she recalls that Dr. Bowes' letter was provided by the Committee Clerk in paper copy to members of the Committee.

Messrs. Capsticks' letter of 22 September 2015 was sent as an attachment to an email sent on 22 September 2015 at 15:30 (CB 341), the afternoon before the Committee meeting. It was sent to the same recipients as Dr. Bowes' email of 21 September 2015. As the Court was informed on day two of the hearing, the Defendant's electronic security system blocked the email and directed it to each recipient's "junk" box. No email was sent by Capsticks to the Committee Clerk or to any officer of the Defendant, other than Mrs. Gilbert. The Capsticks letter was not therefore retrieved by Mrs. Gilbert or any other officer before the Committee meeting, which took place the next morning so as to allow it to be distributed in paper copy.

Each member who was sent Capsicks' email of 22 September 2015 has been contacted to establish whether the email was received and read before the Committee meeting. Cllrs. Beardsmore, Sydney and Munro and Cllr Hall (who addressed the Committee as local member) have confirmed that they retrieved Capstick's letter from the "junk" box and read the letter before the Committee meeting. Cllrs. Essex, Taylor, Hicks, Mallett and Wilson did not retrieve the letter or do not recall reading the letter before the meeting. Cllrs. Cosser, Coleman and Johnson did not attend the meeting. The two substitute members who joined the Committee for the meeting – Cllrs. Ivison and Jenkins – were not copied into the Capstick's email and therefore did not receive Capstick's letter before the Committee meeting.

The information set out above extends somewhat beyond what is required in direct response to the Judge's question. However, we considered it appropriate to draw this information to the attention of the Judge nonetheless."

56.
That account shows that there was a regrettable lapse which meant that one side's late representation was before the Committee, whereas the other side's was not. A minority of members had received it by email, although it is not known if any had read it. I shall consider the significance of this issue below.

57.
SCC has accepted by subsequent written submission that the Court must assume that the members never saw the Capsticks submission. (It appears that the solicitor at Capsticks sent it from an email address not designated as “Not Junk” on Ms Gilbert’s email software programme.)

58.
There is a transcript of the Committee meeting. No-one objected to its being taken into account. Subject to one matter (relating to Dr Bowes’ representations) little turns on what is recorded in the transcript, and I prefer to look at the approved Minutes, which read as follows:

“The committee adjourned from 12. 15pm to 12.25pm for a short break. Upon reconvening the Chairman stood down from the committee and the Vice Chairman took the Chair.

31/15 APPLICATION FOR VILLAGE GREEN STATUS: LAND AT LEACH GROVE WOOD, LEATHERHEAD [Item 9]

Officers:

Helen Gilbert, Commons Registration Officer

Stephen Jenkins, Deputy Planning and Development Team Manager Mark O'Hare, Senior Planning Officer

Nancy EI-Shatoury, Principal Lawyer

Speakers:

The Local Member, Tim Hall, registered to speak and made the following points in reference to the application:

•
Expressed he knows the area well and the green space gets a lot of public use. .

•
Expressed that an area does not need to have shops to be considered. _ a neighbourhood. It does have sheltered housing, a scout hut and other community facilities.

•
The area is a cohesive community and has proved the green space is used

Commended the application for village green status to the committee.

Tim Hall then left the room at 12.28pm.

Key points raised during the discussion:

3.
The Commons Registration Officer introduced the report and informed the Committee that a neighbourhood must have some coherence to be acknowledged. The officer's recommendation was to reject the application.

4.
The Principal Lawyer explained that the Commons Act 2006 was specific about the criteria which need to be met in order for a piece of land to be granted Village Green status. However, the terms

locality and neighbourhood are not defined. Case law has developed which must be considered when seeking to define the terms. The Inspector had found that there was little to differentiate the claimed neighbourhood from the surrounding area and little to suggest cohesiveness. The only appeal available to either side following the committee's decision would be Judicial Review.

8

5.
Members felt that an area did not require a particular type of building to be considered a neighbourhood. It could be considered that way if residents wish it to be. It simply required a sense of place. It was pointed out that many recent developments were not built with shops but this should not mean that they could not become a neighbourhood or locality. Members queried whether the Inspector's judgement would result in other urban areas being rejected as neighbourhoods, with only rural areas being judged to have met the necessary criteria. Members highlighted that the plans indicated that there was an infant school, recreation ground, allotment and parking area within the claimed neighbourhood. The Chairman countered that different people will have different definitions of neighbourhoods and that the Inspector had used case law to come to his conclusion.

6.
It was noted that the application had met all the other criteria set by the Commons Act 2006.

7.
It was noted that the land owner would not be able to develop or sell the land if it were to gain village green status.

8.
The Committee was informed that there was a recreation ground close to the proposed village green, it was noted that this did not affect the application under consideration.

RESOLVED:

Members rejected the officer recommendation to REJECT the application. It went on to APPROVE the application to register the land at Leach Grove Wood as a Village Green for the following reason:

Notwithstanding the Inspector's view, Members formed a different impression. Having considered all the evidence before them they came to the view that the criteria laid down by the Commons Act 2006 had been satisfied by the applicant."

59.
During the course of the meeting, after Councillor Hall had left the meeting, one member, a Councillor Richard Wilson, referred to Dr Bowes as a councillor at Woking, where he apparently chairs the Planning Committee, and referred to his expertise in town and country planning matters, and that he was well known to Ms El-Shatoury, SCC's principal lawyer. Councillor Wilson is recorded as saying that :

"I'm very minded to agree with Ashley on this one I think he did speak to me some time back to say that he was going to present something in front of us."

60.
I asked Dr Bowes whether it was true that he had spoken to Councillor Wilson. Dr Bowes told the Court that he had not done so, and certainly not about the case. I accept that. What is said in the transcript does not imply that the merits of the case were discussed at all, and Mr Clay does not suggest otherwise.

61.
As a result of the Committee's decision, the land was registered as a Village Green on 5th October 2015.

(g) The case for NHSPS

62.
Mr Clay and Mr Lewin put forward 5 grounds. On 17th February 2016, Collins J gave permission to apply for judicial review on Grounds 1-3 and 5, but not on Ground 4. The Claimant argued the grounds on which permission had been given, and sought permission to apply on Ground 4.

63.
Those grounds as set out in the application were:

(1)
SCC failed to give adequate reasons for its decision that the area was a "neighbourhood;"

(2)
the polling district could not be a locality, and a neighbourhood within it could not qualify as one under the Act;

(3)
the members acted irrationally, misdirected themselves, and took into account immaterial considerations;

(4)
the proceedings were unfair and in breach of Art 6 of ECHR because the Claimant's representations in response to the late representations by the Applicant were not considered by the Committee, and Dr Bowes was known to members;

(5)
both the Committee and the Inspector erred in finding that registration is compatible with the powers and duties of the NHS for whose purposes the land is held.

