

## The Sunningwell Case

### Full name of case

*R v Oxfordshire County Council and others, ex parte Sunningwell Parish Council*  
(House of Lords, 1999)

### Case reference

UKHL 28; [2000] 1 AC 335; [1999] 3 ALL ER 385; [1999] 3 WLR 160

### Summary

The judgment significantly changes the criteria by which registration authorities are required to determine applications to register town or village greens and defines 'lawful sports and pastimes' and 'as of right'.

### Issues considered

#### Lawful sports and pastimes

These activities do not need to be either organised sports or have a communal element. Activities such as dog walking, kite flying, solitary or family activities are sufficient to justify registration as long as there is an established pattern of use and it is not 'trivial and sporadic'.

#### As of right (Section 22(2) Commons Registration Act 1965)

The law prior to the Sunningwell judgment was based on the case of Steed which stated that it required 'an honest belief in a legal right to use ....'

Lord Hoffmann, in the Sunningwell judgment, states that 'the actual state of mind of the ..... user is plainly irrelevant'. The subjective element has therefore been removed. It is now only necessary to provide evidence that the green has been used for lawful sports and pastimes

- without force
- without secrecy
- without permission.

The judgment also states that, if the use of the land was subject to 'neighbourly toleration' by the landowner, this will not defeat an application unless there is strong evidence to show that the use as of right was not consistent with any toleration.

#### The inhabitants of any locality

The use of the land must be 'predominantly' by the local inhabitants and use of the land by some members of the general public will not be sufficient to defeat an application. In Sunningwell people from outside the village used a public footpath on the glebe but the evidence showed that it was mainly the villagers who used the land for 'sports and pastimes'.

However the issue of locality was not discussed by Lord Hoffmann and remains a complex evidential issue. The key locality tests are:

- is there a particular and recognisable community or neighbourhood where most of the recreational users of the land live or work?
- can the boundaries of this locality be clearly shown on a map?
- locality cannot be defined only by reference to persons; it must be defined by reference to geography.

## **Commentary**

The decision means that a successful application to register a village green will result in the inhabitants being able to continue to enjoy activities on the land in perpetuity and will almost certainly have the protection of section 29 of the Commons Act 1876 which will prevent any encroachment or enclosure.

## McAlpine/Staffordshire Case

### Full name of case

*R on the application of Alfred McAlpine Homes Ltd v Staffordshire County Council*, 17 January 2002

### Case reference

QBD CO/2653/2001

### Summary

In the High Court Mr Justice Sullivan rejected the argument by the claimant that ‘significant number’, in the context of section 22 (1) of the Commons Registration Act 1965 as amended by the Countryside and Rights of Way Act 2000, means ‘a considerable or a substantial number’. He said that the number of people using the land has to be *sufficient to indicate that it is in general used by the local community for informal recreation*. Oral evidence was given by 16 witnesses at the inquiry about their own use of the land over the 20-year period and what they saw others doing. This was corroborated by numerous written statements.

In summary, Mr Justice Sullivan ruled that a registration authority could register a part of the land for which an application was made, and that ‘significant’ is a matter of impression after analysing the evidence. What matters is that the number of people using the land is sufficient to indicate that it is in general used by the inhabitants of any locality or neighbourhood within a locality.

### Issues considered

Alfred McAlpine Homes Ltd sought judicial review of Staffordshire County Council’s decision of 23 May 2001 to accept an application for the registration of land at Ladydale Meadow in Leek as a village green.

There were two issues:

1. that there was no evidence to support the inspector’s conclusion that the number of inhabitants using the land was ‘significant’ as defined in section 98 of the Countryside and Rights of Way (CROW) Act 2000,
2. that there was no power to accept an application for registration in relation to part only of the land applied for.

On 27 October 1999, an application was made to register Ladydale Meadow as a village green. This is rough, unimproved grassland, once parkland of Pickwood Hall. The meadow was allocated as part of a proposed housing site in the Staffordshire Moorlands local plan, adopted in 1998.

