

R (NHS Property Services Limited) v Surrey County Council and Jones [2016] EWHC 1715 (Admin)

**SUMMARY OF THE ABOVE
DECISION OF MR JUSTICE GILBART**

Introduction

1. In 2013 Mrs Cargill¹ made an application to Surrey County Council (“SCC”) for land known as Leach Grove Wood, Leatherhead, Surrey (“the Land”) to be registered as a town or village green (“TVG”). The statutory test for registration is contained in s.15 of the Commons Act 2006 (“CA 2006”). According to this test it is necessary 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. The owner of the Land, NHS Property Services Limited (“NHSPS”), objected to the application. A non-statutory inquiry was held by an Inspector who recommended to SCC that the application be refused. While he found that 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 a “neighbourhood within a locality”. However, he rejected the argument of NHSPS that there was a statutory incompatibility between the statutory purposes for which the land was held and registration under s.15 of CA 2006.
3. On 6 October 2015 SCC’s Planning and Regulatory Committee (“the Committee”) allowed the application to register the Land as a TVG (“the Decision”), concluding that the criteria in s.15 of the Commons Act were satisfied. In particular, the Committee concluded that the “neighbourhood within a locality” test was met. However, the Committee’s reasons for granting the application did not address the issue of statutory incompatibility. SCC’s reasoning provided:

“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.”

4. NHSPS judicially reviewed the Decision. In his written judgment Gilbert J found that the key issues raised by the challenge were as follows:
 - (a) Was SCC under a duty to give reasons for its decision?
 - (b) If so, what standard of reasoning was required?
 - (c) Did SCC give adequate reasons for finding that the criteria were met?
 - (d) Was the finding that there was a “neighbourhood” one which SCC could reasonably make?

¹ Mrs Cahill has since emigrated. Another supporter of the application, Mr Jones, has taken her place in promoting the application and was an Interested Party in the judicial review proceedings.

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

Law

Statutory incompatibility

- 5. In addition to the criteria in s.15 CA 2006 set out above, land may not be registered as a TVG “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”² (emphasis added).

Powers under which the Land is held

- 6. Here the Land forms part of an area of land which, in short, is owned by part of the National Health Service (“NHS”). The various statutory powers under which the Land has been held in the past and is currently held are set out at [18]-[33] of the judgment. Gilbert J summarised the position at [34]:

“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.”

- 7. These statutory purposes can, very broadly speaking, be summarised as health purposes connected to the NHS such as the provision of: hospital accommodation; medical, dental, nursing and ambulance services; facilities for the prevention of illness, care of persons suffering from illness and the after-care of persons who have suffered from illness.

The duty to give reasons under the TVG Regulations

- 8. The relevant regulations applicable to SCC are the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 (“C(RTV) Regs 2007”). Under these regulations, where a registration authority rejects an application it must give reasons for doing so. There is no duty to give reasons where an application is granted.
- 9. In contrast, the Commons Registration (England) Regulations 2014 (“CR(E) Regs 2014”) apply to certain pilot areas which do not include Surrey. Under these regulations there is a duty to give reasons where an application is granted or rejected.

Section 31(2A) Senior Courts Act 1981

- 10. Section 31(2A) of the Senior Courts Act 1981 (“the SCA 1981”) is concerned with the circumstances in which the court must quash a decision if it identifies an error of law.

² R (*Newhaven Port and Properties Ltd*) v *East Sussex CC* [2015] UKSC 7 at [93].

Essentially, a decision should not be quashed if the error of law would not have made a difference to the outcome:

*“(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.”*

Analysis of Gilbert J

Preliminary issue: existence of a lawful locality

11. NHSPS had argued under its ground 2 that the applicant relied on an unlawful locality, a polling district, as the basis for its claimed “neighbourhood within a locality”. However, given that it is well established that an electoral ward can be a “locality” in law, and the applicant also put her case on this alternative basis, Gilbert J accepted that the Inspector’s Report should be read as finding the relevant locality to be Leatherhead South ward.³ The key question was therefore “neighbourhood” rather than “locality”. As a result, ground 2 was unsuccessful.

Issue (a): Was SCC under a duty to give reasons for its decision?