64.
As the matters were argued before me, the argument crystallised into the following:

(a)
the Committee was under a duty to give reasons for its decision, both because of the nature and effect of the decision, which deprives a landowner of the ability to use his land in a way which is consistent with its use as a town or village green, and because in this case there was a strong adverse recommendation from the Inspector;

(b)
the reasons given did not justify a conclusion that it was a "neighbourhood;"

(c)
there was no finding that justified the test that it was a "neighbourhood within a locality;"

(d)
the conduct of the proceedings was procedurally unfair. The Chairman was the local member, Dr Bowes was known to him and others, and the Claimant's case was not put before them;

(e)
in any event the statutory purposes by and for which the land is held are incompatible with registration as a town or village green.

8

65.
On the first issue (reasons), Mr Clay said that whether or not the statute required the giving of reasons, the Council had actually given some. That being so, the reasons given may be examined to see if any error is disclosed: Westminster City Council v SSCLG [2014] EWHC 708 (Admin). The summary of reasons must be drafted with greater care where the members differ from the officer: R(Potter) v Amber Valley BC [2014] EWHC 888 (Admin). Reference was also made to Hoard v SSCLG and others [2016] EWCA Civ 169 at [54] per Lewison LJ. Here the Committee had to explain why it disagreed with the Inspector. The test of the standard of reasoning is that in South Bucks DC v Porter No 2 [2004] UKHL 33 [2014] 1 WLR 1953 per Lord Brown at [43], [46] [49]- [50], [58]- [59].

66.
On the second issue (neighbourhood) Mr Clay submitted that there was confusion between the Applicant's witnesses as to the extent of the neighbourhood. He relied on the observations of Sullivan LJ in Cheltenham Builders Ltd v Gloucestershire CC [2003] EWHC 2003 [2004] JPL 975 at [85]

"…….. I do not accept the defendant's submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word "neighbourhood" would be stripped of any real meaning. If Parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so."

and contended that that required precise boundaries and sufficient cohesiveness in its character or community. He argued that the Committee never addressed those concepts, and failed to have regard to material considerations. He pointed to the fact that different witnesses referred to different areas, which must call into question the idea that there was a readily identifiable cohesive neighbourhood.

67.
He submitted that the reasons given did not enable one to see how they had decided that it was a neighbourhood. What one had instead was some generalisations without a firm conclusion.

68.
As to the third issue ("neighbourhood within a locality") he submitted that the case for the applicant for registration was based on the idea that a polling district could be a locality. The Committee had given no reasons to conclude that that test was passed. He also submitted that, on a proper reading of the IR [178] there was no finding that there was a neighbourhood within a locality, nor any such finding by the Committee. He said that locality had to be capable of legal definition, as shown by Adamson v Paddico 262 Ltd, Kirklees MBC and others [2012] EWCA Civ 262 [2012] 2 P & CR 1 at [97].

69.
Mr Clay submitted that there was no finding that it was a neighbourhood within the locality of an electoral ward as opposed to a polling district.

70.

On the fourth issue (unfairness in the proceedings) Mr Lewin argued that any procedure which deprived a landowner of the ability to use his land had to comply with the provisions of ECHR Article 6. The Committee's dealing with the issue was tainted by unfairness:

8

a.
both sets of representations should have been before the Committee;

b.
there was too close a relationship between Dr Bowes and the Chairman of the Committee and members;

c.
the objector should have had the opportunity to deal with the points raised by the Committee to justify registration.

71.
On the fifth issue (statutory incompatibility) Mr Clay's central submission was that the land was conveyed to the Claimant for the specific purposes of the CCG, and that that was incompatible with registration. Any use outside those purpose was out with the specific statutory powers which applied.

72.
He relied on R (Newhaven Port and Properties Ltd) v East Sussex CC [2015] UKSC 7 per Lord Neuberger and Lord Hodge. There was, he submitted, an irreconcilable conflict between the purposes for which the land was held and use as a village green. One had to consider the statutory purposes. It was irrelevant that it was not currently in use.

73.
Similarly, arguments that the land could be sold off, or that it was functionally different from the land occupied by the hospital missed the point, which was whether there was a conflict with the statutory powers. It was very unusual to have this question asked where there was a user already in place which was incompatible. This question only arose when one was asking what the purposes enabled in the future, and whether there was incompatibility with them.

74.
The Inspector was wrong to approach this issue on the basis that the principle in Newhaven only applies to bodies which have no power to hold land for public recreation. That failed to recognise the fact that some bodies (e.g. like local authorities) have powers to hold land for recreational purposes, but some do not, such as the Claimant. That power is not to be found in its powers.

75.
Reference was made to BTC v Westmorland CC [1958] AC 126 at [78]; incompatibility was a question of fact to be assessed by what could reasonably be foreseen. The test is one of incompatibility- see R v Inhabitants of Leake [1833] 5 B & AD 469, 478 per Parke J as discussed by Viscount Simonds in BTC v Westmorland at p 144.

76.
The powers of the CCG are limited to the provision of accommodation for hospitals or other listed services- see s 3 National Health Service Act 2006. It is also under a duty (s 14Q of that Act) to exercise its functions effectively, efficiently and economically.

77.

SCC and the Interested party now rely on the obiter dicta of Ouseley J in Lancashire CC v Secretary of State for Environment etc and Bebbington [2016] EWHC 1238, where he was dealing with an area of land held by the County Council, and appropriated to educational purposes. Not only was this part of the judgement obiter but it was addressing a different statutory body with different powers. Ouseley J also found that there was no incompatibility between educational purposes and use as a village green. If that is true in an education case, it is certainly not the case where land is held for the statutory functions which applied in the instant case.

78.
The Committee never considered this aspect of the Claimant's case, whether by adopting the Inspector's reasoning or at all. It follows that their decision is flawed, and there must be judgment for the Claimant unless the Defendant or Interested party can show that there could be no incompatibility, in which case an argument could be made under section 31(2A) of the Senior Courts Act 1981 as amended by Criminal Justice and Courts Act 2015.

(h) The cases for SCC and the Interested party

79.
To a large degree Dr Bowes for the Interested Party adopted the submissions made by Mr Edwards QC for SCC. I shall seek to indicate where there were any departures or admissions.