In 1999 Alfred McAlpine Homes Ltd applied for planning permission to build 24 houses there. This was granted after a public inquiry in June 2000 so, clearly, the outcome of the green application was of great importance to McAlpine.

A non-statutory inquiry into the green registration was held in February 2001 with Mr Vivian Chapman QC as inspector. He recommended that the registration authority should accede to the application, but he advocated a boundary within the application area which identified land which was both the subject of the application and was proved to have been used for recreation by local people for more than 20 years.

The judge said the inspector was entitled to have regard to the fact that the meadow was within easy walking distance from the centre of Leek, that the Carriage Drive gate was rarely locked and that there were no signs forbidding entry.

In respect of the second issue the council proposed to register a smaller area than had been applied for. There is no express power in either the act or regulations to register a smaller area of land. The regulations require the land to be identified but the judge recognised that most applicants are not expert cartographers.

He considered that the reason for identification was so that the registration authority can give notice to owners, lessees, tenants, occupiers and others who might wish to object.

The judge concluded: 'provided the boundary is not altered in such a way as to defeat the purpose of defining the land in the application form, there can be no sensible objection to the registration authority cutting down the extent of land to be registered'.

He also stressed that the only consequence of him quashing the council's decision to register a lesser area would be that a fresh application would be submitted and the same conclusion, to register the land, would be reached.

The claimants were ordered to pay the council's costs and given leave to appeal.

### **Commentary**

This is the only case to date which considers a definition of 'significant number'.

## **The Beresford Case**

### **Full name of case**

*R v City of Sunderland ex parte Beresford* (House of Lords, 2003)

### **Case reference**

UKHL 60

### **Summary**

This case considered the meaning of the phrase 'as of right'. The encouragement of the use of the land by the provision of benches and regular cutting of the grass reinforced, rather than undermined, the impression that local people were using the area 'as of right'.

### **Issues considered**

The local authority, Sunderland City Council, who owned the land, argued that by mowing the land and erecting seating they had given implied permission for people to use the land. They argued that such implied permission defeated any contention that use was 'as of right' because they had given permission. The Lords rejected this argument and confirmed that the land should be registered as a town or village green.

### **Commentary**

This is an important decision, particularly where land is owned by a local authority.

## The Laing Homes Case

### Full name of case

*R (on the application of Laing Homes Ltd) v Buckinghamshire County Council and the Secretary of State for the Environment, Food and Rural Affairs* (High Court, 2003)

### Case reference

EWHC 1578

### Summary

Laing Homes, which had bought the land in 1963 with a view to developing it for housing, applied to the court to quash Buckinghamshire County Council's decision to register the land. It did so on four grounds.

1. There was insufficient evidence of use of the whole of the land to justify its registration as a green.
2. The public inquiry inspector erred in concluding that the use of the fields for an annual hay-cut for well over half of the 20-year period was compatible with the establishment of village green rights (a farmer Mr Pennington, had taken an annual hay crop from the fields from about 1982 to the early 1990s).
3. The use was not as of right.
4. An ecclesiastical parish cannot be a 'locality'.

The judge, Mr Justice Sullivan, upheld grounds 1, 2 and 3 and rejected ground 4, quashing the decision of Buckinghamshire County Council to register as a village green three fields totalling 38 acres at Widmer Farm, Widmer End, near Hazlemere.

### Issues considered

Buckinghamshire County Council had resolved to register the land as a green, on 8 April 2002, following a public inquiry in 2001 into the application from Grange Action Group. The applicant had to show that the land had been used by people from the locality for lawful sports and pastimes for at least 20 years, without interruption and without permission.

Laing Homes appealed against this decision and also sought a declaration under section 4 of the Human Rights Act 1998 that sections 13 (3) and 22 of the Commons Registration Act 1965, which provide for the registration of land as a green, were incompatible with Article 1 Protocol 1 to the European Convention on human rights.

