

WHAT DOES REDCAR¹ ACTUALLY SAY?**Philip Petchey****Preliminary**

1. In the *Sunningwell*² case, Lord Hoffmann went back to first principles and held that in deciding whether use had been *as of right*, a court was not concerned with the state of mind of those who had used the land:

*In the normal case, of course, outward appearance and inward belief will co-incide. A person who believes he has the right to use a footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not.*³

2. However he also emphasised that, in analysing whether use has been *as of right*, the Court must consider how the matter would have appeared to the landowner.⁴ It is clear from *Redcar*, if it was not clear before, that this means how it appeared to the reasonable landowner.
3. Potentially one can see that this re-introduces the state of mind of the users. The Court is not concerned with their actual state of mind, but it might be concerned with what the reasonable landowner thought their state of mind was. (Arguably the best evidence – or at least relevant evidence – of that is what the state of mind of the users actually is.)
4. Take now a school playing field. Obviously many school playing fields are fenced off but not all are; and some are crossed by public footpaths. Funds may be limited and holes in the fence

¹ Ie *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 WLR 653.

² Ie *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335.

³ See p356C.

⁴ See pp 352H – 353A.

may not have been repaired. In such circumstances there may have been free and unrestricted access to the public during the relevant 20 year period. This will have been, in part, out of school hours – so the dog walkers will be out first thing in the morning and, in the evening long after the last evening school game. But they may also be out during the day, keeping off the pitches but otherwise generally using the land.

5. Cases like this gave rise to arguments based on *deference* – the idea that the use of local people which was relied upon deferred to the greater right of the owner – and thus was not *as of right*. Dog walker A would go over to the playing field intending if possible to walk all over it, but if he found a game going on he would not interrupt it. He knew jolly well that he did not have an entitlement to go on the land, and would not seek to interrupt the use of the landowner who **did** have an entitlement. The way, surely, it appeared to the landowner was that dog walker A was not asserting a right.
6. These arguments were accepted, among others, in the *Laing*⁵ case and by Sullivan J (as he then was) and the Court of Appeal in the *Redcar* case. At non-statutory inquiry after non-statutory inquiry, counsel would ask local people whether they had ever interrupted a game of football; and local people invariably replied:

No;

adding something along the lines of:

It would have been discourteous to have done so.

7. Counsel would respond by pointing out that the inquiry was not concerned with the subjective view of the users of the land, and would pass on.

⁵ *Re R (Laing Homes Limited) v Buckinghamshire County Council* [2004] 1 P and CR 573.

8. Of course the fact that users knew that they do not have a right does not mean that their explanation that it was courtesy that led them not to interrupt the game was incorrect, and of course one just does not know what people **actually** thought. As put, one is left with a sense of unease that *deference* was a device to defect applications based on the subjective intention of the users and thus contrary to principle.⁶
9. The correct solution to the legal issue arising evidently lies in the compatibility - or otherwise - of the landowners' use with the use by local people. But this can be read in two ways. One can either say, as the Supreme Court did, that because dog walking is compatible with – in that case – golfing use, dog walking can establish a village green. Alternatively you can say that because the dog walkers never interfered with the landowners use – for whatever reason – the landowner had no reason to think that rights were being asserted. There is a tension here which you may not feel is entirely resolved in the *Redcar* case.
10. I took the school playing field example because the Supreme Court might have been somewhat less keen on registering a school playing field as a village green – both generally and because it might have jeopardised some rebuilding project under, say, the Building Schools for the Future project. The facts in *Redcar* were really the most favourable possible for the applicants. As is well known, there are a number of commons on which golf courses are situated and over which there are public rights of access. And in *Redcar* the land was known as Coatham Common. The golf use went back at least as far as the 1920s – if not earlier – that is essentially as far as living memory. The recreational use would, on the face of it, have gone back as far. (Pausing there,

⁶ This point is made in Riddall *Miss Tomkins and the Law of Village Greens* [2009] Conveyancer 326. And in *Redcar* case itself see the speech of Lord Rodger at paragraph 95.

the land should on this basis have been registered as a village green in 1970, but then, of course, no-one would have thought that a combination of dog walking and informal children's recreation could have led to this result.) And people may genuinely have thought that they did have the right. Paragraph 21 of the Inspector's Report records:

Squadron Leader Kime believed that he and other local people had a right to use the Common. This seemed to have been based on three factors

- *He was under the impression that his title deeds conferred such a right, but was unable to find the relevant "piece of paper".*
- *Some years ago, there had an unsuccessful prosecution of a Mr John Stevenson (known locally as "Young Stivvy") for cutting a fence barring access to the Common from Church Street.*
- *As with many other local people, he believed that because the land was called Coatham Common, the people of Coatham had the right to use it.*

11. Alas, Young Stivvy remains an intriguing mystery – nothing more was forthcoming at the inquiry.
12. There is authority which says that it does not prevent your use being *as of right* if you actually believe that you do have the right.⁷ And the fact that people actually did believe they had the right does strike at the jurisdiction of the doctrine of deference that I have articulated above – namely that deference demonstrates that local people are behaving as those who have not a right.
13. With this by way of introduction, I shall turn to a consideration of the speeches given in the Supreme Court in *Redcar*.