12. The Judge found that SCC was under a duty to give reasons for its decision in the circumstances.
13. The fact that there is no statutory duty to give reasons when granting an application under the C(RTV)Regs 2007 was not considered to be determinative given that the CR(E)Regs 2014 imposed such a duty in other parts of the country. It was therefore necessary to determine the matter with reference to first principles.
14. The Judge considered the effect of registration of land as a TVG on a landowner and found that it had grave consequences since it would seriously impede the way in which the landowner could use and develop the land in the future. As a result, the effect of registration is a determination of civil rights/obligations under Article 6 of the European Convention on Human Rights such that reasons are required.⁴ Gilbert J then went on to consider the position under the common law. He considered that, in accordance with *R v Civil Service Appeal Board ex p Cunningham* [1991] 4 All ER 310, this was one of the scenarios in which fairness requires the giving of reasons:

“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.”⁵

³ [42(c)]; [95].

⁴ *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605.

⁵ [104].

Issue (b): If so, what standard of reasoning was required?

15. SCC had argued before the court that in circumstances such as this, where there is no statutory duty to give reasons, the standard of reasoning is lower than would otherwise be the case. However, Gilbert J was not persuaded by this approach. He found the starting point to be that while reasons can be shortly stated they “must be intelligible and deal adequately with the substance of the arguments advanced”⁶ and the “principal controversial issues”.
16. It follows that in a TVG registration case the reasons must address:
- (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.⁷
17. As for the standard of those reasons, the losing party must know why they lost and what the legal justification was for doing so.⁸
18. In addition, Gilbert J noted that under the C(RTV) Regs 2007 SCC had to 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.⁹ He concluded from this that SCC:

*“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.”*¹⁰

Therefore, to be lawful SCC’s reasons had to address the question of statutory incompatibility.

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

19. Although NSHPS had not initially argued that SCC’s reasons were inadequate due to their failure to address the question of statutory incompatibility, this was a matter raised by Gilbert J during the hearing. He concluded that this amounted to an “obvious and substantial omission in the SCC reasons”. As Gilbert J explained:

⁶ [108]; *South Bucks v Porter* [2004] 1 WLR 1953.

⁷ [109].

⁸ [111].

⁹ Regulation 6.

¹⁰ [113].

“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.”¹¹

20. However, Gilbert J rejected NSHPS’s original argument that the reasons were inadequate because they did not explain adequately the rationale for the Committee’s approach to “neighbourhood”. The Judge accepted SCC’s submissions that the cohesion of a “neighbourhood” is not a matter for experts but is a subjective question on which the Committee was entitled to form a view. He went on:

“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. [...] [The Inspector’s] 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 for (for example) highway engineering in a debate about the design of a junction, or retails economics in a case where the extent of pent up demand is in issue [...]. 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 then, and the arguments for and against the Applicant’s case.”¹²

21. Thus, SCC’s reasoning given in respect of the “neighbourhood” question was lawful.

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

22. Given that the Judge agreed with SCC that it is matter of impression whether there is sufficient cohesion for a “neighbourhood” to exist, SCC’s approach to determining this issue was entirely legitimate. The Inspector was no more of an expert on this issue than the Committee, and the Committee was entitled to form its own view on the subject.

Issue (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?

23. Having concluded that SCC’s reasons were unlawful for failing to address the question of statutory incompatibility, the Judge went on to apply s.31(2A) SCA 1981. In other words, he considered whether the Decision would have been the same (ie the

¹¹ [114].

¹² [117].

application would still have been granted) if SCC's error had not occurred. For this to be the case SCC had to show that there was no statutory incompatibility such that the reasons' failure to tackle this point was immaterial. However, this argument did not succeed because Gilbert J identified a statutory incompatibility between the powers under which the Land is held by the NHSPS and use of the Land as a TVG under the CA 2006. Thus, the failure of SCC's reasoning to deal with this question was highly material (to the extent that it was determinative) to the Decision.

24. The Judge's approach to statutory incompatibility was to examine the leading case on this issue, the Supreme Court decision of *Newhaven Port and Properties Ltd v East Sussex CC* [2015] UKSC 7, in some detail.¹³ In *Newhaven* it was held that registration as a TVG was incompatible with the statutory powers governing the land's use as a port. The relevant test with regards statutory incompatibility was explained as follows:

*"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."*¹⁴ (Emphasis added).

