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**Further comments on the
decision of the House of Lords**

Unless otherwise indicated,
paragraph numbers in the
sidenotes refer to the numbered
paragraphs in the opinions of
the Lords of Appeal.

{1} [2003] UKHL 60; [2004] 1 AC
889; [2003] 3 WLR 1306

{2} RWLR s.5.3 p.29

{3} RWLR s.15.3 p.51

Ex parte Beresford: further comment

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Opinions in the case of R. v. City of Sunderland, ex parte Beresford{1} were given in the House of Lords on 13 November 2003. Their Lordships reversed the decision of the Court of Appeal (which was discussed by Jones and Beck){2} and differed too in conclusion from the registration authority and Smith J., and ordered that the application land be registered as a town or village green. The case was reported in the January issue;{3} this article considers the two key points in further detail. These points are the issue of precario and the dicta of Lord Scott concerning land owned by public authorities.

The background

The land was an open, flat area of grass owned in the 1970s by the Washington Development Corporation.

It was always the intention that the land should be developed, but in the meantime it was kept as mown grassland. Wooden seats had been constructed around the perimeter in 1977 for a visit by the Queen in her Silver Jubilee year, and an artificial cricket pitch was laid out in 1979. Ownership had then passed to the Commission for the New Towns and later to the City of Sunderland Council (the defendant council). Since at least 1977 the land was used by local inhabitants for various sports and pastimes.

S.22(1) of the Commons Registration Act 1965 provides that ‘town or village green’ means land on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years. Accordingly, the land appeared on the face of it potentially to satisfy the definition of a town or village green.

When the land was threatened with development, Mrs Pamela Beresford applied to the local registration authority to have the

{4} See *Oxfordshire County Council v. Oxford City Council and Robinson* [2004] 2 WLR 1291; RWLR s.15.3 p.61. An appeal is being pursued in that case, although permission to 'leapfrog' to the House of Lords has been refused.

{5} [2000] 1 AC 335; [1999] 3 All ER 385; RWLR s.15.3 p.21

land registered as a town green. The effect of land being a town or village green is that it has protection under the Inclosure Act 1857 and the Commons Act 1876 from interruption of the use for recreation, and in particular by construction of anything upon the land. {4} Thus the proposed development would have been frustrated.

The question of use 'as of right' The registration authority decided, however, that the use of the land did not comply with the requirement in s.22(1) for the use to have been 'as of right'. It was established in *R. v. Oxfordshire County Council, ex parte Sunningwell Parish Council* {5} that this phrase had the same meaning as under the Prescription Act 1832 and the Rights of Way Act 1932, and it therefore meant without force, without secrecy and without permission: nec vi, nec clam, and nec precario.

Although it was accepted that there had been no express permission for the use of the land, the registration authority here

considered that there had been an implied licence for the use of the land granted by the owners, given that the land had been laid out and made available for public recreation. Accordingly, the use of the land was with permission and not as of right. Thus the registration authority declined to amend the register of town or village greens to include the application land.

The applicant brought judicial review proceedings against the registration authority. The case was argued on the issue of whether positive, overt acts of encouragement to use land for recreation could amount to implied permission (or licence or consent) from the owner to use the land, and thereby be *precario*, defeating a claim for registration arising from use as of right.

In the event the House of Lords went further, holding that for a permission to qualify as *precario* not only did it have to go beyond mere acquiescence or tolerance, but it also had to be revocable; that is, give rise to a temporary licence that could be withdrawn at any time. Permission alone was not enough.

{6} *Per* Lord Rodger at para. 57

Precario Lord Rodger began his analysis of the issue by going back to Roman law, under which it was said that ‘*precarium*’ was “the name given to a gratuitous grant of enjoyment of land or goods which is revocable at will”.{6} Tracing the history of the concept, including its application in Scotland, it was noted that the use depended on the will of the grantor which might be withdrawn. The concept of *precario* was summed up as being use “by the revocable will of the owners of the land ... by virtue of a licence which the owners ... could have withdrawn at any time”.{7}

{7} *Per* Lord Rodger at para. 59

Their Lordships confirmed the previous understanding of the law which was that although there was no need for formality in granting permission there was a need for a positive act of granting use which went beyond tolerance or mere acquiescence in its use. Encouragement by the landowner was not enough, either, to establish that the use was *precario*.

Tolerance, acquiescence and encouragement do not indicate

that the use is only by virtue of the owner's revocable permission. Where any land has therefore been made available for public recreation - has almost been dedicated to use as a village green - any permission would not be of the relevant sort: there is no indication of the temporary, revocable character which is required. The permission is unlimited and unregulated.