The judge accepted that these issues were ones of fact and degree in each case. He said that 'like the inspector, I have not found this an easy question...Rough grazing is not necessarily incompatible with the use of the land for recreational purposes...I do not consider that using the three fields for recreation in such a manner as not to interfere with Mr Pennington's taking of an annual hay crop for over half of the 20 year period, should have suggested to Laings that those using the fields believed that they were exercising a public right, which it would have been reasonable to expect Laings to resist.'

The judge considered it would be inappropriate for him to resolve the human rights issue, in spite of the 'wide-ranging and important issues of principle', which were raised. He said that, as he had decided the application under domestic law in favour of the claimant, the human rights issue did not arise and he could not resolve this on a hypothetical basis. (The society believes that there is no infringement of human rights, particularly if registration is necessary for the preservation of the environment and/or is in the interests of the community, as these are principles which are applicable to article 1 protocol 1.)

## Trap Grounds

### Full name of the case

*Oxfordshire County Council (Respondents) v Oxford City Council (Appellants) and another (Respondent) (2005) and others*

### Case reference

[2006] UKHL 25

### Summary

- The Court of Appeal was wrong to conclude that action taken by an owner on land after an application to register it as a green can prevent its registration;
- recreational use by local people ‘as of right’ must continue until the date of the application, in order to justify registration under the law as it currently stands;
- the nineteenth-century protective statutes (section 12 of Inclosure Act 1857 and section 29 of Commons Act 1876) apply to new greens once registered;
- such land becomes a green on registration, with legal rights for local inhabitants to indulge in lawful sports and pastimes there;
- human rights law is not infringed by registration of land as a green; and
- registration authorities can exercise discretion in accepting amended application.

### Issues considered

The key issues in this case were whether registration of land as a green, based on 20 years lawful sports and pastimes, gives the relevant inhabitants *rights* to indulge in lawful sports and pastimes on the land, and whether registration brings the land within the scope of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876, which protect the land from encroachment. A further issue was whether a claim may be founded on qualifying user for any period of 20 years, or whether the lawful sports and pastimes must continue up to the date of the application to register, the date of registration or some other date.

We set out the rulings and guidance which were sought. We have summarised in italics after each what the Lords’ findings were.

### Rulings

#### a) *Substantive effect of ‘class c’ registration*

- 1 Whether the relevant inhabitants have rights to indulge in lawful sports and pastimes on land which has become (within the meaning of section 13 of the 1965 Act) a class c green.

Land can be registered as a ‘class c’ green under the Commons Registration Act 1965, (as amended by section 98 of the Countryside and Rights of Way Act 2000) where there has been significant use of the land for not less than 20 years, by the inhabitants of any locality, or of any neighbourhood within a locality, for lawful sports and pastimes, as of right.

*Registration of land as a ‘class c’ green does confer rights on the part of local inhabitants (however defined) to indulge in sports and pastimes on that land.*

- 2 Whether land which has become (within the meaning of section 13 of the 1965 Act) a ‘class c’ green falls within the scope of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876.

*Such registration is conclusive that the land is a town or village green within the scope of (inter alia) section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876.*

**b) *The effect of the amendment in section 98 of the Countryside and Rights of Way Act 2000***

- 3 The meaning of the words ‘*continue to do so*’ in the amended definition, for which purpose the court was asked to rule whether (in the absence of regulations made under section 22(1A)(b) of the 1965 Act) the lawful sports and pastimes must continue up to (a) the date of the application to register or (b) the date of registration or (c) some other (and if so what) date.

*The words ‘continue to do so’ in the amended definition mean that the lawful sports and pastimes must continue to the date of application.*

- 4 Whether all applications for registration of land as a class c green made on or after 30 January 2001 automatically engage (and engage only) the amended definition.

*Any application for registration of land as a class c green made on or after 30 January 2001 automatically engages (and engages only) the amended definition.*

**c) *‘Free-standing’ periods of use***

- 5 Whether the application could as a matter of law (if supported by appropriate facts) succeed on the basis stated by Miss Robinson in Part 4 of her application, namely that the land became a green on 1 August 1990, or whether (subject to (6) below) an application which specifies in Part 4 a date earlier than the date immediately preceding the date of the application must fail.