80.
Mr Edwards QC started by considering the nature of the "locality" and "neighbourhood within a locality" tests. He accepted that the polling district claimed by the Applicant was not a locality, but that an electoral ward undoubtedly was. He pointed out that the case was argued that way (in the alternative) by the Applicant, and she was not challenged for doing so by the Claimant at the inquiry.

81.
He submitted that it is now clearly established that an electoral ward amounts to a locality as a matter of law, referring to R (Oxfordshire and Buckinghamshire NHS Mental Health Trust) v Oxfordshire CC [2010] EWHC 530 (Admin) at [69], and Leeds Group PLC v Leeds City Council [2010] EWHC 810 at [88]- [89]. He also referred to the criteria for the identification of electoral wards in s 56 and Schedule 2 paragraph 2 of Local Democracy, Economic Development and Construction Act 2009**.** It followed that the live issue was only whether the area relied on was a neighbourhood, because it undoubtedly fell in a locality, and that was what the Inspector found at [178(b)]. His finding at [178 (c)] related only to the first alternative of the polling district. That being so, the test of "locality" within the second limb was undoubtedly met.

82.
On the first issue (reasons) Mr Edwards submitted that there was no duty to give reasons. The statutory regime had required the giving of reasons when an application was refused, not when one was granted, which could not have been a matter of oversight. The Courts should be slow to find a duty to give reasons when Parliament has not provided for one. He referred to the approach to this issue by Jay J in Oakley v South Cambridgeshire DC [2016] EWHC 570 (Admin) at [27]- [35] (a case of an unsuccessful challenge to a local planning authority for a failure to give reasons for a grant of planning permission against the advice of its officer). At [35]- [36] Jay J's summary of the authorities reads:

35..... The judgment of Sedley J in Institute of Dental Surgery" ([1994] 1 WLR 242), "which in my respectful view contains, despite its relative age, still the best and most authoritative statement of the

principles germane to the implication of a duty to give reasons. Rather than cite copiously from that decision, let me attempt the following summary:

(i) There are cases where the nature of the process itself, or the subject matter, calls in fairness for reasons to be given. Ex parte Doody" ([1994] AC 531at 562C-D) "was such a case.

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(ii) There are cases where "something peculiar to the decision", some form of apparent aberration, triggers a reasons duty. Ex parte Cunningham" (R v Civil Service Appeal Board, ex p Cunningham [1991] 4 All E R 310) "was such a case, because the Court could evaluate for itself the discrepancy between the compensation awarded to Mr Cunningham by the board, and the compensation he would have received in an Industrial Tribunal.

(iii) Category (ii) above does not include decisions which are challengeable by reference only to the reasons for them. If there are no reasons, ex hypothesi there can be no challenge; but the absence of reasons cannot logically be the basis for requiring them. Pure academic judgments fall within this class of decisions.

(iv) The classes of case where reasons are or may be required are not closed.

36 I should add that Sedley J's formulation of "something peculiar to the decision" was his interpretation of the judgments of the majority in the Court of Appeal (McCowan and Leggatt LJJ) in ex parte Cunningham. McCowan LJ accepted Counsel's choice of words – "it cries out for some explanation from the board" - which is arguably more general. However, my reading of the majority view is that an explanation was called for because, without it, the decision was inexplicable."

83.
In Oakley Jay J declined to hold that there was a duty to give reasons for the grant of planning permission. Mr Edwards invited the conclusion that no reasons had to be given in the instant case. If a duty existed, it was met by short reasons. They did not have to meet the standards which would be required in a planning decision letter, which was a creature of the relevant legislation. The Court invited Mr Edwards to address the decision of the Court of Appeal in R (Assura Pharmacy Ltd) v E Moss Ltd (t/a Alliance Pharmacy) [2008] EWCA Civ 1356 where the court took the description of the nature required of reasons from a well known case in the planning field (Clarke Homes Ltd v Secretary of State for the Environment (1993) 66 P&CR 263 at page 272-3) and applied it to a decision of another kind, and did so where there was no statutory duty to give reasons. Mr Edwards accepted the Court's application of the standard in that case, but maintained his submission in the CA 2006 registration context.

84.
On the second issue (neighbourhood) Mr Edwards submitted that the decision was that of the RA, and therefore of the members. The inquiry had not been a statutory inquiry, and there was no statutory obligation to say why it differed from the Inspector. While the members were bound to have regard to the IR, it was their decision. There is nothing in the stated reasons which discloses any error of law. Further, the members had before them the IR and Ms Gilbert's officer's report, and the reasons given address the test of neighbourhood given in the Act.

85.
There was, he submitted, nothing inadequate about the reasons given.

86.

As to the third issue (neighbourhood within a locality) he referred to the preliminary parts of his submissions, recited above. The applicant had argued her case on this alternative basis, and the fact that the locality claimed was an electoral ward was an end of the matter. (This was effectively accepted by Mr Clay in his response).

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87.
All material considerations and relevant material were before the members, namely the IR, the officer's report, Dr Bowes' letter, the Claimant's letter and the representations of the ward councillor. (This submission must be read in the light of what transpired about the response from the Claimant to Dr Bowes' letter for the Applicant).

88.
The Committee had no need to identify the precise boundaries of the neighbourhood (see Leeds at [101] per Judge Behrens QC).

89.
On the fourth issue (unfairness) Mr Edwards resisted the argument that the references to Dr Bowes as 'Ashley' were significant. The Committee had addressed the issues. As to the letter from the Claimants, and the failure to distribute it to members, there was a risk to sending documents by email.

90.
In any event, there was nothing in the Claimants' letter which raised anything new. Even if the way in which the matter was dealt with was to be criticised, the decision would have been no different had the failures and omissions not occurred.

91.
On the fifth issue, Mr Edwards referred to the IR at [90 (f)]. He accepted that if it were held that the land was held for use by the CCG, it could only be used for those purposes. But that was to apply the wrong test. He referred to the Lancashire CC decision and the judgement of Ouseley J at [77]- [81]. There must be a duty to use land for specific purposes to negate registration. Ouseley J showed that the fact that it could be so used was not enough. This case was not to be compared to that in Newhaven where the land in question was part of a working harbour.

92.
Dr Bowes adopted Mr Edwards' submissions on the first 4 grounds, or made submissions to essentially the same effect.

93.
On the fifth issue (statutory incompatibility) he emphasised that the land had not in fact been used for the claimed statutory purposes. The Claimant had had two decades to make the point that recreational use was prohibited. He drew attention to the observations of Lord Brown in R(Lewis) v Redcar and Cleveland BC (No 2) [2010] UKSC 11 [2010] 2 AC 70 at [101]- [102] and [105] and submitted that like that (the recreational use of the golf course) this was not a case of give and take, but one where the owner had done nothing with his land and could not complain of registration.