Lord Rodger concluded that:

“[I]n the absence of any act on the owners' part to regulate the activities on the land or otherwise to show that the inhabitants were disporting themselves only by the owners' revocable leave or licence, it is proper to infer that the owners had acquiesced in the inhabitants' use of the land as of right. The same result follows if the owners are thought to have encouraged the activities”.{8}

{8} Para. 68

The kinds of acts which in the circumstances of the *Beresford* case could have given rise to the necessary permission would have been to make a charge for entry or to give express permission by way of signs erected on the land, or other methods of publicity, to make it clear to the public that land is being used

with the temporary permission of the owner, which can be revoked at any time.

{9} Para. 72

Lord Walker suggested that a sign with a notice along the following lines might be sufficient: “The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time”.{9} A landowner who had erected a “keep out” sign which was ignored by users and which was not enforced would have secured no protection from the establishment of a town or village green, because the use would clearly be *nec precario*. But nor would one who erected a sign giving unqualified permission to use the land for sports and pastimes, as the permission would not be precarious. A purported dedication of the land as a village green will not create a registrable village green, but the purported dedication will invite public use ‘as of right’, and could lead to registration after 20 years of such use.{10}

{10} Para. 46

Implied permission to negate ‘as of right’ Turning from the nature of the permission required, to whether it can be implied from the circumstances, Lord Rodger said:

“I see no reason in principle why, in an appropriate case, the implied grant of such a revocable licence or permission could not be established by inference from the relevant circumstances”.{11}

{11} Para. 59

Lord Walker agreed with this proposition, provided that “the permission is implied by (or inferred from) overt conduct of the landowner”{12} such as would amount to:

{12} Para. 83

“communication by some overt act which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass”.{13}

{13} Para. 75

Lord Bingham said, similarly:

“I can see no objection in principle to the implication of a licence where the facts warrant such an implication. ... A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants’ use of the land is pursuant to his permission”.{14}

{14} Para. 5

Inaction on the part of the landowner is not enough. Something has to be done therefore to make the public aware that the land is being used only by permission, and temporary, revocable permission at that. Such circumstances may well include fencing the relevant land and occasionally closing it to all users, either for the sake of it or when the land is required for the landowner's own purposes. When therefore the gate is left open following such a closure it is demonstrably clear that permission is being given to use the land, but that it could be withdrawn at any time if the owner chooses to exercise his right to exclude persons.

The effect of their Lordships' opinions The result is that although, in principle, permission could be established by inference from the relevant circumstances (including the positive, clear, overt and unequivocal acts of the owner), even an express permission is not necessarily inconsistent with use as of right - it all depends on the nature of the permission. Mere encouragement, as in *Beresford*, therefore will not lead to the implication of the

necessary temporary and revocable licence; on the facts there were not sufficient overt acts communicating a permission to enter.

Land owned by public authorities It is clear that the various judicial minds which grappled with the issues in this case were troubled by the potential for a result where land owned by a public authority could be sterilised for later use or development which was required for a wider public benefit. At first instance, Smith J. considered that “the fact that the land is in public ownership is plainly a relevant matter”; in the Court of Appeal, Dyson L.J. said that, whilst part of the relevant background, it was “a factor of little weight”. { 15 } Neither party’s counsel sought to rely on the issue of public ownership, but nonetheless two of their Lordships felt that it was necessary to deal with the issue.

{ 15 } [2002] 2 WLR 693 at 703 E-F,
para. 30

Lord Scott dealt with this issue at length in his opinion. He took as his starting point that the successive owners of the land had “been public authorities, holding the land for public purposes

{16} Para. 14

and whose tenure of land had been subject to various statutory provisions”,{16} and asked how, if at all, this bore upon the answer to the question as to whether the use of the land was ‘as of right’.{17}

{17} Para. 15

New Towns Acts: a power to use the land The land was acquired by the Washington Development Corporation under the New Towns Act 1965, as development land. There was a power under s.21(1) of the New Towns Act 1981 for Washington Development Corporation to make the land available as open space land to be used by the public for recreation. S.21(1)(a) also allowed such open space land to be used by the development corporation or by any other person in any manner in accordance with planning permission. Lord Scott asked: “why does s.21(1)(a) not apply to entitle the council to use the land ‘in any manner in accordance with planning permission’?”{18} Lord Scott expressly left the question unanswered, but also left it without any clear indication as to why he felt the question should

{18} Para. 26

be answered. Lord Scott has unfortunately left the issue beyond comprehension. It is submitted that if the land had acquired the status of a town or village green under the Commons Registration Act 1965, any power under the New Towns Act 1981 to put the land to a new use must operate subject to the restrictions arising by statute due to the prior status of the land as a town or village green. The strength of the status of land as a town or village green was robustly confirmed by Lightman J. in *Oxfordshire County Council v. Oxford City Council*.{19}

{19} Supra note 4

Local Government Act 1972: the trumping of village green status?