*The application could not as a matter of law succeed on the basis that the land became a green on 1 August 1990.*

**d) *Amendments to the application***

- 6 Whether Oxfordshire County Council has the power (the city council not objecting) to treat the application as if a different date (namely a date immediately preceding the date of the application) had been specified in Part 4, and to determine the application on that basis.

*The county council has power to treat the application as if a different date had been specified in Part 4, and to determine the application on that basis.*

- 7 Whether as a matter of law it is open to the county council to permit the application to be amended so as to refer to some lesser area (such as by excluding the part known as ‘the reed beds’ and/or a ten-metre strip along the western boundary of the part known as ‘the scrubland’), and if so, according to what criteria.

*As a matter of law, it would be open to the county council on proper consideration to permit Miss Robinson’s application to be amended to refer to a lesser area, as proposed by her.*

- 8 Whether as a matter of law it is open to the county council (without any such amendment being made) to accept the application in respect of, and to register as a green, part only of the land included in the application, such as the part known as ‘the scrubland’, and if so, according to what criteria.

*As a matter of law, it would be open to the county council on proper consideration to register as a green part only of the land included in the application.*

**e) Evaluation of evidence**

- 9 How the county council should approach the application in the light of the evidence reported by the Inspector in relation to user of the main track and subsidiary tracks and his estimate that only about 25% (or less) of ‘the scrubland’ is reasonably accessible; and
- 10 the relevance of the existence or potential for the existence of public rights of way.

Issues (ix) and (x) are matters of fact and degree for evaluation by the authority.

**Commentary**

Trap Grounds, open space in north Oxford, has now been registered as a green.

On 24 May 2006 the Law Lords reversed the court of appeal decision, which had required evidence of lawful sports and pastimes to continue right up until registration of land as a village green. Now it is only necessary to provide evidence of 20 years’ use to the date of application.

(Subsequently, section 15 of the Commons Act 2006 amended the legislation to take account of the rulings in this case.)

To view a copy of this judgement, visit:

<http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060524/oxf-1.htm>

## The Whitmey Case

### Full name of case

*R on the application of Whitmey v Commons Commissioners* (Court of Appeal, 2004)

### Case reference

[2004] EWCA Civ 951

### Summary

The judges concluded that the commons commissioners have no jurisdiction for registering greens in a dispute arising under section 13 of the Commons Registration Act 1965

### Issues considered

Christopher Whitmey, a trustee of the Hereford Diocesan Board of Finance, brought the action in a personal capacity following Stephen Tunnicliffe's application to Shropshire County Council to register the board's land as a village green.

Mr Whitmey contended that, when registration is opposed, it should be referred to the commons commissioners, and that registration authorities do not have jurisdiction to decide disputed applications.

The 1965 act sets out the system for initial registration, which ended on 2 January 1970. If an objection was made, the registration was referred to a commons commissioner (section 5(5), (6), (7)). However, the judges agreed that section 5(7) applies only to objections to the registration of land under section 5, ie the initial registration, and not to objections to applications under section 13 (where the land has since become a green).

The court was asked to decide whether the registration authority has the power to decide disputes. Lady Justice Arden, giving the leading judgment, confirmed that there are three ways in which disputes under section 13 can be determined.

1. An application to the court for a declaration that land is or is not a village green.
2. The registration authority can itself determine the matter.
3. Following registration, a dissatisfied party can apply to the court for rectification of the register under section 14(b) of the 1965 act.

The registration authority is not empowered by statute to hold a hearing, but it has various powers under section 111 of the Local Government Act 1972 which would allow it to call an inquiry. In the event of a serious dispute, an authority making a determination should proceed only after receiving the report of an independent legal expert following a non-statutory inquiry.

Mr Whitmey also sought advice on whether the procedure violated article 6 of the Convention of Human Rights. This states that 'in the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...'. The court held that there was no breach of article 6, as a subsequent application to the court, by judicial review, was not prejudiced. (*R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295).

### Commentary

This case confirms that registration authorities have powers to determine town and village green applications.