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Full name

Cotham School v *Bristol City Council, Katharine Welham and Bristol City Council*

Neutral citation no

[2024] EWHC 154 (Ch)

Link to judgment

www.bailii.org/ew/cases/EWHC/Ch/2024/154.html

Summary

The high court decides that a school is not entitled to an Aarhus cost protection order in opposing registration of its land as a town or village green under section 14 of the Commons Registration Act 1965, because the order is not within the scope of civil procedure rules—notwithstanding that registration is a matter relating to the environment. The court also decides that a local authority cannot appear in two roles in the court proceedings, both as commons registration authority and as landowner, but must be represented by a single litigation team.

Background

An application was made to Bristol City Council in 2011 on behalf of Save Stoke Lodge Parkland to register, as a town or village green, playing fields at and owned by Cotham School. Cotham School is an academy school. An inquiry took place into the application in 2016, and the inspector recommended to the council that the application should not be granted. In the event, a committee of the council rejected the inspector's and officers' advice and granted the application. That decision was in 2018 quashed on an application to the High Court for judicial review (*R (Cotham School)* v *Bristol City Council*), on the grounds that the inspector had found that use of the land was not as of right, and the committee was wrong in law and had failed give adequate reasons for a finding to the contrary. The determination of the 2011 application therefore remained in play.

In due course, the application returned to the council for determination, and was again granted in 2023. That decision also was challenged on an application to the high court under s14(b) of the Commons Registration Act 1965.

The matter first came before the court in early 2024 to decide two 'preliminary' matters (*ie* preliminary to determining the application afresh under s14(b)). The court had been asked to decide whether the school could secure an order for the purposes of the *Aarhus Convention* which would limit its

exposure to the costs of the other parties. (Such an order may be available to a party challenging a decision in relation to the environment in order to avoid exposure to costs which would be prohibitively expensive.) And the court, on its own initiative, also questioned whether the council could appear as two separate parties, with two litigation teams, both as commons registration authority and as landowner and education authority.

Discussion

The judge, HHJ Paul Matthews sitting as a high court judge, decided that a local authority cannot appear in the same case in two different capacities (here, as commons registration authority and landowner). If the authority wishes to pursue both interests, it must be represented by the same legal team ('they must all sail under one flag'), or find some other party to appear and represent its second interest. (Oddly, in the judgment, the council still appears in the case listing as first and third interested parties.)

In considering the role of the commons registration authority, the judge opined (*obiter, ie* his view is not binding) that the authority's role is to decide on the evidence, not to inquire into it.

The judge decided that a registration application is within the general scope of the *Aarhus Convention*, being concerned with 'provisions of … national law relating to the environment'. But the judge also concluded that a decision on registration, although taken 'by private persons [or] public authorities', is taken by 'bodies or institutions acting in a judicial … capacity', and so not brought within the scope of the *Aarhus* rules. However, this was not argued before the judge, and was not decisive in the case.

The academy school was acting, in its claimant landowner capacity, as a member of the public. But a s14 challenge was not, for the purposes of civil procedure rules, 'judicial review or review under statute', being instead a from-first-principles redetermination of the original decision to register, where the court considers the merits of the application all over again.

Hence the claim was not eligible for *Aarhus* protection (although the judge noted that this was only because the civil procedure rules fail correctly to implement the convention rights). The court also declined to award the school a protective-costs order or cost-capping order (these being other mechanisms available to the court to reduce a party's potential exposure to costs).

Comment

The judge opined that the role of the commons registration authority was to decide on an application on the evidence placed before it, and not to make its own enquiries. Its role: 'was to decide, on the basis of opposing evidence and submissions between competing parties, whether or not the legal test for registration of a town or village green was met in the circumstances of the case.' These observations were made without argument, but may be helpful where authorities start digging for evidence to support or oppose an application. On the other hand, an application to a commons registration authority should not be granted simply because it is not opposed—in such a case, we suggest that the authority may need to act as 'devil's advocate' in order to test the applicant's case.

What is particularly helpful is the confident conclusion that an application to register land as a town or village green fell within the scope of the 'provisions of … national law relating to the environment', and the concise rebuke to Underhill LJ in *NHS Property Services* v *Surrey County Council*, who had found to the contrary (the judge said, of Underhill LJ, that: 'he gives no reasons for that view, and, as things

stand, I regret to say that I do not understand it'). The claimant, Cotham School, failed to avail itself of costs protection because domestic civil procedure rules are drafted so as to exclude a s14 challenge from scope (the judge thought that was an incorrect transposition of the *Aarhus Convention* rights). Ironically, the school had also brought a challenge by way of judicial review, but that element of proceedings had been stayed by the court.

More worrying, the judge suggested that determination of an application to register a town or village green was done by a commons registration authority (or for that matter, presumably the Planning Inspectorate) 'acting in a judicial … capacity' (for the purposes of article 2 of the *Aarhus Convention*), so that a challenge to that decision was not intended to attract costs protection. However, the judge acknowledged that the matter had not been argued before him, and there might be a knock-out blow which he had not noticed. It is suggested that the very requirement for an application to be determined by a local authority, with provision for a court to review that decision either under s14 of the 1965 Act (or, in certain cases, s19 of the Commons Act 2006), or on an application for judicial review, demonstrates that the local authority at first instance is not acting in a judicial capacity, precisely because there is provision for judicial oversight. A commons registration authority also determines applications under various provisions, which range from the entirely routine (such as registering a transfer of rights of common held in gross) to the complex (such as an application to register a town or village green). It is far from obvious that elements of these functions can separately be classed as judicial, nor likely that all of the functions can be classed as judicial. But this question probably will be the subject to determination by another court on another occasion.

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