(i) Discussion

94.
I can start by dealing with two matters very shortly. As Mr Clay effectively accepted in his submissions in response, an electoral ward is beyond question a locality for the purposes of the CA 2006. It is also

quite plain that the polling district was not a locality for those purposes, and no-one suggested to me that it could be. I am bound to observe that it is very puzzling that the original application made by Dr Bowes for his client could ever have argued the case in the way it did on the first limb. The critical test was always that of "neighbourhood." I turn now to the six main issues which I identified at paragraph 5 above.

(a) was SCC under a duty to give reasons for its decision?

95.
Given the fact that there is no statutory duty to give reasons, one must look to the ECHR and to the common law to see if one exists. The fact that there is no statutory obligation is a matter to be taken into account in considering that issue, but is not determinative of the point. The situation exists that the duty exists in some administrative areas under the CR(E)Regs 2014 but not in others governed by the C(RTV)Regs 2007. It follows that there is no matter of principle underlying the process which makes the giving of reasons undesirable. It appears that an anomaly has been left within the statutory code. I conclude that in this sphere it must be seen as being of little weight in determining the question of whether reasons are required where an application is granted after properly made objections have been advanced.

96.
It is therefore sensible to start from first principles. Article 6 of the ECHR "the right to a fair trial" reads

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly....."

If it applies, it is now firmly established that there is a duty to give reasons; see the judgement of Lord Phillips MR in English v Emery Reimbold & Strick Ltd. [2002] EWCA Civ 605 [2002] 1 WLR 2409, [2002] 3 All ER 385. So the question is whether an application for registration determines the civil rights and obligations of the landowner of a piece of land which is the object of the application. It is to be noted that the decision to register a piece of land is not a matter where the RA has any discretion. If the criteria in the Act are met, then the registration must take place.

97.
The effect of registration is that the landowner can no longer use the land for any purpose inconsistent with use as a village green. Indeed, s 38 CA 2006 prevents (in the absence of a consent under s 39) works which have the effect of preventing or impeding access to or over the land, works of resurfacing, the erection of fencing, the construction of buildings and other structures, the digging of ditches and trenches and the building of embankments. The criteria for the grant of a consent under s 39 (which consent may only be given by the national authority (in England the Secretary of State for Communities and Local Government) apply tests not applicable to development control generally under the Town and Country Planning Act 1990, and some acts prohibited under the CA 2006, such as fencing or the digging of ditches, may not require planning permission.

98.
The effect of registration is also that a criminal offence is committed if a person interrupts its use or enjoyment as a place for exercise and recreation (s 2 Commons Act 1876).

99.

In my judgement the effect of registration is therefore a determination of civil rights or obligations. It permits user by others of property owned by the landowner, and restricts his or her own ability to use it or develop it. Further, the only route by which registration can be challenged is that of judicial review, which makes the existence of reasons yet more important to so that they can be the subject of judicial scrutiny. In my judgement, the giving of reasons is therefore required to achieve compliance with Article 6 of ECHR.

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100.
I turn now to consider the application of the common law. As De Smith's Judicial Review Seventh Edition at [7-099] points out, fairness may itself require, in a wide range of circumstances, that reasons be given. The traditional view is set out in Lloyd v McMahon [1987] AC 625 per Lord Bridge of Harwich at p 702, whereby, when one has to consider the requirements of fairness, one should take into account the character of the decision-making body, the kind of decision it has to make, and the statutory or other framework in which it operates. The court there adopted a minimalist approach. As Lord Bridge said in this passage of his speech:

"… [It] is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

101.
However, the law on this topic has continued to develop. Since the decision in R v Civil Service Appeal Board ex p Cunningham [1991] 4 All ER 310 (a "landmark decision" in the view of De Smith) it is established that fairness may itself require, in a wide range of circumstances, that reasons must be given. While it is of course stated in a case about prisoners, it is worth recalling the basis of the doctrine, as explained in R v Secretary of State for the Home Department, ex p. Doody [1993] UKHL 8 [1994] 1 AC 531 at 565 per Lord Mustill:

"My Lords, I can moreover arrive at the same conclusion by a different
and more familiar route, of which Ex parte Cunningham, [1991] 4 All E.R. 310 provides a recent example. It is not, as I understand it, questioned that the decision of the Home Secretary on the penal element is susceptible to judicial review. To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed. If there is any difference between the penal element recommended by the judge sand actually imposed by the Home Secretary, this reasoning is bound to include, either explicitly or implicitly, a reason why the Home Secretary has taken a different view."

102.
While the Institute of Dental Surgery judgement of Sedley J was cited by Jay J in Oakley, it is right to point out that since then in R (Wooder) v Feggetter and another [2002] EWCA Civ 554 [2003] QB 219, Sedley LJ himself doubted that the Institute of Dental Surgery case would have been decided the same way had it been heard in 2002 (see [39]- [43]) and Brooke LJ at [23]).

103.

In the case of registration, one has the situation of a landowner being at risk of losing his freedom to do as he wishes with his land. In my judgement that demands the provision of reasons, so that he may know whether the decision was made on lawful grounds, and may be able to determine whether he has grounds to challenge it in the courts.

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104.
While I do not consider that the approach in the Institute of Surgery case has the persuasive force now that once it did, I do not depart from Jay J's approach in Oakley to the giving of reasons for the grant a planning permission. I find it instructive to consider the difference between the two statutory regimes. The grant of planning permission cannot determine rights as between persons, let alone impose obligations. It will always be open to the applicant for planning permission not to implement it, and it is of course fundamental to the statutory code for the imposition of conditions that they must relate to land under the applicant's control (s 72 Town and Country Planning Act 1990). It follows that the grant of permission does not determine private rights and obligations. In the case of the Claimant in Oakley, the Claimant was objecting to the grant of permission on land she did not own. It follows that the grant of permission to the applicant in that case was not determinative of any of the Claimant's rights or obligations. By contrast, a refusal of planning permission restricts the ability of the applicant (and/or landowner) to develop his/her land, so it is entirely appropriate that there is a statutory requirement for the giving of reasons for refusal, but none for the grant of permission.

105.
It is surely anomalous that under the 2007 Regulations those seeking the creation of a right are entitled to know of the reasons why their application to use someone else's land has been refused, whereas those seeking to avoid the concomitant restriction or curtailment of an existing right on their own land are denied the reasons why their case has failed. That would be anomalous whether or not the 2014 Regulations were to the same effect. But in my judgement the fact that they are to different effect but sit alongside the 2007 Regulations, as noted above, has itself no apparent explanation other than anomaly.