Lord Scott also considered s.122 and s.123 of the Local Government Act 1972, which contain limited powers for local authorities to appropriate open space land to other uses and to dispose of it. Both counsel in the case agreed that land appropriated to another use or disposed of under the 1972 Act would retain any prior status it had as a town or village green. Lord Scott, however, thought that the power of disposal under

{20} Para. 52

the 1972 Act would “trump” any town or village green status, whether or not the land was registered as such. {20} He said that:

{21} Para. 28

“an appropriation to other purposes duly carried out pursuant to s.122 would plainly override any public rights of use of an ‘open space’ that previously existed. Otherwise the appropriation would be ineffective and the statutory power frustrated. The comparable procedures prescribed by s.123 for a disposal must surely bring about the same overriding effect”. {21}

It is submitted that whilst Lord Scott may be correct as to any public rights of use of an open space under local government statutory powers, these are not the only rights of use over the land where it has become a town or village green. An appropriation or disposal under the 1972 Act could not affect the rights of certain local inhabitants to use land for recreation which had arisen prior to appropriation or disposal by virtue of the Commons Registration Act 1965. The two sets of rights are entirely separate. The rights accruing to the local inhabitants are it seems private rights. Customary rights of village green are

{22} Paras. 4 and 43 of Lightman J.’s judgment

private local rights arising under the common law. It was held by Lightman J. in *Oxfordshire County Council v. Oxford City Council* that there is only a single concept of a green and that the same rights accrued to a green regardless of whether the green arose by custom or 20 years’ use (classes ‘b’ and ‘c’).{22}

There is nothing in the words of the 1972 Act which suggests that rights accruing by virtue of the Commons Registration Act 1965 are destroyed on appropriation or disposal, and there is no warrant for reading in such words. Rather, s.122(1) of the 1972 Act expressly provides that “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”.

In these circumstances the statutory power under the 1972 Act is, it is submitted, not perhaps frustrated so fundamentally as Lord Scott suggests; the land can still be disposed of, for example, but subject to the limitations which attach to land which has become a town or village green.

Open Spaces Act 1906: permission by implication from a statute? It was suggested in the case that where land owned by a local authority has been applied or appropriated for the purpose of public recreation pursuant to a statutory power, a sufficient permission for *precario* may be found by implication from the relevant statute: the users would have a statutory right to disport themselves on the land. Lord Walker said that “the notion of an implied statutory licence has its attractions”.{23}

{23} Para. 86

S.10 of the Open Spaces Act 1906 provides that, for land acquired under that Act, the local authority should hold the open space in trust to allow enjoyment by the public as an open space.{24} As a statutory trust arises, the inhabitants of the locality are the beneficiaries of the trust. In these circumstances Lord Walker considered that “it would be very difficult to regard” those who used the land “as trespassers”.{25} The case of *Hall v. Beckenham Corporation*,{26} to which Lord Walker refers, does not however consider whether there is implied

{24} Para. 29

{25} Para. 87

{26} [1949] 1 KB 716; [1949] 1 All ER 423

permission arising from statute: it simply established that use of land held under s.164 of the Public Health Act 1875 was by right not as of right. An implied licence was not raised.

In any event, it is submitted that Lord Walker's point is not a complete answer to the question as far as implied permission is concerned. Whether the users of the land are regarded as trespassers does not determine whether the use of the land is *precario*. It is far from clear that a *qualified* right as a beneficiary of a trust would be sufficiently precarious to render the use other than 'as of right', where use was not 'by right' under the trust. The statutory regime, as well as the decision-making processes of local authorities, gives rise to certain limitations which would hinder an instant revocation of any implied licence. There must be a real argument that any statutory implied licence is insufficiently revocable to render use *precario* and therefore to prevent land becoming a town or village green.

Lord Scott suggested that regulation of the use of the land by

{27} Para. 30

the public by virtue of the trust arising under s.10 of the 1906 Act meant that the use of the land would not have been a use as of right. {27} Regulation of use can also occur for example by the promulgation of byelaws to limit what can be done on the land. But such provisions do not limit whether someone can use the land for sports and pastimes, merely how they can use the land. Accordingly, it is submitted that it would not be sufficiently clear to a user that they are being permitted to use the land only by virtue of the temporary, revocable permission of the landowner. It is not enough, in the words of Lord Rodger, “to show that the inhabitants were disporting themselves only by the owners’ revocable leave or licence”. Something more, such as preventing or charging for entry, is required to show that use is *precario*.

Conclusion The conclusion of the House of Lords in this case was not expected in such terms. It will have important implications, not least that land which would not have qualified as a village green before *Beresford* could now be registrable as such.

It may be that some registration applications that have failed before could be made again. More village green applications will no doubt result. Some potential routes to avoid the effect of this decision have been recorded above.

Lord Walker concluded his opinion by noting some concern that the registration of the land in *Beresford* as a village green had the effect of preventing building on the land in a way that bypassed the normal development controls contained in the planning system, and which might be thought to have stretched the concept of village greens close to or even beyond the limits which Parliament was likely to have intended in 1965. Their lordships' opinions cannot be said to have allayed such concerns.

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