

**ISSUES FOR THE FUTURE****DOUGLAS EDWARDS QC**

1. When, in the Trap Grounds case, I opened the appeal for Miss Robinson in front of the House of Lords I ventured to suggest that the appeal concerned the remaining main controversial issues concerning the registration of land as village greens in the modern context. It is fair to say that the House of Lords in that appeal did determine many undecided issues. However, further issues and important decisions have emerged thick and fast since. Indeed, the last 12 months have give rise to a plethora of decisions of the courts and of inspectors and registration authorities concerning issues of fundamental importance to the administration of the process. The intention of this paper is to identify and consider outstanding issues and how those issues are likely to arise and be resolved in the future. I will consider first procedural issues and then substantive issues.
2. In terms of procedural issues, there is no indication as yet when the new procedures which accompanied the Commons Act 2006 will be rolled out nationally. The trials within selected registration authority areas continues. As such, outside those areas, a relatively ad hoc arrangement continues.
3. There are three procedural issues which seem to be, or remain, controversial.

4. First, there are circumstances in which registration authorities should hold public inquiries before determining applications. It had seemed, following the decision in *R (Whitney) v Commons Commissioners* [2005] QB 282, that the matter was largely resolved. However, several registration authorities now seem to be investigating alternative means of determining applications in an attempt to avoid the time and expense of convening a public inquiry. In particular, the possibility of a committee of members considering an application seems to be in contemplation by several authorities. Plainly, keeping the application “in house” may have its advantages. However, it also brings with it considerable practical difficulties and potential legal risks. In practical terms, where an application taken together with objections gives rise to issues as to fact, it will generally be necessary for the parties to be given the opportunity to call and challenge evidence. The procedure before members must therefore allow for witnesses to be called and cross-examined. Not only must members be prepared to allow, impartially, this procedure to take place but they must also be prepared to sit for several days to hear the totality of the evidence. Secondly, members must be prepared following the end of proceedings to give full and written reasons for their decision, applying their findings of fact to the not uncomplicated legal framework. In terms of the legal position, what is, I suggest, plain from the decision in *Whitney* is that where the registration authority has an interest, either proprietary or otherwise, in the land sought to be registered, it is generally necessary for an independent input into the process by referring the application to an independent inspector for his or her recommendation (see Arden LJ at para.32). Should a registration authority with such an interest in land not involve an independent inspector in the determination of an application of substance then it runs a very significant risk of successful legal challenge. It also seems possible to construe the decision in *Whitney* such that, even absent such a conflicting interest, where there is a substantial dispute as to fact or where the application is particularly

controversial locally, a public inquiry may be the only reasonable course to follow (see eg Arden LJ at para.29). The extent to which, faced with a controversial application or an application which gives rise to a serious dispute of fact, a registration authority may adopt a form of determination of an application which does not involve a public inquiry remains to be resolved. However, I suggest were a registration authority, whether for reasons of resources or otherwise, decides not to hold an inquiry in those circumstances it runs a considerable risk of legal challenge and poses considerable practical difficulties in providing the time and training for members to approach the task in a manner which is fair and legally sound.

5. The second practical issue which arises concerns repeat applications. To what extent is a registration authority entitled to refuse to accept and consider an application to register land as a green where an earlier application to register the same land as a green has been rejected. In effect, the issue is the extent to which *res judicata* has a role in the town/village green regime. There is certainly no statutory basis for *res judicata* in the Commons Act 2006. However, at least one inspector has reported to a registration authority that *res judicata* is applicable. Moreover, Sedley LJ, when a High Court judge, appeared to refuse permission on paper for a claim for judicial review on the basis that *res judicata* applied. The extent of legal authority to support the proposition does not go beyond these sources. As a matter of common sense there seems to be merit in a registration authority having power to dismiss summarily an application which is in substance identical to an application which has already been dismissed. In such circumstances, I suggest that a court would support summary dismissal of such an application. However, where the second application in form or, importantly, in terms of evidence submitted in support of it departs from the earlier application, perhaps in terms of being supported by evidence to overcome the reason for rejection of the earlier application, there



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seems every reason for a registration authority to take that application seriously and consider it accordingly. I have very considerable reservations that save where the repeat application is identical in substance, there is any real scope for dismissal of an application simply by reason of the fact that it concerns land which has already been considered pursuant to an earlier application. I suggest that for such a power to exist it would need to be spelled out very specifically in the statutory scheme. It is not and as such I consider there are considerable risks in adopting such an approach.

