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.)
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, i.e. 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.
Yeadon Banks

Full name of case

Leeds Group plc v Leeds City Council

Case reference

[2010] EWCA Civ 1438

Summary

The Court of Appeal has ruled in Leeds Group plc v Leeds City Council [2010] EWCA Civ 1438 but the case is not yet concluded.

The appeal was against the 7 May 2010 order of His Honour Judge Behrens in the High Court, who dismissed two claims by Leeds Group plc relating to the registration of two hectares at Yeadon Banks, on the outskirts of Leeds, as a village green. The application for registration was made by our member the Keep Yeadon Banks Green group (KEYBAG) led by Doug Jones. Leeds Council appointed barrister Alun Alesbury to hold a public inquiry; he recommended that the land be registered and the council agreed, in February 2007. The owner of part of the land, Leeds Group plc which wanted to sell it for development, appealed to the High Court and then the Court of Appeal.

Issues considered

There were two issues before the court: whether the word ‘neighbourhood’ in subsection 22(1A) of the Commons Registration Act 1965 should be interpreted to include the plural, and whether the user evidence was of adequate quality.

At the time the application was made, in July 2004, the Commons Act 2006 had not been passed. The application therefore relied on the definition of greens in the Commons Registration Act 1965 as amended by section 98 of the Countryside and Rights of Way (CROW) Act.

The Commons Registration Act 1965 defined a green as land on which the inhabitants of any locality have indulged in lawful sports and pastimes as of right for not less than 20 years. The CROW Act amended this to land on which a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, for not less than 20 years. Therefore, with effect from 30 January 2001 when section 98 of the CROW Act took effect, the concept of ‘neighbourhood’ was introduced into the greens definition. This was retained in the Commons Act 2006 section 15.

Alun Alesbury concluded that in the evidence two areas each qualified as a neighbourhood, but alternatively these areas could be taken together to qualify as one neighbourhood. In the High Court, the appellant challenged the ruling that ‘neighbourhood’ included ‘neighbour-hoods’, but this was rejected by the judge.

Court of Appeal

The matter was raised again in the Court of Appeal. Lord Justice Sullivan, in the lead judgment, said that applying the normal rules of statutory construction, the singular includes the plural unless the contrary intention appears. He concluded that there was ‘no logical reason why “any neighbourhood” should not include two or more neighbourhoods’. Lady Justice Arden agreed with him but Lord Justice Tomlinson dissented. Therefore, the appeal was rejected on that point.
The other matter was about the quality of the user evidence. Until 30 January 2001 the user had to be from a locality; after that date it qualified if it came from the immediate vicinity of the land, i.e. from the neighbourhood. George Laurence QC for the landowners argued that their predecessor could not reasonably have been expected, before 30 January 2001, to resist the assertion of any right by people living in the immediate vicinity of the land because before that time there was no basis in law whereby user by such a limited class of people could result in the land becoming registrable as a green.

He referred to the proposition of Lord Walker in *R (Lewis) v Redcar and Cleveland Borough Council* [2010] 2 AC 70 (*OS* summer 2010 page 3) who said that ‘if the public … is to acquire a right by prescription, they must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him’. Mr Laurence said that the user by such a limited class of the public was not, to use Lord Hope’s words in *Redcar* ‘of such amount and in such manner as would reasonably be regarded as the assertion of a public right’.

**Commentary**

The theory is that the landowner was content for people within the immediate vicinity of the green to use the land because, until 30 January 2001, they could not contribute to the evidence for registering the land as a green. In practice, was the landowner aware of who was using the green and whence they came? Unlikely.

Mr Laurence asked that the grounds for appeal be amended to include a ruling on whether the change in law by the CROW Act took away the vested rights of an owner of the land insofar as the applicant relied on acts of use under the amendments brought about by section 98 of the CROW Act, which would be insufficient to give rise to a green at common law. The court is to reconvene to consider this point and therefore the outcome of the registration of Yeadon Banks is not yet determined.
Merton Green

Full name of case
BDW Trading Ltd (t/a Barratt Homes) v Spooner (representing the Merton Green Action Group) and another

Case reference
[2011] EWHC B7 (QB) (15 February 2011), case no OCF90671

Summary
Village green rights can be overridden by rights of development in certain circumstances, so that the protective provisions of section 12 of the Inclosure Act 1857 and 29 of the Commons Act 1876 do not apply to the land. The circumstances are that the land has been appropriated by a local authority under section 122 of the Local Government Act 1972 for planning purposes, notwithstanding that it is a common or village green.

Issues considered
The land consists of 12 hectares of open space in Caerwent, Monmouthshire. Outline planning permission for residential development was granted in June 2006.

In March 2007, Monmouthshire County Council (MCC) appropriated the land for planning purposes (ie approved its change of use from open space to development land). In October 2007 the claimants, Barratt Homes Ltd, bought the land from the council for £10.9 million. MCC granted full planning permission and in March 2010 Barratt began to build.

Meanwhile, in July 2008 the Merton Green Action Group, a member of the OSS, led by Anne-Marie Spooner, had written to Barratt Homes indicating its intention to apply to register the land as a village green. In July 2009 the group made the application. MCC held an inquiry in November 2010. There, Barratt Homes, the objector, contended that section 241 of the Town and Country Planning Act 1990 (TCPA) by which the land was appropriated for development, overrides section 15 of the Commons Act 2006, by which the land was registered as a green and thus protected by nineteenth-century legislation. Therefore, argued Barratt’s QC Anthony Porten, any village green rights which might have accrued on the application land have been displaced by the objector’s rights to develop the land in accordance with planning permission.

