

## Moorside Fields and Leach Grove cases (Court of Appeal)

### Full name

*(1) R (on the application of Lancashire County Council) and Secretary of State for Environment, Food and Rural Affairs and Janine Bebbington; (2) R (on the application of NHS Property Services Ltd, Surrey County Council and Timothy Jones.*

### Neutral citation number

[2018] EWCA Civ 721.

### Link to judgment

<http://www.bailii.org/ew/cases/EWCA/Civ/2018/721.html>

### Summary

The principal outcome of the two cases is a ruling that the fact that land is held by a public body for the purposes of its performance of statutory powers and duties does not automatically render it incapable of registration as a town or village green under section 15 of the Commons Act 2006.

### Background

Two town or village green cases were heard together in the court of appeal. One was an appeal from Lancashire County Council, as the local education authority, against the decision to register 13 hectares of land known as Moorside Fields in Lancaster as green. The respondent was the Secretary of State for Environment, Food and Rural Affairs whose inspector, Alison Lea, had approved the application following a public inquiry.

Our member Janine Bebbington, who had applied for the registration, appeared as an interested party. Ouseley J had dismissed an appeal from Lancashire County Council in the high court in an order dated 27 May 2016, and the county council had appealed.

The second case concerned an application for registration of 2.9 hectares of Leach Grove Wood at Leatherhead in Surrey. The land adjoins Leatherhead Hospital and is in the same freehold title. The application for registration was made by local people and although the public-inquiry inspector, barrister William Webster, recommended Surrey County Council refuse the application (on the grounds that the claimed locality and neighbourhood were not a locality or a neighbourhood within the meaning of section 15 of the Commons Act 2006), Surrey County Council decided to register the land. The NHS as landowner appealed to the high court and its claim for judicial review was upheld by Gilbert J on the grounds that the county council had failed properly to consider the question of 'statutory incompatibility'. Timothy Jones, one of those involved in the original application, then appealed to the court of appeal.

## Discussion

Common to both cases was the question of whether the concept of 'statutory incompatibility' (ie that the purposes for which the land was held were incompatible with recreational use) defeated an application for the registration of the land as a town or village green under section 15 of the Commons Act 2006. In the court of appeal Lord Justice Lindblom gave the lead judgment and Lord Justice Rupert Jackson and Lady Justice Thirlwall concurred.

The judge compared the circumstances of the current cases with those of Newhaven Port where the supreme court<sup>1</sup> held that it was not possible to obtain rights by prescription against a public authority which had acquired and used land for specific statutory purposes when the exercise of those rights would be incompatible with the statutory purposes.

The judge held that the circumstances in the Lancaster and Leatherhead cases were different. 'Our task, in each case, is to apply them [the legal principles in the Newhaven case] to the relationship between the provisions of the 2006 act concerning the registration of town and village greens and the statutory powers and duties relating to the land in question' (para 35). 'There is no blanket exemption for land held by public bodies for the purposes of their performance of statutory powers and duties. Section 15 of the 2006 act contains no limitation, or exception, for public body landowners'.



He also pointed out that parliament has had several opportunities to enact such a provision, but has not done so (para 36).

In the Lancaster case 'there were no specific statutory purposes or provisions attaching to this particular land. Parliament had not conferred on the county council, as local education authority, powers to use this particular land for specific statutory purposes with which its registration as a town or village green would be incompatible' (para 40). The judge went on to explain that there was no statutory obligation to maintain or use the land in a particular way, to carry out particular activities on it, to provide a school there or otherwise develop it. The fact that the county council, as owner of the land, had statutory powers to develop it was not sufficient to create a 'statutory incompatibility'.

Similarly at Leatherhead, he could not see why the court should be compelled to find an incompatibility between the statutory provisions under which the land at Leach Grove Wood was held and its registration as a village green.. The statutory functions on which NHS Property Services relied were general in character and content and the registration of the land as a green would not have any material effect on the services' function under the National Health Service Act 2006 to hold land.

The judges therefore dismissed the argument that there was statutory incompatibility. They also dismissed the further four grounds in the Lancaster case. They held as follows. Ouseley J was right to endorse the inspector's findings that the county council had not demonstrated that it had held Moorside Fields for educational purposes. The public-inquiry inspector had not erred in finding there existed a 'locality' for the purposes of section 15 of the Commons Act 2006 (despite there having been a boundary change for the claimed locality of Scotforth East ward in 2001, during the 20-year period of claimed use). It was not necessary to prove that the 'significant number of inhabitants' of a locality must be geographically spread across that locality. The inspector was correct in finding that the land was used 'as of right'.

In the Leatherhead case the judges rejected the second ground of appeal, that Surrey County Council, in deciding to register the green, had not given adequate reasons for departing from the inspector's finding that there did not exist a relevant neighbourhood.

## Comment

It is important, in considering whether the rules of 'statutory incompatibility' apply, to investigate the particular circumstances of how the land is held and to decide whether the public is capable establishing rights for lawful sports and pastimes on the land.

1 [R \(on the application of Newhaven Port and Properties Ltd\) v East Sussex County Council \[2015\] UKSC 7.](#)



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