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Further Down the Village Green Rabbit Hole

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For the more technically minded among you - Richard Manyon analyses further recent developments on the requisite quality of use in cases of town and village green registrations and prescriptive easements. This article was published in the November 2012 edition of the Rights of Way Law Review.

The Queen on the Application of Mann v Somerset County Council [2012] EWHC B14 (Admin)

Richard Manyon, Partner

Side note: Control of access to claimed TVG as permission

Case Note

On an application for judicial review of a registration authority's decision to reject an application to register land as a town or village green ("TVG") under section 15(2) of the Commons Act 2006 the High Court held that by occasionally excluding members of the public from part of the relevant land, the landowner was making clear that the use of all of the land was by an implied permission. Accordingly such use of the land by members of the public over the preceding 20 year period had lacked the requisite quality of being "as of right" and as such was not sufficient to justify the registration of the land as a TVG.

Background

This was an application for judicial review of the decision by Somerset County Council to refuse the registration of Pen Mill Field in Yeovil ("the Land") as a town or village green. This decision had been made following recommendations from an inspector on the advice of leading counsel, and representations by the parties.

By section 15(2) of the Commons Act 2006 an application may be made for registration where (a) 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 20 years; and (b) they continue to do so at the time of the application.

The freehold in the Land is owned by Punch Taverns Property Ltd (although it is licensed to an individual), who appeared as an interested party in these proceedings. It is about 1.2 hectares in area and is bounded on two sides by the rear gardens of private residences. On a third side there are public allotments. The fourth side is made up of a hotel and hotel car park, which are also owned by the

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interested party. There is no public right of way to the Land but the public had gained access by crossing the hotel car park. There is a ridge running across the Land.

Prior to the decision of Somerset County Council a list of relevant questions had been complied by their counsel, Mr Blohm QC, for consideration by the inspector as follows:-

1. Was there public user of the land for informal recreation over the relevant 20 year period?

2. If so, was the user found by the inspector of such amount and in such manner as would reasonably be regarded as being the assertion of a public right?

3. If the answer to 2 is "yes", it is for the landowner to establish that the user is deficient because it has for all or part of the period been vi, clam or precario- forceful or contentious, secretive or furtive, or permissive. Has the land owner established this?

4. Was the claimed neighbourhood a neighbourhood in fact within the ordinary English meaning of the word?

5. At the date of the application did the claim to neighbourhood fall wholly within Polling Districts 2 and 3 of Yeovil East Ward?

The inspector responded as follows:-

1. There was public user of the application land throughout the relevant 20 ear period but that it was interrupted to the south of the ridge running east-west across the land.

2. User was of such amount and in such manner as would reasonably be regarded as the assertion of a public right.

3. User was neither by force nor stealth. The landowner has established that the user was permissive.

4. Yes.

5. Yes.

The facts relating to the permission found by the inspector were that the interested party "occasionally" held beer festivals and funfairs on part of the Land. When they did so, they would charge members of the public an entrance fee to enter the affected part of the Land, and denied access to that part of the Land to those who did not pay (although public access to the remainder of the Land was unaffected).

The inspector considered the requirement for a landowner when seeking to show an implied licence, under R (Beresford) v City of Sunderland ("Beresford")**[1]**, to be able to show overt acts to make clear that the use of the Land was by their permission, and considered the rule in R (Lewis) v Redcar & Cleveland Borough Council ("Redcar") that acquiescence or deference was not sufficient**[2]**. In light of these authorities the inspector found that "by the landowner charging for entrance to the beer festival marquee and for the use of the funfair activities [this] gives rise to the implication that use of the remainder of the application land on other days was with his permission".

The inspector concluded: "the fact that access was denied to only a relatively limited proportion of the application land and on only a few occasions while local people continued to use the remainder of the land seems to me beside the point...the important point is that, in the context of Beresford, the landowner, even in denying access to only a limited area of land and only on a few occasions, was asserting his right to exclude. In so doing, he was making it plain that the inhabitants' use on other occasions occurred because he did not choose...to exclude and so was permitting such use. I see no reason to infer that he was only asserting such a right only in respect of the footprints of the facilities."

The registration authority followed the recommendation of the inspector and rejected the application for

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registration of the land as a TVG on the basis of implied permission.

The Proceedings

The question before Robert Owen QC (sitting as a High Court Judge) was whether the registration authority was entitled to come to this conclusion on the evidence and facts of the case. He summarised the question as follows: "whether the inspector [and therefore the registration authority]...misdirected himself as to the significance or effect in law of the owner's conduct in question which he found to be sufficient to establish the grant of an implied licence."

Mr Chapman QC (appearing for the claimant) framed the essential question as: "did the holding of beer festivals for a few days on a small part of the field amount, as a matter of fact, to the implied grant by the landowner to local people of permission to use the whole field?" With the exception of the words "for a few days" and "small". the defendant agreed that this was a fair summary. The interested party had no objection to Mr Chapman's formulation of the question.