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Lord Walker of Gestingthorpe

14. In *Laing*, Sullivan J held that because local residents kept off some fields when they were harrowed, rolled and fertilised in connection with the taking of a hay crop, they had deferred to the landowner.

15. Lord Walker, bringing to bear his own agricultural knowledge, says that people would have had to have kept off the field for a period of about 3 months. If correct, of course, this supports Sullivan J's analysis. But he concludes:

*Taking a single hay crop from a meadow is a low level activity compatible with recreational use for the late summer and from then until next spring.*⁸

16. Nonetheless he then goes on to say that *Laing Homes* was not necessarily wrongly decided. This is a bit puzzling. It may be that all he is saying is that, with evidence of people using the margin of the fields, there was insufficient evidence of use of the actual fields. This is going to lead to on-going argument at village green inquiries.

17. The key passage in his speech is at paragraph 36.

In the light of these and other authorities relied on by Mr Laurence I have no difficulty in accepting that Lord Hoffmann was absolutely right, in Sunningwell [2000] 1 AC 335, to say that the English theory of prescription is concerned with "how the matter would have appeared to the owner of the land" (or if there was an absentee owner, to a reasonable owner who was on the spot).

But I have great difficulty in seeing how a reasonable owner would have concluded that the residents were not asserting a right to take recreation on the disputed land, simply because they normally showed civility (or, in the inspector's word, deference) towards members of the golf club who were out playing golf. It is not as if the residents took to their heels and vacated the land whenever they saw a golfer. They simply acted (as all the members of the court agree, in much the same terms) with courtesy and common sense. But courteous and sensible though they were (with occasional exceptions) the fact remains that they were regularly, in large numbers,

⁸ See paragraph 28.

crossing the fairways as well as walking on the rough, and often (it seems) failing to clear up after their dogs when they defecated. A reasonably alert owner of the land could not have failed to recognise that this user was the assertion of a right and would mature into an established right unless the owner took action to stop it (as the golf club tried to do, ineffectually, with the notices erected in 1998).

(I emphasise the *but*).

18. He then, as an “add on” to his speech went on to consider the effect of registration. George Laurence QC, for the registration authority said that the effect of registering the land would be to create recreational rights for local people who in exercising them could render the golf use nugatory.⁹

19. He rejected this argument:

The alleged asymmetry between use before and after registration will in most cases prove to be exaggerated. Golfers and local residents can co-exist without much friction even when the latter have established legal rights.¹⁰

20. He does not go into what happens if there **is** a conflict, which might be perceived as a weakness in the reasoning: but it should be recognised that Mr Laurence QC was taking a lawyer’s point. In practice there wouldn’t be a problem; it would be unhappy to allow the theoretically difficult to dictate the determination of the registrability of the land where the **real** issue is the compatibility of the use of local people and the new development that is planned for the land.

21. In passing, Lord Walker disagreed with what Lord Hoffmann said in the *Trap Grounds*¹¹ case, namely that an annual bonfire on Guy Fawkes Day could establish a village green: too sporadic, he said. I once wrote a whole paper on this subject, and it is pleasing to note that at least this

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¹⁰ See paragraph 47.

¹¹ See paragraph 49 in that case.

issue has now been resolved. But Lord Walker does raise the possibility that it might be established as a standalone custom. I once had a case where there was good historic evidence that land had been used for pace egging. On the face of it, the customary right not having been exercised since the Second World War and the land not being registered as a village green, the right must have been lost. But perhaps it could now be vindicated as a stand alone custom?

Lord Hope of Craighead

22. For Lord Hope, as it was not for Lord Walker, the critical question was

*What are the respective rights of the local inhabitants and the owner of the land once it has been registered?*¹²

Laing

23. Having two passages from *Laing*, and Sullivan J's conclusion, Lord Hope said:

This passage suggests that Sullivan J was approaching the case on the assumption that registration was inconsistent with the continued use of the land by Mr Pennington for taking the annual hay crop. In other words, registration would bring non-interference to an end. The public right to use the fields for recreational purposes would make it impossible for them to be used for growing hay.

His approach has also been taken as indicating that in cases where the land has been used by a significant number of inhabitants for 20 years for recreational purposes nec vi, nec clam, nec precario, there is an additional question that must be addressed: would it have appeared to a reasonable landowner that the inhabitants were asserting a right to use the land for the recreational activities in which they were indulging?