6. Thirdly there is the question of declarations of the court as to the status of land as a green. The decision of the High Court in *McLaren v Kubiak* [2007] EWHC 1065 (Ch) is often regarded as settling the position to the effect that declarations are not available as to the status of land as a green. Judge Pelling QC held that the status of land may only be determined through an application for registration and by the registration authority. I have previously suggested in a paper delivered at FTB's last village green seminar, that the Judge may have gone too far in this conclusion. However, there is scope for the matter to be reconsidered in the context of the Commons Act 2006. That Act, of course, has introduced the two and five year grace periods in which land remains exposed to an application for registration notwithstanding the fact that qualifying use has ceased. Plainly, if an application is made during such a period, that will provide the conduit for determination of the status of the land. However, absent such an application it is possible to envisage perfectly legitimate reasons why a landowner or developer may wish to establish the extent to which land is vulnerable to registration as a green. It seems therefore that the availability of a declaration from the court as to the status of land as a green does need to be revisited in light of the new regime introduced by the 2006 Act. In an appropriate case, a court would, I suggest, be willing to revisit *McClaren* and

consider the submission that that decision was confined to the statutory regime provided by the Common Act 1965. That said, the limitations of declarations must also be recognised (as I have discussed in an earlier seminar paper) namely that that are a personal remedy, moreover, they are less effective or possibly ineffective where the status of land as a green or otherwise concerns matters of evidence rather than law.

7. In terms of substantive issues, the decision of the Supreme Court in *Redcar* has resolved many issues concerning the “as of right” element of the statutory test, as has been discussed in other papers. However, it has also led to other difficult issues.
8. First, it further complicates the position in respect of local authority land. In *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, Lord Walker opined that land held by a local authority under the Open Spaces Act 1906 gave rise to a statutory trust and, as such, recreational use of that land would not be use “as of right”. Lord Walker further advised that “the position would be the same if there were no statutory trust in the strict sense but land had been appropriated for purposes of public recreation” (para.87). Lord Walker’s dictum has in practice generally been relied upon as authority for the proposition that land held by a local authority for general recreation purposes is not used “as of right”. Entirely sensible although this approach is, it remains somewhat unclear as to why this conclusion follows if, as the Supreme Court has now concluded, that use “as of right” means simply use without force, stealth or permission.
9. Secondly, in terms of local authority-held land particular difficulties seem to have arisen in respect of playing fields. Land held and laid out as playing fields under the Physical Training



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and Recreation Act 1937 and latterly the Local Government (Miscellaneous Provisions) Act 1976 seems to have been particularly troublesome. What is the position where land is expressly held and laid out as formal playing pitches under those acts but when not in use for formal games, it is used by local inhabitants for dog walking and informal play? Certainly, following Lord Walker's approach in *Beresford* use for formal games of football would not be likely to be considered as use "as of right" since such use is directly attributable to the power under which the land is held and has been laid out. However, dog walking and informal play would seem on the face of it to fall outside the express power under which the land was held. There are certainly two reports of inspectors of which I am aware in which it is advised that land held and used in such circumstances is used "as of right" by local inhabitants and as such may be registered as a green notwithstanding that it is held by a local authority under express powers. That said, other Inspectors have taken a different view. How this particular issue will be resolved remains unclear. However, an approach whereby land held by local authorities under express statutory powers to hold land for recreational purposes may well ultimately be considered somewhat differently from private land and any recreational use of local authority land, notwithstanding the fact that that use may not conform precisely with the purpose under which the land is held or made available, will not be considered use "as of right".