Mr Chapman went on to summarise that there were five apparently contentious issues in the case as follows:-

> i. Whether the defendant was right to refuse to register the Land on the ground that it could be inferred from the holding of beer festivals and funfairs on part of the field that local people were using the whole field with the permission of the landowner.
>
> ii. If not, whether the defendant should have accepted the inspector's alternative recommendation as to registering only the northern part of the field on the ground that the beer festivals and funfairs had interrupted use on the southern part.
>
> iii. Was the application bound to fail because the locality relied upon were Polling Districts which were said to be incapable of being a locality within the meaning of the section? This issue was raised only by the interested party.
>
> iv. Was the application bound to fail because the quality of use of the local people did not meet the minimum threshold for registration as a new green? That is, must the claimant (first) establish something more than, or additional to, use as of right?
>
> v. In the event that the decision is to be quashed and the matter be remitted, on what basis should it be remitted?

The first of these was the main point of dispute in the case and will therefore be examined in particular detail.

Implied Permission

There was no dispute that the public had made use of the land over the 20 years preceding the application. The Court stated that the claimant must make it appear that such use has been "as of right" or "nec vi, nec clam, nec precario". Having established this prima facie the Court held that the onus shifted to the landowner to show that in fact the use was not as of right and that one of Lord Hoffmann's vitiating circumstances in R v Oxfordshire County Council ex parte Sunningwell Parish Council ("Sunningwell") **[3]** was present. There was no additional requirement for the claimant to make out in light of Lord Walker's judgment in Redcar[4] and Lord Neuberger's decision in London Tara Hotel Limited v Kensington Close Hotel Limited ("London Tara Hotel")**[5]**.

The Court held that this was a case where the evidential burden fell on the defendant to show that one of the vitiating circumstances was present, in this case that a permission should be implied from the conduct of the landowner.

The Judge, in examining this area, placed heavy reliance on Beresford**[6]** and concluded that that case

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was authoritative guidance that the owner must make it clear that the public's use of the land is with his permission and that that may be shown by excluding the public on occasional days; the owner must do something on his land to show that he is exercising his rights (as owner) over his land and that the public's use is by his leave; there must be a positive act by owner; implied consent by taking a charge for entry or similar overt act communicated to the public is sufficient without the need for express explanation or notice; such conduct need only occur from time to time and such conduct will be expected to have an impact on the public and show that when the public have access they do so with the leave or permission of the owner.

In light of this guidance the Court found that there was an implied licence in this case because the landowner had unequivocally exercised its right as owner to exclude and the owner did not have to do more than it did to bring it home to the reasonable local inhabitant that this right was being exercised and that the use by the local inhabitants was pursuant to a permission. It was sufficient to exclude the public occasionally from part of the land to convey this.

The Court rejected the argument by the Claimant that this case was on all fours with Redcar in that it was a case involving co-existing uses by the landowner and the public, meaning that there was no implied licence but merely "deference" on the part of the public. If the Claimant had been able to show that only such deference existed (rather than overt permission) then there would have been no hurdle to showing that the public use included the required ingredient of being "as of right"**[7]** and the claim for registration may well have succeeded.

In Mann, the Court took the view that this was not a case of simple deference. Instead there was an overt act of exclusion (from part of the Land) giving rise to the implication of a licence affecting the whole. The acts of the landowner had been without regard for the position of the public and demonstrated that the right to exclude was being exercised, leading to the inference or implication of permission for the remainder of the time. While the law does expect a landowner to do something when faced with the use of his land by others, in this case the interested party did so by taking action which showed to the reasonable onlooker that the right to exclude was being exercised.

The Court therefore affirmed the decision of the inspector and the defendant registration authority. Having reached this conclusion, question 2 of those posed by Mr Chapman QC (see above) fell away, and questions 3 and 5 were resolved in the defendant's favour.

This leaves the fourth of Mr Chapman's questions which, although not critical to the decision of the Court that the claim should be dismissed, raises interesting issues which should be addressed.

Quality of Use

This point was advanced by the interested party only, without support from the defendant. It was summarised by the Court as being that "the subjective belief of the local inhabitant was not irrelevant" and that "their use must be such as to convey to the reasonable owner that they believed they were exercising a right".

It is of course surprising that the interested party would advance any argument based on the subjective belief of the users of the Land in light of Lord Hoffmann's ruling in Sunningwell**[8]** that "to require an inquiry into the subjective state of mind of the users of the road would be contrary to the whole English theory of prescription... for this purpose, the actual state of mind of the road user is plainly irrelevant". The Court made this point in its judgment in this case when it rejected the quality of use argument.

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In a Note to the Judge after the handing down of his judgment, counsel for the interested party made clear that they had not intended to argue that the subjective belief of the user was relevant but simply that, in cases relating to TVGs and prescriptive easements, it is not sufficient for the claimant simply to show use of land and the absence of all three of Lord Hoffmann's vitiating circumstances. The interested party argued that there should be an additional requirement on the claimant to show that their quality of use was sufficient to "reasonably be regarded as the assertion of a...right"**[9]**.