*I am not sure that Sullivan J was really saying that there was an additional question that had to be addressed. But if he was, I would respectfully disagree with him on both points*¹³

24. It is difficult to think that Lord Hope thought that there was scope for thinking that *Laing* was correctly decided.

¹² See paragraph 54.

¹³ See paragraph 63.

25. In paragraphs 64-69 Lord Hope reviewed the authorities and reiterated that there are only three “vitiating circumstances” – nec vi nec clan nec precario – and no add on text as to how it appeared to the reasonable landowner. But he then said that *this does not answer Mr Laurence’s point, which was really and quite properly to the first question as to the quality of the uses that is relied on. That, as has been said, is the critical question in this case.*

26. At this point, I’m a little puzzled as to what the critical question is, but Lord Hope goes on (see paragraphs 70-74) to conclude, having considered what authority there was, that there was no incompatibility between the registration of land as a town or village green with the rights that go with that, and the landowner’s continued use. What seems key is that:

... otherwise it would be very difficult, if not impossible, to obtain registration in cases where the owner is putting his land to some other use than, perhaps, growing and cutting grass for hay or silage.

27. He goes on:

Where then does this leave deference? Its origin lies in the idea that, once registration takes place, the landowner cannot prevent use of the land in the exercise of the public right which interferes with his use of it: the Laing case [2004] 1 P & CR 573, para 86. So it would be reasonable to expect him to resist use of his land by the local inhabitants if there was reason to believe that his continued use of the land would be interfered with when the right was established. Deference to his use of it during the 20-year period would indicate to the reasonable landowner that there was no reason to resist or object to what was taking place. But once one accepts, as I would do, that the rights on either side can co-exist after registration subject to give and take on both sides, the part that deference has to play in determining whether the local inhabitants indulged in lawful sports or pastimes as of right takes on an entirely different aspect. The question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. Deference by the public to what the owner does on his land may be taken as an indication that the two uses can in practice co-exist.¹⁴

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See paragraph 75.

28. Lord Hope expressly considers the position where a conflict did in fact arise:

If any of the local inhabitants were to exercise their rights by way of all take and no give in a way to which legitimate objection could be taken by the landowner they could no doubt be restrained by an injunction: Philip Petchey R (Lewis) v Redcar and Cleveland Borough Council. Rights of Way Law Review March 2009, section 15.3 pp 139, 143.¹⁵

29. Finally, Lord Hope emphasises the essential compatibility between recreational and other uses:

There will be periods of the day, such as early in the morning or late in the evening, when the golfers are not yet out or have all gone home. During such periods the locals can go where they like without causing inconvenience to golfers.¹⁶

30. In the case of a school playing field, one sometimes wondered whether it made any difference if the playing field were only as a matter of fact used in the mornings and evenings; as distinct from one where there was use at all times of day and observable deference took place on the ground. Clearly there is now no impediment to registration in the latter case; Lord Hope indicates that registration (subject to sufficiency issues) will be available in the former.

Lord Rodger of Earlsferry

31. Lord Rodger stated the simple position asserted by the applicant:

In this case the local inhabitants' use of the disputed land for recreation was peaceable, open and not based on any licence from the council or the golf club. So, prima facie, the inhabitants did everything that was necessary to bring home to the council, if they were reasonably alert, that the inhabitants were using the land for recreation "as of right".¹⁷

and the counter argument of the registration authority:

But the council argue that, since there were competing interests, the inhabitants' use of the land was peaceable only because they "overwhelmingly" deferred to the golfers' simultaneous use of the same land. Had they not done so, it would have

¹⁵ See paragraph 76.

¹⁶ See paragraph 77.

¹⁷ See paragraph 93.

become contentious. But, because they routinely deferred to the golfers, the inhabitants did not do “ sufficient to bring home to the reasonable owner of the application site that they were asserting a right to use it” : Dyson LJ [2009] 1 WLR 1461 , para 49. In other words, the reasonable owner of the disputed land would have inferred from the behaviour of the inhabitants that they were not asserting a right over the land— and so would have seen no need to take any steps to prevent such a right accruing.¹⁸

32. He then said that it would be unreasonable to draw the conclusion that local users were not asserting a right from an assumption as to local users’ understanding as to the legal position.

Then there is this passage:

96. Such a conclusion might, just conceivably, have been plausible and legitimate if there had been no other explanation for the inhabitants' behaviour. But that is far from so. The local inhabitants may well have deferred to the golfers because they enjoyed watching the occasional skilful shot or were amused by the more frequent duff shots, or simply because they were polite and did not wish to disturb the golfers who— experience shows— almost invariably take their game very seriously indeed. A reasonable landowner would realise that any of these motives was a more plausible explanation for the inhabitants' deference to the golfers than some supposed unwillingness to go against a legal right which they acknowledged to be superior.