25. Having studied the relevant passages from *Newhaven* Gilbert J extracted three key principles from that judgment:

- (a) one must consider the actual statutory powers under which the land is held;
- (b) 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;
- (c) 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.¹⁵

26. Gilbert J went on to conclude that the recent decision of Ouseley J in *Lancashire CC v Secretary of State for the Environment and Rural Affairs and Bebbington* [2016] EWHC 1238 did not to alter these principles. In that case Lancashire County Council held the land in its capacity as education authority. The relevant question was whether, if the land had been held for educational purposes, there was any incompatibility between those purposes and TVG use (ie recreational purposes). Ouseley J concluded that there was no such incompatibility. In particular, he rejected the argument that the fact that the land was held for very general educational purposes required use of the land.

27. Having stressed the need to approach statutory incompatibility on a case by case analysis, Gilbert J considered the statutory powers under which the Land was held in this case. He pointed out none of the bodies which had held the Land over the relevant

¹³ [121]-[127].

¹⁴ *Newhaven* at [93].

¹⁵ [128].

period had a general power to hold land. Rather, land could only be acquired or held if done so for the specific purposes defined in the relevant Acts. These purposes do not include recreation or anything outside the purview of providing health facilities. The Judge went on to draw a contrast between the scenario here and that in *Lancashire*:

“[I]t 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.”¹⁶

28. Therefore, Gilbert J’s conclusion was that there is a conflict between the statutory powers in this case and registration of the Land as a TVG. Further, given that the Inspector reached the opposite conclusion and did not apply *Newhaven* as outlined above, the Inspector’s approach to the question of statutory incompatibility was wrong in law.

Issue (f): Was the conduct by SCC of the meeting which considered the issue fair to NHSPS?

29. The first of NHSPS’s complaints in relation to unfairness was that Cllr Hall should not have been present at the Committee meeting at which the Decision was made given that he had declared an interest in the matter. This argument was made despite the fact that Cllr Taylor took over from Cllr Hall as chairman for this item and Cllr Hall withdrew as soon as he made his representations. Gilbert J was not impressed with the submissions of NHSPS on this point: “In my judgement he [Cllr Hall] acted with complete propriety, and no complaint can be made of it.”¹⁷
30. NHSPS also argued that the proceedings were unfair because Dr Bowes (the applicant’s barrister) sent the Committee representations which were taken into account before the Decision was made, while the landowner’s response to these submissions (sent by their solicitors, Capsticks) was not. It was also suggested that the fact that Dr Bowes was on first-name terms with certain members was indicative of some sort of unfairness.
31. As became apparent over the course of the proceedings, Dr Bowes’ representations were provided to the Committee in hard copy while Capsticks’ representations were not. Moreover, the Capsticks’ representations were “junked” by the email server of the Council so that various Members did not see them until after the Decision had been taken. In these circumstances the Judge observed that, although officers did not intend for NHSPS to suffer any disadvantage, this was the consequence of what had occurred.

¹⁶ [135].

¹⁷ [140].

32. While Gilbert J advised Dr Bowes to avoid familiar terms of address in similar situations in future, he found that Dr Bowes had not done anything wrong in making written representations to the Committee before it made the Decision – Dr Bowes was entitled to take this course of action and NHSPS was entitled to respond.
33. It was also necessary to consider the application of s.31 SCA 1981. The question was whether the disadvantage caused to NHSPS by the Committee having Dr Bowes' representations before it but not those of NHSPS actually affected the outcome of the Decision. Gilbert J concluded that it did not; it was highly likely that the Committee would still have allowed registration even if had seen the submissions of NHSPS at its meeting.¹⁸ As a result, there was no basis for quashing the Decision on the ground that it was procedurally unfair.

Conclusion

34. Ground 5 of the claim was successful because the Committee never considered the question of statutory incompatibility and gave no reasons in respect of this issue. Further, this meant it was appropriate to quash the Decision because Gilbert J considered that NHSPS' objection to registration on the ground of statutory incompatibility to be well-founded. However, as explained above, he rejected NHSPS' other arguments: Grounds 1-4.
35. In light of the judgment the following order was made:
- (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 judgment of this Court.
36. As for costs, given that SCC had lost the case overall but succeeded on four of the five grounds of challenge, the Judge ordered SCC to pay NHSPS' costs of the judicial review, less any costs attributable to the hearing of the argument and submissions lasting more than one full hearing day.
37. The Interested Party, Mr Jones, made an application for permission to appeal the Judge's ruling on the statutory incompatibility point on the basis of the draft judgment. Gilbert J granted that application.

15 July 2016

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¹⁸ [143].