106.
Whether or not there is a duty to give reasons for grant in any event, in my judgement it cannot be right that no reasons are required when, as here, the landowner has made objections, and done so in the context of a statutory duty on the RA to consider them. I am therefore satisfied that there was a duty to give reasons. Further, I accept that even if there were no such duty, as reasons were given, the reasons given must be scrutinised against the appropriate standard.

(b) if so, what standard of reasoning was required?

107.
The starting point must be that the reasons given must be intelligible and deal adequately with the substance of the arguments advanced. They can be shortly stated. There is a very useful summary of the authorities in S Bucks v Porter at [24]- [25]:

"24 As already noted, three previous decisions of this House have considered the reasons requirement in a planning context. In this, the fourth, it is I hope convenient to start by assembling a number of the more authoritative and useful dicta from the many cases in the field. I begin with Megaw J's oft-cited judgment in In re Poyser and Mills' Arbitration [1964] 2 QB 467, 478:

"Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised."

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25 In Westminster" (Westminster City Council v Great Portland Estates plc [1985] 1 AC 661), "Lord Scarman at p 673 set out the above passage and continued:

"[Megaw J] added that there must be something 'substantially wrong or inadequate' in the reasons given.

In Edwin H Bradley & Sons Ltd v Secretary of State for the Environment (1982) 264 EG 926, 931 Glidewell J added a rider to what Megaw J had said: namely, that reasons can be briefly stated. I accept gladly the guidance given in these two cases."

At [34] Lord Brown also endorsed the passage in Bolton Metropolitan District Council v Secretary of State for the Environment (1995) 71 P & CR 309 per Lord Lloyd of Berwick at p 314-5, which includes the important principle that:

"What the Secretary of State must do is to state his reasons in sufficient detail to enable the reader to know what conclusion he has reached on the 'principal important controversial issues.'"

Re Poyser v Mills was not a planning case, but the others were. That is relevant because of the matters that appear below. However, the general standard to be attained is no different.

108.
Given the principle that the reasons must enable the persons concerned by the decision to know whether the tests set by the law have been addressed and addressed lawfully, in a registration case, that must include:

(a)
whether the applicant for registration has shown that the criteria in s 15 CA 2006 have been met, and why the tests have been met or not as the case may be;

(b)
in a case where an objection has been made on a ground known to law, whether that objection is or is not well founded, and why it was or was not well founded as the case may be.

109.
But given those parameters, what standard of reasoning is required? Here again, context is important. The S Bucks v Porter test is based in part on the duty to give reasons, but in part also on the tests in s 288 of the TCPA 1990 relating to whether or not the Claimant is a "person aggrieved." That is clear from the speech of Lord Brown at [26]- [34]. The summary at [36] flows from that discussion:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects

of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

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110.
It does not follow that the same test should simply be read across without adjustment for context to a case where the issue is not whether a Claimant may be able to resubmit a proposal in a different way, or where an objector could make a successful policy challenge on another occasion, but is whether the landowner is deprived of rights (or where the applicants fail to have rights created). In my judgement, in a CA 2006 case the standard must be that the losing party knows why they lost and what the legal justification was for doing so. That will include the reasons why a case submitted in accordance with the Regulations was rejected.

111.
Of course given the frequency of challenges to planning decisions being made in this Court or its predecessor, it is unsurprising that one looks to planning cases for the relevant standard, provided one makes the proper allowance for context. For example, in R (Assura Pharmacy Ltd,) v E Moss Ltd (t/a Alliance Pharmacy) [2008] EWCA Civ 1356, (2009) 105 BMLR 161 the Court of Appeal addressed the standard of reasoning required when some proposed pharmacies had been denied a place on the list of approved pharmacies held by the PCT for its area. In looking for a test by which the reasoning of the decision was to be measured, at [59] Lawrence Collins LJ looked to the well known tests in the planning field:

"decision letters such as the ones which are the subject of this appeal are to be considered on a "straightforward down-to-earth reading... without excessive legalism or exegetical sophistication": Clarke Homes Ltd v Secretary of State for the Environment (1993) 66 P&CR 263 at page 272-3, per Sir Thomas Bingham MR), applied in, e.g. MR Dean & Sons (Edgware) v First Secretary of State [2007] EWCA Civ 1083, at [43]." (That is also known as First Secretary of State & Anor v Sainsbury's Supermarkets Ltd [2007] EWCA Civ 1083)."

I intend to apply those tests, remembering always that it was for the RA to determine the matter, and not the Inspector.

112.
It will be recalled that under Regulation 6 of the 2007 Regulations (C(RTV)Regs 2007), the RA must decide to proceed to consider the application, and in doing so (a) must consider all objections made by the date when it elects to proceed further, and (b) may consider those received afterwards up to the time it finally disposes of the application (Regulation 6). It follows that in this case SCC as the RA had to consider not just the application, but also all the objections made to it at both stages. The Claimant's objection, which included the point about statutory incompatibility, was made at both stages. As it was one of the controversial issues, SCC was bound not just to consider it, but to give reasons for the conclusions it reached upon it.

(c) Did SCC give adequate reasons for finding that the criteria were met?

113.

I start by dealing with the obvious and substantial omission in the SCC reasons. At no point is the issue about statutory incompatibility ever addressed. There is not even a case to be made (and none was made to me) that it had been considered but not spelled out in the reasons. The officer's report merely recites the bare conclusion of the IR at [178(c)] and the reasons in the Minutes are entirely silent on the topic. It is not possible to say that the Inspector's view was adopted on this point, because there is not the slightest evidence that it was. It follows that unless SCC and Dr Bowes convinced me that the decision was bound to be the same, so that 31(2A) of Senior Courts Act 1981 as amended by Criminal Justice and Courts Act 2015, this decision must be quashed. I shall return to that subject below. In any event, if Mr Clay's fifth ground is made out, the Registration was unlawful in any event.

114.
I pass now to the issue of the standard of reasoning on the subject of "neighbourhood." I shall do so first without having regard to the issues generated by the treatment of Dr Bowes' representations. I was at first attracted to the argument of the Claimant that the Committee had not grappled with the criteria in the depth applied by the Inspector, but Mr Edwards convinced me that in fact the Committee addressed the central question, which was whether the "neighbourhood" had the quality of cohesion looked for in the Cheltenham Builders case. The concepts in this area of the law are not ones of firm and precise definition. That is well illustrated by the decisions in Cheltenham Builders v S Gloucs DC [2003] EWHC 280], Leeds Group Plc v Leeds City Council [2010] EWHC 810 and [2010] EWCA Civ 1438 , and R(Oxfordshire etc NHS Mental Health Trust) v Oxfordshire CC [2010] EWHC 530 (Admin).

