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Bebbington (Moorside Fields) case

Full name

Lancashire County Council v The Secretary of State for the Environment, Food and Rural Affairs and Janine Bebbington, 21 May 2016

Neutral citation number

[2016] EWHC 1238 (Admin)

Link to judgment

www.bailii.org/ew/cases/EWHC/Admin/2016/1238.html

Summary

Land owned by a local authority and annexed to a school could be registered as a town green, as there was insufficient evidence that it was held for educational purposes. The court also opined that, even if the evidence were sufficient, there was no fundamental conflict between registration and the statutory purposes of the education authority.

Discussion

Ms Bebbington applied to Lancashire County Council to register Moorside Fields as a town green. The Fields were held by the council for education purposes. The application was referred to the Planning Inspectorate (on behalf of the defendant, the Secretary of State) because the application was made in an area pioneering the implementation of Part 1 of the Commons Act 2006, and the council faced a conflict of interest between its roles as commons registration authority and local education authority. A public inquiry into the application was held by an independent inspector, who granted the application except in relation to an inaccessible area. The council (as local education authority) sought leave to challenge the inspector's decision.

The key grounds of challenge were whether the land was held for educational purposes, and if so, whether registration would be incompatible with those purposes, applying the judgment of the Supreme Court in *R (Newhaven Port and Properties Ltd) v East Sussex `County Council and Newhaven Town Council*. The inspector had not been convinced that the land was held for educational purposes, although there was no evidence that it was held for any other purpose (and part of the land was described as the school playing field). It seems that the council had failed to carry out sufficient research before the inquiry, because it applied for, but was refused, leave to adduce new evidence to the court. The court declined to interfere with the inspector's conclusion, finding that the inspector thought the

evidence too weak for the necessary conclusion to be drawn in the council's favour. Although other cases had determined that the necessary inferences about the purposes for which land were held could be drawn from long-standing practice which was lawful under statute (see *R (Malpass) v Durham County Council*), here there was very limited evidence of use which could give rise to such inferences.

Even so, the judge said he would have been satisfied on the evidence cited by the inspector, and that the presumption of regularity warranted that resolutions approving the purchase of the land would have been passed for the purposes mentioned in the conveyances. But he refused to declare the inspector's findings irrational, and particularly noted that the council had not suggested at the inquiry that there was further missing evidence which might be relevant (as, it turned out, there was), so that the inspector was entitled to assume that she had been presented with all the available material. The judge also noted that some of the land had not performed any educational function in the 70 years since it was acquired.

The court did not need to go on to consider incompatibility with statutory functions, but did so (this part of the judgment is therefore *obiter* and not binding). The council referred to its statutory functions to provide sufficient schools, and in respect of those schools, to provide outside space for play, and to safeguard pupils, and that registration would impede discharge of those duties. The court held that *Newhaven* had decided that: 'where a statutory body holds land under statutory powers for a defined statutory purposes, the public cannot register a green under the Commons Act on the basis of public user which is incompatible with the continuing use of the land for those statutory purposes. ...The mere fact that the land is owned by a statutory body for an identified statutory function does not mean that use as of right for public recreation is necessarily incompatible with that function.' Else, the court said, virtually any publicly-held land would be incapable of registration.

In *Newhaven*, the Supreme Court decided that the general provisions for registration of greens must defer to the specific powers for management of the port of Newhaven, but in the present case, the claimant council could point only to general duties imposed on all local education authorities. The court found there was no specific incompatibility: the land, registered as a green, could still be used by the education authority for recreational purposes, on the basis of the same 'give and take' as had been practised in the past—even if it could not now be used for a school extension. The council could still discharge its functions after registration of the land—but not necessarily using the application land in the way it might have intended.

The council also challenged the locality adopted for the application. The locality was a council ward, which had been abolished during the 20-year period, but a ward of the same name had been created with a similar, but not wholly contiguous, area. No user witnesses originated from the now excluded area. The court referred to the judgment of the Court of Appeal in *Adamson v Paddico (267) Ltd and others*, in which that court had observed in relation to a historic locality that, 'it may not matter if subsequently the boundaries are affected by local government reorganisation, so long as it remains an identifiable community'. The court adopted the same approach, noting that the technical abolition of the original ward was a matter of legal form, and there was sufficient continuity between the two wards, and sufficient contiguity, that no distinction need be drawn, saying that: 'the answer to whether or not the change stopped time running would be one of fact and degree'.

The court also thoroughly rejected a challenge that the origin of the users of the green must be distributed throughout the locality, rather than concentrated in one part of it. The court accepted that the rights which accrue to the locality on registration of the green would flow to the whole locality, and not just the part which may have used it, but thought this was an inevitable consequence of having to specify a locality. The words of the court in *Alfred McAlpine Homes Ltd* v *Staffordshire County Council*, which referred to land being 'in general use by the local community' were intended to refer to number and frequency of user, and not the uniformity of residence throughout the locality. The court noted that, while tangential questions had been considered in other cases, none of them provided support for the challenge on this ground.

Conclusion

The court said: 'A closer relationship is required between the performance of the function and the use of the particular land before conflict with public recreational use can give rise to statutory incompatibility. That is going to be a hard test to satisfy for public bodies with general functions which do not specifically or in reality have to be performed on the land in question.' The court appeared to endorse the inspector's approach of considering evidence 'about the past and present use made of the land for educational purposes and [the council]'s intentions and needs', rather than the council simply giving evidence as to future intentions (although these might be relevant).

Comment

This is a very relevant and timely case on the registration of land held with or by schools and other educational institutions. The case does not decide that playing fields and similar land can always be registered as a green. But it does suggest that an education authority will need to show that registration would be wholly incompatible with the purposes for which the land is held. And councils will need to present convincing evidence that the land was indeed held for educational purposes. However, it is quite possible that these questions will migrate to the Court of Appeal before very long.

It is also useful to have confirmation at last that the 'spread' argument about user in a locality is misguided and has no part of the registration criteria. And that a sensible approach can be taken to an evolving designation of a locality, which focuses on whether any change in the designation actually affects the measurement of user.