In January 2011, the inquiry inspector Sue Arnott recommended that the bulk of the land be registered, but because the registration process does not take account of the effect of appropriation, she could not rule on that matter.

In April 2010 Barratt Homes had offered to sell affordable housing units to a housing association, Melin Homes Ltd. In September 2010 Melin Homes refused to buy until the village green application had been defeated or Barratt Homes’s contention that section 241 prevailed had been upheld in court. So in January 2011 shortly after the inspector’s report was published, Barratt Homes went to the High Court for a declaration on the matter, before His Honour Judge Seys Llewellyn QC.

Section 122 of the Local Government Act 1972 gives the power of appropriation for planning purposes to a council such as MCC. By section 233 of the TCPA, where any land has been acquired or appropriated by the local authority, the authority may dispose of the land in order to secure its best use. Section 241 of the TCPA provides that ‘notwithstanding anything in any enactment relating to land which is or forms part of a common [which includes ... any town or village green], open space [which includes any land used for the purposes of public recreation] or fuel or field garden allotment ... such land which had been acquired by a ... local authority ... may be used by any person in any manner in accordance with planning permission’. At the time of appropriation the land was open space but not registered as a green.
The action group argued among other things that there was nothing in section 241 to indicate that it applied to subsequent specific legislation, and there is nothing in the Commons Act 2006 to indicate that registration as a green must give way to the TCPA.

On the other hand the claimant argued that section 241 refers to ‘any enactment’ and does not state that it is restricted to enactments prior to it. If anything in the Commons Act 2006 was intended to take away the provision in the TCPA, it would have been spelled out.

The judge said that Bennion on Statutory Interpretation establishes that ‘(1) the courts presume that parliament does not intend an implied repeal of an earlier statute; (2) the presumption against implied repeal is stronger where modern precision drafting is used; (3) the presumption is also stronger the more weighty the enactment said to have been repealed; and (4) the presumption is subject to the well-recognised countervailing presumption that a general provision does not derogate from a special one’.

The judge considered that the TCPA provided ‘the fundamental legislative architecture for planning use of land, with both general over-arching provisions, and highly detailed specific provision for individual areas’. The language of section 241 is entirely general, ‘notwithstanding anything in any enactment’, and the judge considered that ‘it would be natural, if parliament intended this to refer only to prior or previous enactment, for the statute to say so expressly’.

In his opinion it was not sufficient to say that the 1990 act is of general application and that the Commons Act 2006 is specific or particular. ‘In relation to village greens, s241 TCPA 1990 is specific in its prescription. In relation to village greens, it is the Commons Act 2006 which is the more general in application.’

He then checked against the Bennion tests and concluded: ‘I see considerable force in the contention for the claimant that (1) the starting point here is to presume against repeal; (2) the presumption is stronger because the Commons Act 2006 is an example of modern precision drafting.’ For (3) the claimant contended that the ‘presumption is yet stronger because the TCPA is the principal act regulating the planning system for the whole of England and Wales’. While the judge felt the proposition may be too simple, he adopted his earlier comments on this. On (4), the judge considered it is the Commons Act 2006 which is the more general provision and the TCPA which is the more specific one.

However, Rhodri Williams QC, counsel for the action group had pointed out that section 15 does not apply where planning permission was granted before 23 June 2006 on the land and construction works were commenced before that date, and the land had or would thereby become permanently unusable by members of the public. Such land cannot be registered as a green under section 15. The action group argued that section 15 therefore made strictly limited and defined provision protecting a developer where construction was commenced before a defined date. The 2006 act could have made provision in terms of s241 TCPA but it did not do so, and this was a further indication that the 2006 act should prevail.

The judge considered that this did not necessarily mean that parliament, in protecting the position of the developer in section 15, intended to abrogate the provisions of s241. Alternatively, or additionally, ‘parliamentary draftsmen may have had in contemplation that s241 did already make specific provision, and in wholly general terms, namely “notwithstanding anything in any enactment relating to land which is or forms part of a common, open space ... etc”’. He considered it would be ‘a little strange if parliament, having by s241 TCPA intended to allow development in the circumstances there set out, were without express reference to have abolished this by the passage of the 2006 act.’

However, he conceded that ‘I was left with a faint and perhaps false impression that a more wide ranging consideration of this and other like statutes might have thrown further light on the proper solution to the question. For my part I have reached the clear conclusion in the light of my observations above that it is the provisions of section 241 TCPA which prevail and that the Commons Act 2006 has not expressly or impliedly abrogated the effect of those provisions.’
Commentary
It is unfortunate that, because of the risk of costs against it, the action group felt unable to appeal, to enable the ‘more wide ranging consideration of this’ to take place. For the present, where land has been appropriated by a local authority for planning purposes, it seems that a village green application may not succeed.

If the land is a registered green at the time of the appropriation, section 122 of the Local Government Act 1972 limits the appropriation to 250 square yards so these circumstances would not arise and any appropriation would have to be under section 229 TCPA, subject to the consent of the Secretary of State and provision of suitable exchange land or approval by both Houses of Parliament under section 19 of the Acquisition of Land Act 1981. In this case, although the land was arguably a green at the time of appropriation, it had not been recorded as such and therefore it can be argued that MCC was not aware that the land was a green. Section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876 only protect land which is registered as a green.

A similar case will no doubt return to the courts and we hope that we shall be able to assist those arguing against this worrying judgment.