115.
The cohesion of a "neighbourhood" is not something which can be assessed by using some recognised technique. In that it is quite different from topics of the type where a proper appreciation is dependent to varying degrees of significance on expert knowledge. Thus if a Highway Engineer expresses a view that an access arrangement is acceptable, s/he will do by considering it against tested standards, and no doubt considering known data on the safety record on the stretch of road concerned. The question of whether a new development will be seen or hidden from various viewpoints, or the effect of operations on a nearby woodland can be assessed using standard techniques of landscape planning or arboriculture. Housing need can be addressed using demographic and other material. But the cohesion of a community, in the sense used in Cheltenham Builders is essentially a matter of impression.

116.
In that context, I do not consider that the Committee's approach to the issue can be criticised. It considered the Inspector's assessment, but then made its own, which it preferred. Even if there can be a heightened duty on a decision maker to give reasons for differing from a planning inspector or planning officer, I do not regard this as a comparable situation. This was a non-statutory inquiry presided over by an inspector who did not come to the inquiry as an expert but as a member of the Bar. His expertise lay in the law and practice relating to village greens, not in their identification, even assuming that such an expertise could exist. He is not a geographer or an anthropologist considering some technical test applied in field studies to the existence of a neighbourhood. This is not a case where the reporting Inspector officer is an expert in the fields of (for example) highway engineering in a debate about the design of a junction, or retail economics in a case where the extent of pent up demand is in issue, or housing need where there is an issue about the levels of projected housebuilding. The question of whether or not this was a neighbourhood in the sense used in the CA

2006 is not the same kind of question. It was very much a matter of impression where elected members could have just as much expertise as the inspector. They were not required to go through all of his reasoning, nor the various events at the inquiry. What they were required to do was to address the “neighbourhood” question as it stood before them, and the arguments for and against the Applicant’s case.

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117.
I therefore reject this aspect of the Claimant’s case, subject to the issue of the way in which Dr Bowes’ representations were dealt with.

(d) was the finding that there was a “neighbourhood” one which SCC could reasonably make?

118.
Given the conclusions under the previous head, the finding that there was a neighbourhood was undoubtedly a decision which SCC could reasonably make.

(e) given the absence of any consideration or reasoning relating to the question of statutory incompatibility, has SCC shown that there was no basis for concluding that there was statutory incompatibility?

119.
I have put the question thus, because, given the failure to address the matter at all, the decision was legally flawed, and the Claimant must succeed unless 31(2A) of the Senior Courts Act 1981 as amended by Criminal Justice and Courts Act 2015 applies. Subsections (2A), (2B) and (2C) read:

“(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application,

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirements in subsection (2A) (a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

120.
The starting point for addressing this topic is the decision of the Supreme Court in Newhaven Port and Properties Ltd) v East Sussex CC [2015] UKSC 7 [2015] 2 WLR 601 [2015] AC 1547 [2015] 2 All ER 991, and in particular the leading judgement of Lord Neuberger and Lord Hodge.

121.
That case concerned the registration of 6 hectares of land known as the West Beach in Newhaven in East Sussex. That land was part of the operational land of Newhaven Harbour. It is currently covered by the sea for periods of time either side of high tide. On average the beach is wholly covered by water for 42% of the time, but for the remaining 58% it is only uncovered to some extent. It is entirely uncovered by water for only a few minutes at a time. ([10]).

122.

At [23]- [24] Lord Neuberger and Lord Hodge identified the issues in the appeal. The third issue was

“whether, in any event, section 15 of the 2006 Act cannot be interpreted so as to enable registration of land as a town or village green if such registration was incompatible with some other statutory function to which the land was to be put.” ([24])

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They turned to the third issue at paragraph [75]. At [76] they introduced the nature of the argument:

“Section 15 is in Part 1 of the 2006 Act, which extends to all land in England and Wales, with the exception of the New Forest, Epping Forest and the Forest of Dean (section 5), and land includes "land covered by water" (section 61(1)). There is no express exclusion of land held by statutory undertakers for statutory purposes. Therefore any restriction on the scope of section 15 would have to be implicit. NPP argues that statutory incompatibility provides that restriction. In support of its assertion NPP relies on case law in relation to public rights of way and private easements in English law and public rights of way and servitudes in Scots law.”

123.
They then addressed the English law of dedication and prescription, but warned that reference to case law on public rights of way, easements and servitudes was relevant by way of analogy only. They referred to the words of Lord Scott in R(Beresford) v Sunderland City Council [2004] 1 AC 889 at [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.”

124.
They then pointed out that in cases where dedication is implied through user, the owner’s ability to dedicate remains relevant, referring to the Rights of Way Act 1932 and the Highways Act 1980, and referred to BTC v Westmorland CC [1958] AC 126, where the issue was whether the owners of the railway had the power to dedicate a path, which turned on whether it was incompatible with the statutory objects for which the land was held [78].

125.
Lord Neuberger and Lord Hodge then reviewed the English authorities on dedication and prescription ([78]- [80]) and the Scottish case law on the law of positive and negative prescription [79]- [90]. At paragraphs [91] to [93] they set out their conclusions on the principles to be applied. It is necessary to refer to them here. I have italicised the question which their Lordships said must be asked in these cases:

“Statutory incompatibility: statutory construction

91 As we have said, the rules of prescriptive acquisition apply only by analogy because Parliament in legislating for the registration of town and village greens has chosen similar wording (indulging "as of right" in lawful sports and pastimes) in the 1965 and 2006 Acts. It is, none the less, significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded on would be incompatible with those purposes. That approach is also consistent with the Irish case, McEvoy v Great Northern Railway Co [1900] 2 IR 325, (Pales CB at 334-336) which proceeded on the

basis that the acquisition of an easement by prescription did not require a presumption of grant but that the incapacity of the owner of the servient tenement to grant excluded prescription.

92 In this case if the statutory incompatibility rested only on the incapacity of the statutory body to grant an easement or dedicate land as a public right of way, the Court of Appeal would have been correct to reject the argument based upon incompatibility because the 2006 Act does not require a grant or dedication by the landowner. But in our view the matter does not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act.

93 The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (generalia specialibus non derogant), which is set out in section 88 of the code in Bennion, "Statutory Interpretation" 6th ed (2013):

"Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed."

While there is no question of repeal in the current context, the existence of a lex specialis is relevant to the interpretation of a generally worded statute such as the 2006 Act.”