33. This suggests that, in Lord Rodgers’ view at any rate, there could be a case where deference might work as an argument. Does one now cross-examine local people about their beliefs? And as I pointed out at the outset, the immediate reason for deference may be politeness but underlying it could be the knowledge that ultimately this is not an entitlement.

Lord Brown of Eaton-under-Heywood

34. Here is the nub of Lord Brown’s approach:

... I may say it once that were it the law that, upon registration, the owner's continuing right to use his land as he has been doing becomes subordinated to the locals' rights to use the entirety of the land for whatever lawful sports and pastimes they wish, however incompatibly with the owner continuing in his, I would hold that more is required to be established by the locals merely than use of the land for the

¹⁸ See paragraph 94.

stipulated period nec vi nec clam nec precario. If, however, as I would prefer to conclude, the effect of registration is rather to entrench the previously assumed rights of the locals, precluding the owner from thereafter diminishing or eliminating such rights but not at the expense of the owner's own continuing entitlement to use the land as he has been doing, then I would hold that no more is needed to justify registration than what, by common consent, is agreed to have been established by the locals in the present case.¹⁹

35. Lord Brown is clear on the nature of the right of local people in the dispensation as he holds it to be:

*... in so far as future use by the locals would **not** be incompatible with the owner continuing in his previous use of the land, the locals can change, or indeed increase, their use of the land; they are not confined to the same "lawful sports and pastimes", the same recreational use as they had previously enjoyed. But they cannot disturb the owner so long as he wishes only to continue in his own use of the land.²⁰*

36. In theory, there could be arguments about the owner's use – e.g. is it use of playing fields generally, use of 2 pitches on Wednesdays and Friday afternoons, or somewhere in between.

Lord Kerr of Tonaghmore

37. Even with the fifth speech, the interest is sustained.

38. What do you make of this passage?

According to Mr George QC, the only exception to the tripartite test arises where the users expressly represent that they are not asserting any right at all. In those circumstances, according to him, they are either benefitting from the implied permission of the owner or they are covertly allowing the necessary period to elapse in which case they fall foul of the requirement that the use of the lands should not be secret.²¹

¹⁹ See paragraph 100.

²⁰ See paragraph 101 (emphasis in the original).

²¹ See paragraph 111.

39. Paragraph 112 appears to me then to go furthest of all the Justices in discountenancing how the matter appeared to the landowner.

The question that has troubled me is, “ What if the inhabitants' engagement in the pastimes and sports is not on foot of an express representation that they are not asserting a right but on the basis of an unspoken understanding by all concerned that they are not doing so?” Is there a reason why, as a matter of principle, there should be any different legal outcome? It appears to me that there is none.

40. His ultimate conclusion brings him – apparently reluctantly – into line with Lord Walker, Lord Hope and Lord Brown. But he makes implicit what would otherwise only be implied, that Lord Rodger is of a different view:

Whatever may have been the position previously, however, it is now clear that, where it is feasible, co-operative, mutually respecting uses will endure after the registration of the green. Where the lands have been used by both the inhabitants and the owner over the pre-registration period, the breadth of the historical user will be, if not exactly equivalent to, at least approximate to that which will accrue after registration.

*On that basis, I am content to accept and agree with the judgments of **Lord Hope DPSC, Lord Walker and Lord Brown JJSC** that no overarching requirement concerning the outward appearance of the manner in which the local inhabitants used the land is to be imported into the tripartite test.²²*

The tripartite test

41. Part of the weakness of the judgments of the Court of Appeal was that “how it appeared to the reasonable landowner” and, hence, the idea of deference was seen as an “add on” to the tripartite test of *nec vi nec clam nec precario*. Better – in a sense - to say that it is implicit in the test itself, but then of course you have the difficulty of explaining in what way that it is.
42. In truth it was open to the Supreme Court to decide the case either way and the answer was not dictated by the answer to this question. Be that as it may

²² See paragraphs 115 to 116.

- Lord Walker does not specifically address whether there is an add on
- Lord Hope is clear that there is not²³
- Lord Rodger is silent
- Lord Brown is clear that there is not and says that *Lord Walker of Gestingthorpe JSC has explained there is nothing in the extensive jurisprudence on this subject to compel the imposition of any such additional test*²⁴
- Lord Kerr evidently endorses Lord Hope's approach²⁵.

43. But one goes round in circles: Lord Hope and Lord Brown both emphasise the quality of the use, which of course is the point that Lord Rodger was stressing.

²³ See paragraph 69.

²⁴ See paragraph 107.

²⁵ See paragraph 116 endorsing paragraph 69 of Lord hope's speech.