In this case the interested party argued that this additional requirement was not satisfied because a reasonable landowner would not have believed that any right was being asserted by the public in light of the periodic exclusion of the public from part of the Land.

The Court in Mann did not directly address this point, although the relevant authorities were referred to. In support of its argument the interested party pointed to the judgment of Lord Hoffmann in Sunningwell **[10]** that the user(s) "must have used [land] in a way which would suggest to a reasonable landowner that they believed they were exercising a public right" and the judgment of Lord Hope in Redcar**[11]** that there is a question to be answered before Lord Hoffmann's vitiating circumstances come to be considered about the "quality of the user during the 20-year period" and whether it is sufficient to mean that the landowner should be "taken to have acquiesced" in the relevant use.

Against the interested party's exposition of this high authority are seemingly ranged other authorities referred to in the judgment in Mann suggesting that quality of use is not a separate matter to be considered, most notably:-

> a. the judgment of Lord Brown in Redcar**[12]**: "I see no good reason whatever to superimpose upon the conventional tripartite test for the registration of land which has been extensively used by local inhabitants ... a further requirement that it would appear to a reasonable landowner that the users were asserting a right to use the land";
>
> b. the judgment of Lord Kerr in Redcar**[13]** that the test of use "is satisfied if the use has been open...that [it] did not take place in secret; and that it was not on foot of permission from the owner. If the use of the lands has taken place in such circumstances... it is ipso facto reasonable to expect an owner to resist or restrict the use if he wishes to avoid the possibility of registration".
>
> c. the judgment of Lewison LJ in London Tara Hotel**[14]**: "this is clear authority at the highest level that if a use satisfies the tripartite test (not by force, nor stealth, nor the licence of the owner) then a prescriptive right will be established. There is no further criterion that must be satisfied. As Lord Kerr put it, once those three criteria are established it is ipso facto reasonable to expect the landowner to challenge the use. In other words, once these three criteria are established the owner is taken to have acquiesced in the use."

The Court in Mann ruled that there was no conflict between these authorities and that no additional quality of use requirement can be imported into the law of TVGs (and prescription). It decided that, once the amount and manner of use was sufficient to be taken as the assertion of a right, the only relevant considerations were Lord Hoffmann's three vitiating circumstances vi, clam or precario. If these are absent, and a claim can be made out, that is the end of the matter.

Comment

Landowners will welcome this decision in that it confirms that irregular exclusion of the public from part of a piece of land may operate to communicate to a reasonable observer that use of the whole of the land is by the landowner's permission. Any alternative ruling would raise grave difficulties in deciding what amount of land would need to be the subject of exclusion, and with what frequency, to allow a successful resistance to be amounted to a claim that adverse rights had been acquired. The decision might be seen as harsh on the users however, who, it was agreed, were able to use the majority of the land undisturbed by any exclusion at all times and as such an appeal may be in the pipeline.

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On a more fundamental level, the quality of use argument raised by the interested party forms part of an ongoing debate in this area of the law. Is it the case that a claimant need only show regular use of land and the absence of Lord Hoffmann's three vitiating circumstances in order to succeed in an application for the registration of a TVG (or in a claim for a prescriptive easement)? This is the approach espoused in this case and in London Tara Hotel.

Alternatively, is it the case that there is an additional requirement that a claimant should have to show that the quality of their use was such as to put a reasonable landowner on notice that an adverse right was being asserted? Parties in TVG and prescriptive easement litigation have been seeking to show that this is the case, although it has not found favour with the Courts as yet. Clearly some enquiry as to the nature and frequency of the use is permissible (very occasional use for example would be unlikely to give rise to a permanent right) and if this is the case, might there not be other, less obvious issues that might affect whether a right appears to be being asserted which may vary according to the facts of individual cases? It may be that this problem will only be solved by another case coming before the Supreme Court. In the absence of a further clear ruling on the subject, it seems likely that the argument of an additional quality of use requirement in these cases will continue to be advanced.

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V Chapman QC (instructed by Edward Harris) for the Claimant

L Blohm QC (instructed by Somerset CC Legal Department) for the Defendant

G Laurence QC (instructed by TLT LLP) for the Interested Party

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Endnotes:

[1] [2003] UKHL 60 paragraph 5.

[2] [2010] 2 AC 70

[3] [2000] 1 AC 335, page 350H-351B.

[4] Supra, paragraph 20.

[5] [2012] 2 All ER 554, paragraph 28.

[6] Supra Note 1, paragraphs 5, 6, 59, 75, 76, 79 and 83.

[7] Supra Note 2, paragraph 15.

[8] Supra Note 3, page 355B.

[9] Supra Note 2, per Lord Hope paragraph 67

[10] Supra Note 3, per Lord Hoffman page 354F

[11] Supra Note 2, per Lord Hope paragraph 67

[12] Supra Note 2, per Lord Brown paragraph 107

[13] Supra Note 2, per Lord Kerr paragraph 116

[14] Supra Note 5, per Lewison LJ paragraph 74

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