126.
It is then helpful to see how Lord Neuberger and Lord Hodge applied the test which they had identified. They rejected the argument based on there having been cases which supported the view that land held by public bodies could be registered as town or village greens. Lord Neuberger and Lord Hodge said that they could be readily distinguished ([98]) and pointed out that in such cases the land had not been acquired and held for a specific statutory purpose. For example, in the “Trap Grounds” case (Oxfordshire CC v Oxford City Council [2006] UKHL 25 [2006] 2 AC 674) the land had not been held for specific statutory purposes that might give rise to a statutory incompatibility [99]. In Lewis v Redcar (the authority relied on by Dr Bowes) Lord Neuberger and Lord Hodge pointed out that the land had not been acquired and held for a statutory purpose which would be likely to be impeded if the land were to be used as a village green [100]. Given the arguments in this case one should look at paragraphs [101] to [102]:

“101 In our view, therefore, these cases do not assist the respondents. The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour.

102 In this context it is easy to infer that the harbour authority's passive response to the use by the public of the Beach was evidence of an implicit permission so long as such user did not disrupt its harbour activities. This is consistent with our view of the byelaws which we have discussed above. There has been no user as of right by the public of the Beach that has interfered with the harbour activities. If there had been such an assertion of right it would not avail the public, because the 2006 Act cannot operate in respect of the Beach by reason of statutory incompatibility."

I should refer also to [96] where their Lordships addressed the situation at Newhaven:

"96 In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence."

127.
It follows from those passages that:

(f)
one must consider the actual statutory powers under which the land is held;

(g)
the fact that in some cases parcels of land belonging to some statutory bodies have been registered does not give rise to a rule that any land held by a statutory body can be registered;

(h)
it is not necessary that the land in question is used for a purpose incompatible with use as a village green. What matters is whether, as a matter of statutory construction, the relevant statutory purpose is incompatible with registration.

128.
I can find nothing in the judgement of Ouseley J in Lancashire CC v Secretary of State for the Environment and Rural Affairs and Bebbington [2016] EWHC 1238 which is to any different effect. In that case land owned by Lancashire County Council ("LCC") was registered as a town or village green. LCC was the education authority and said that it held the land in that capacity. He rejected the challenge by LCC, made on various grounds, including that of statutory incompatibility. Ouseley J upheld the Inspector's conclusion that the land had not been acquired or held for educational purposes during the relevant 20 year period ([64]). Ouseley J then considered whether, if the land had been held for educational purposes, there was any necessary incompatibility between that and its use for recreational purposes, acknowledging that the issue did not arise for decision after his conclusion at [64]- see [65].

129.
Ouseley J concluded that there was no incompatibility between educational functions and use as a town or village green- see [79]. In that case what was urged upon him was that the general educational function required use of the land. He rejected that argument at [81]. It is important to see how he put the matter at [77]- [78]:

“77 It is clearly easier to apply the principle that the intention of Parliament was that the general Commons Act should yield to special Acts where the Act governs a specific statutory undertaker with specific functions to be performed over its landholdings. It is rather less easy to apply the principle where one general Act is said to yield to other general Acts, dealing with a local authority function. The notion that the general was intended to yield to the specific is very different from the general yielding to the general. But that glimpse of the rather obvious still leaves some issues as to how the line is to be drawn.

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78 In Newhaven, the land in question was obviously central to any changes which might be needed to the operation of the port. Two questions however which did not arise directly in Newhaven were (1) whether public recreational use is incompatible with the exercise of the statutory body's functions where some use can nonetheless be made of the land for its purpose but the range of uses, including the more important ones for its functioning is inhibited; and (2) if no use could be made of that land for the statutory purpose, how significant did the impact have to be on the performance of the statutory function for statutory incompatibility to arise, if other land could be used albeit less satisfactorily.”

There is nothing there which goes beyond Lord Neuberger’s and Lord Hodge’s approach of considering the nature of the statutory powers in question, nor is there anything which suggests that the only relevant statutory powers are those specific to the piece of land in question.

130.
Given the way in which this case was argued before the Inspector and before me by Dr Bowes for the Interested Party, it is necessary to stress that statutory powers are not identical across the range of statutory bodies. Just to take local authorities, there is a general power to acquire land under s 120(1) Local Government Act 1972 for the purposes of any of their functions under it or any other enactment, or for the benefit, improvement or development of their area. By s 120(2):

“A principal council may acquire by agreement any land for any purpose for which they are authorised by this or any other enactment to acquire land, notwithstanding that the land is not immediately required for that purpose; and, until it is required for the purpose for which it was acquired, any land acquired under this subsection may be used for the purpose of any of the council's functions.”

131.
It also has the power to appropriate land under s 122 of that Act

“(1) a principal council may appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation; but the appropriation of land by a council by virtue of this subsection shall be subject to the rights of other persons in, over or in respect of the land concerned.”

132.
Those powers are much wider than those in issue here, and allow for land to be held for purposes other than those which authorised the land’s acquisition. They also permit land being held where no incompatibility could arise, such as land held for the benefit of the area. Some other statutory codes contain specific provision to ensure that public recreational access is afforded- e.g. the Water Industry Act 1991 ss 3 and 5. The contrast between those examples and the powers in issue here demonstrate that it is not sensible to treat all ownership by statutory bodies as being to similar effect. A case by case analysis is required.

133.
I turn now to consider the relevant statutory powers in the instant case. I have set them out in an earlier passage of this judgement. It is clear that there was no general power in any of the relevant bodies to hold land. Land could only be acquired or held if done so for the purposes defined in the relevant Acts. The defined statutory purposes do not include recreation, or indeed anything outside the purview of (in summary) the purposes of providing health facilities. Could the land be used for the defined statutory purposes while also being used as a town or village green? No-one has suggested that the land in its current state would perform any function related to those purposes, and the erection of buildings or facilities to provide treatment, or for administration of those facilities, or for car parking to serve them, would plainly conflict with recreational use.

134.
Indeed, it is very hard indeed to think of a use for the land which is consistent with those powers, and which would not involve substantial conflict with use as a village green. A hospital car park, or a clinic, or an administrative building, or some other feature of a hospital or clinic would require buildings or hard standing in some form over a significant part of the area used. By contrast, it is easy to think of functions within the purview of education, whereby land is set aside for recreation. Indeed, there is a specific statutory duty to provide recreational facilities, which may include playing fields, and other land, for recreation, the playing of games, and camping, among other activities- see section 507A Education Act 1996.

135.
It is not relevant to the determination of the issue that the land has not in fact been used for the erection of hospital buildings or used for other hospital related purposes. The question which must be determined is not the factual one of whether it has been used, or indeed whether there any plans that it should be, but only whether there is incompatibility as a matter of statutory construction. If the land is in fact surplus to requirements, then the use of the CA 2006 is not the remedy.