10. A further and discrete issue concerning local authority land has come to the fore recently and that concerns identifying by reference to its use, the statutory power under which land is held by that authority. Where an express resolution is made by the authority at the time of acquisition or subsequent appropriation of the land, the position will be clear. However, what is the situation where land is made available by a local authority for recreational purposes



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consistent with its powers under the Open Spaces Act 1906 or the Public Health Act 1875 but without any express resolution to that effect either at the time of acquisition or through subsequent appropriation? The mechanism which has come to the fore for dealing with such situations has been “implied appropriation”. The concept of an “implied appropriation” has arisen most recently in a decision of a deputy high court judge in *Oxy-Electric Ltd v Zainuddin* (unreported 22 October 1990) in which he was required to consider a submission that appropriation could be “implied” with the implication arising from the manner in which the land was used by the local authority. The deputy judge held that “... if the local authority dealt with the land in such a manner that it could only have dealt with it lawfully if it had made an appropriation, then the resolution need not record such appropriation”. The result of this is that where, by way of example, land was acquired by a local authority for housing purposes but never developed as such and is in fact laid out and/or made available for public recreational purposes, then it ought to be possible to contend that there had been an implied appropriation of the land from the statutory powers under which the land was acquired to the 1875 Act and the 1906 Act. In fact this is largely the basis on which an application to register Castle Park in Bristol failed last year. However, the basis of the concept of implied appropriation is, to an extent, open to question. It in effect attributes a fictional decision to a local authority but without giving any basis for the timing or circumstances of that decision. In principle, a decision to appropriate land by a local authority is a public decision and is one which should be open to challenge by way of judicial review. To invent ex post facto the fiction of such a decision removes that opportunity for challenge. The extent therefore to which “implied appropriation” is robust remains to be seen if or when the higher courts review a decision based on the concept.

11. Another issue is the position of land held as “amenity land” by a local authority as amenity land under the Housing Act 1936 or subsequent Acts which include a power to erect houses and also to provide “open space” for use in association with the occupation of those houses. If it can be demonstrated that land is laid out as open space pursuant to the 1936 Act or a subsequent Act then, consistent with the approach taken by Lord Walker in *Beresford*, it should be possible to sustain a contention that that land is not used “as of right”. That was largely the conclusion reached by an inspector appointed for Buckinghamshire County Council in respect of land of Brea Hill, Brill. However, other inspectors have concluded and advised that proving land as “open space” does not give a right to use such land for “recreational purposes” as open space may include land provided for visual or landscape purposes. In my view, a court is likely to conclude that land provided as “open space” under the Housing Acts and used for recreational purposes will not be used “as of right”, consistent with the approach of Lord Walker in *Beresford*. However, where such land was not in fact provided for recreational purposes but for visual or landscape purposes the same conclusion does not follow. It is unlikely that a court, if asked to decide the matter, will conclude that as a matter of principle land held as “open space” under the Housing Act cannot benefit from the *Beresford* principle.
12. Penultimately, I turn to human rights. In *Whitney* the Court of Appeal held that procedurally at least the village green regime was human rights compliant. In *Trap Grounds* the House of Lords had little time for the submission that the substantive effects of registration were not compatible with Convention Rights. Against that background, it may well be thought that there is now little scope for human rights challenges to village green registration. However, the position in respect of the five year period of grace under the 2006 Act remains controversial



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and, in my view, there may well be scope for a human rights challenge in an appropriate case concerning the operation of that five year period. In many cases, the five year period of grace is still operating such that landowners who had legitimately put in place protection through fences or notices before the 2006 Act came into force are in effect being robbed of that protection by the operation of the five year period of grace. This potentially has the most serious of consequences. However, there is little to suggest that proportionality was considered when, at the very end of the Parliamentary process, the amendment to introduce the five year grace period was introduced. Indeed, the balance of benefit compared to disbenefit may be said to support a conclusion that the five year grace period operates disproportionately adversely to the interests and rights of a landowner. It is somewhat of a surprise that this issue has not yet arisen. The scope for the issue to arise reduces with the passage of time and the consequent reduction of applications which can be made on the basis of use terminating within a five year period before s.15 of the 2006 Act came into force. However, if or when it does arise the outcome is difficult to predict.

13. Finally, there is the legislative future. On 15 January 2010, Lord Davies of Oldham, the former Under-Secretary of State at DEFRA in a written parliamentary answer stated that a review would be carried out in the Spring of 2010 concerning town and village greens particularly in respect of land with planning permission. Whether this review takes place and, if so, when remains now wholly uncertain. Plainly, the last Government were coming under increased pressure from the development industry concerning the operation and sterilising effect of the TVG regime. Whether the Coalition Government, with the emphasis placed, by the Conservatives at least, on “localism”, will be inclined to modify the regime remains unclear.



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