136.
Given those conclusions, it is my judgement that there is a conflict between the statutory powers in this case and registration.

137.
For completeness, I should say something about the Inspector's approach to this issue. I refer to his conclusions in his report at [175].

(v)
As to his sub-paragraph (c), I disagree with him on the argument that the land should be treated differently from the area currently occupied by the hospital. It is held under the same title and for the same statutory purposes. If this were a town planning decision, where questions of what the best use of the land would be, or of proportionality, I would agree with him. But they do not arise, and the point taken before him by for the applicant was irrelevant.

(vi)
As to his sub-paragraph (d), that the Claimant's argument would emasculate the CA 2006 "when it came to land held by public bodies for specific statutory functions," his approach is not supportable in the light of Newhaven. The examples referred to above of land held for the purposes of local government, education and water resources show that the fear is not justified.

(vii)

As to his sub-paragraph (e) (the importance of a positive duty to use the land for a specific purpose) no such test appears in Newhaven or in CA 2006. There is nothing inconsistent with the purposes in the Act that the Claimant retain the land for potential future use. Indeed, prudent husbanding of resources might make long term retention a prudent course. Nothing in the Act sets a test of necessity which has to be satisfied to make the possession lawful. It is of course true that at Newhaven the land was an unused part of the working harbour. But Lord Neuberger and Lord Hodge regarded evidence about future proposals as irrelevant- see [96] and [97]. What mattered was the question of statutory construction ([97]).

(viii)
As to his sub-paragraph (f), he has equated one set of statutory powers (those entitling the NHS to possess this land) with the generality he has assumed exists in the powers of other statutory bodies to hold land under other statutory powers. As shown by examination of the Local Government Act 1972, the Education Act 2006 and the Water Industry Act 1991 above, it is unwise and misleading to make such assumptions. As their Lordships made clear in Newhaven, one has to look at the actual statutory power in question and determine whether there is incompatibility as a matter of statutory construction. Broad brush generalisations about statutory powers to own land do not meet that standard. I note that at no point in this part of his report does the Inspector seek to address the extent of the powers in the relevant legislation, some (but not all) of which he had identified at an earlier stage of his report.

(ix)
As to his sub-paragraph (g), this is in truth an argument in favour of departing from Lord Neuberger's and Lord Hodge's insistence that one must address the relevant statutory powers. It can make no difference to their interpretation that it would have been straightforward to erect a sign. Lord Neuberger and Lord Hodge expressly rejected the argument of passive acceptance at [102] of Newhaven.

(x)
I entirely understand and appreciate that the Inspector was taken by the fact that the land had not in fact been used for the statutory powers under which the Claimants possessed it. But that cannot be used as a way of interpreting the statutes in question.

138.
It follows in my judgement that the Inspector's approach to the question of statutory incompatibility was in error, and that it is impossible for this Court to apply section 31 (2) so as to avoid the effects of the failure of SCC to consider the lawfully made objection.

(f) was the conduct by SCC of the meeting which considered the issue fair to the Claimant NHSPS?

139.
I start with the concern raised about the fact that Councillor Hall was Chairman of the Committee. I consider that this is a point of no substance. Councillor Hall was entitled to present his view as ward member to the meeting, which he did after vacating the chair, and having given his representations, he left the meeting. In my judgement he acted with complete propriety, and no complaint can be made of it.

140.
So far as the question of the representations from the two parties are concerned, it has now been established that Dr Bowes' set was circulated in hard copy, but the Claimant's were not. Further,

several members did not receive the latter because the Council's email server junked them. Although I do not thereby seek to suggest that the officers intended that the Claimant suffer any disadvantage, it patently did so, and through no fault of its own, because it was responding to Dr Bowes' late submission.

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141.
While Dr Bowes will, I have no doubt, be more careful in future about adopting too familiar a tone in any future communication on behalf of a client to a statutory authority, and when doing so on his Chambers' notepaper, I do not consider that his conduct here has caused any actual unfairness. He was entitled to send a late submission to SCC in the light of Ms Gilbert's report, and the Claimant was entitled to respond.

142.
Thus, the question is whether the disadvantage caused to the Claimant by the members having Dr Bowes's representations before them but not the Claimant's, caused any actual prejudice which could have affected the decision. In my judgement the decision which it reached, and the reasons it gave, were unaffected by that. I consider that section 31 applies in this case.

(j) Conclusions

143.
I therefore conclude that Ground 5 of the Claim succeeds. The Committee never considered the question of statutory incompatibility, and gave no reasons for rejecting the Claimant's case as an objector. In any event, it is my conclusion that the objection on the grounds of statutory incompatibility was well founded. I reject Grounds 1-3, save insofar as the failure to address the statutory incompatibility issue amounted to a failure to give reasons. I grant permission to apply for judicial review on Ground 4 but dismiss the claim on that ground.

144.
I invited Counsel to make submissions to me in the light of the draft judgment on the appropriate order to be made. There is agreement that the order should be

a.
The Registration of the Leach Grove Wood Town or Village Green of 6th October 2015 be quashed, and

b.
The application for registration shall be re-determined by the Defendant Registration Authority in accordance with the judgement of this Court.

(k) Costs

145.
The Claimant has sought the whole of its costs from the Defendant. The Defendant has resisted an order that it pay all the costs, contending that the Claimant only succeeded on the ground of statutory incompatibility (and a failure to give reasons related to that issue), and that its liability should be limited to one half of the costs.

146.
I agree with the Defendant that the Claimant should not succeed in obtaining all its costs, for the reasons given. However, I do not consider that that means that the proportion awarded should be one half. I doubt that the trial bundle would have been significantly smaller had the arguments been

limited to Ground 5 and to the failure to address this objection. However I accept that the submissions in the case would have taken 1 day instead of the two days' sitting time the argument actually consumed, albeit over three days.

147.
I shall therefore order that the Defendant pay the Claimant's costs, less any costs attributable to the hearing of the argument and submissions lasting more than one full hearing day. The claim for costs will be assessed in default of agreement.

(l) Permission to appeal

148.
Dr Bowes has made a submission that I should grant permission to his client to appeal. He was good enough to submit it in writing after I had sent out the draft judgement. In essence he disputes the arguments advanced in the judgement that the statutory powers under which the land was held would prevent registration, and that there is a compelling reason to grant permission, and/or that an appeal would have a real prospect of success, and/or that the case had a wider importance. The Claimant disputes those grounds.

149.
I do not need to explore all of Dr Bowes' arguments, because I accept that it is a case which meets the test in CPR 52.3 (6)(a)- i.e. his second ground. I therefore grant permission to appeal.

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