Neutral Citation Number: [2025] EWHC 1382 (Ch)

Case No: PT-2024-BRS-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 10 June 2025

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

COTHAM SCHOOL	**Claimant**
- and -	
(1) BRISTOL CITY COUNCIL	**Defendants**
(2) KATHARINE WELHAM	

- -
- -

Ashley Bowes (instructed by **Goodenough Ring**) for the **Claimant**
Douglas Edwards KC (instructed by **Bristol City Council Legal Department**) for the **First Defendant**
Andrew Sharland KC (instructed by **Direct Access**) for the **Second Defendant**

Hearing dates: 27-31 January, 10 February 2025

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This judgment was handed down remotely at 10:30 am on 10 June 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives

HHJ Paul Matthews :

INTRODUCTION

General

1. This is my judgment following the trial of this claim brought under CPR Part 8 for an order amending the commons register kept by the first defendant, Bristol City Council ("the City Council"), in its capacity as commons registration authority for Bristol. The order sought is one to delete the entry relating to land known as Stoke Lodge playing fields ("the land"), in north-west Bristol. This land was registered as a town green in August 2023, after an application for that purpose by the second defendant, who is a local resident. The claimant is an academy school, which in 2011 was granted a long lease of the playing fields by the freeholder, the City Council, for use as school playing fields.

2. Some of the following introduction to this case is based on material taken from a judgment last year concerned with procedural matters in this claim (available at [2024] EWHC 154 (Ch), [2024] JPL 955). In substance, the present claim is a contest between the claimant school and local residents. The school wishes to be able to control the land, including by the use of fences and gates, primarily to ensure the use of the land as school playing fields, but secondarily (and subject to certain restrictions) to allow it to be used for the purposes of local recreation. The latter however wish to have unrestricted access to the land at all times and object to any fences and gates, and any other restrictions imposed by the school. The land has been registered as a town green, giving various rights of access to local inhabitants. The claimant school is taking these proceedings in order to cancel that registration, if it can.

What this case is *not* about

3. This is a case that has aroused a great deal of passion on each side. It really matters to the parties. Each side has tried its utmost to persuade the court that it is right. Each side has put in evidence and made arguments seeking to support a conclusion that, if it should not win, the consequences will be practically apocalyptic. Inevitably, one side (at least) will be disappointed by this judgment. But these consequentialist arguments, though they may be useful in the political arena, are of little assistance to a court of law.

4. In the present case, if the land *is* held to satisfy the test for a town or village green, the local residents will succeed, and any fences, gates and other restrictions may well prove impossible. The school says that, in that case, it will be unable to use the land for the purposes of school playing fields, for security, health and safety reasons (among others). In this litigation, however, the court is not required to decide whether the school is right about that. More importantly, it is not required to decide whether use by the school is more important or less important, or more or less in the public interest, than use by local residents. That is a *political* decision, which Parliament has made in enacting the relevant legislation. By virtue of that legislation, use of a certain kind and quality by certain people for a certain period enables the creation of a

public right against the landowner. Use which is less than that does not. The matter is binary.

5. Either this case satisfies the requirements of that legislation, in which case the local residents succeed, or it does not, in which case the school succeeds, or at least may do so. The court's only functions are to decide whether the land concerned at the date of registration *was, or was not*, within the legal definition of a town or village green, and, if it was not, whether it is "just" to amend the register. These are questions of mixed fact and law. The political and consequential issues raised by the facts of this case are wholly outside the court's jurisdiction. The lawyers involved know this, but the public needs to know it too. I trust that, if the media report this case, they will make this clear.

The position of the first defendant

6. My judgment in this case last year was concerned in part with the position of the first defendant, which was (and is) both the registration authority under the relevant legislation and also the freeholder of the land concerned. It had originally sought to play two distinct roles in the litigation, and filed two acknowledgments of service, one in one capacity and one in the other. I held that it could not do this, and could appear on the record in this case once only. In the event, the first defendant chose to oppose the order sought by the claimant, and appeared by leading counsel at the trial. It did not call any evidence of its own, and did not seek to cross-examine any of the witnesses who were called. But it did make submissions on the law, in defence of the authority's decision to register the land as a town green. It did not adopt a neutral position.

7. In *TW Logistics Ltd v Essex County Council* [2017] Ch 310, a similar claim to the present was brought by a landowner for the rectification of the register, against the registration authority. In pre-trial correspondence, the defendant's solicitors said:

> "it is accepted that a registration authority … should maintain a strictly neutral stance in the exercise of its statutory function and we agree that it should not and confirm that it has not predisposed itself either for or against continued registration … Our client's position is one of neutrality and will continue to remain so."

8. Subsequently, the claimant argued that in fact the defendant had not adopted a neutral position. Barling J summarised the defendant's position in this way:

> "39. In its skeleton argument, Essex CC states that, whilst seeking to uphold its decision to register the Land on the evidence before the Inspector, it would take a neutral stance in relation to the additional evidence submitted in these proceedings, including the expert evidence of Mr Hibbert. Pursuant to that stricture, Mr Sharland did not cross-examine any of the witnesses called, nor did Essex CC call any evidence itself. Mr Sharland did not make submissions in respect of TWL's two new grounds of challenge, as they were not advanced before the Inspector and are, at least to some extent, based on the new evidence."

9. After considering authorities, he concluded

> "41. It seems to me that there is a danger of elevating what may be an appropriate position for such an authority to take depending on the circumstances, into a principle that it is under a duty to apply a self-denying ordinance. I see nothing in the *Leeds* case (*Leeds Group plc v Leeds City Council* [2010] EWHC 810 (Ch), [2011] Ch 363, CA) nor in the dicta in [*Oxfordshire County Council v Oxford City Council*] [2006] 2 AC 674 which denies the authority the right to take a more active role in section 14 proceedings, should it wish to do so. Lord Hoffmann simply referred to the absence of a duty on the part of the registration authority to investigate or to adduce new evidence.
>
> 42. Without having heard full argument, I am inclined to the view that the fact that the authority has a quasi-judicial role at the decision-making/registration stage does not and should not preclude it, where appropriate, from fully defending its decision in the context of a subsequent section 14 claim, including by challenging new evidence and new submissions and/or by calling new evidence of its own. By the same token, if, having heard new evidence and submissions, an authority were to take the view that its original decision was wrong, it would surely not be right for it to defend it."

10. The point was not discussed when the case was taken to the Court of Appeal ([2019] Ch 243) or the Supreme Court ([2021] AC 1050). The approach of Barling J was not challenged in the present case, and I have not heard any argument, or had to rule upon it. Whether it is right or not can be left to another case where it arises as an issue between the parties. Whether it might affect questions relating to costs in this case is another matter, but that does not arise at this stage, and indeed may never arise.

BACKGROUND

History of Stoke Lodge

11. Stoke Bishop is a very old settlement. It is referred to in the Domesday Book of 1086 as *Stoche*. In old English, "*stoc*" meant a dwelling or a place (like "stow" in Brigstowe, later Bristol). Under the feudal system, it was held of the king by the Bishop of Worcester (in whose ecclesiastical diocese it then lay, and who also owned the monastery at nearby Westbury on Trym). No doubt that is why it became known as Stoke Bishop. Until just after the Second World War, the land with which this case is concerned formed part of the grounds belonging to a substantial residential property known as Stoke Lodge. This had been built in 1838 on land which was formerly part of the Kingsweston estate, based on Kings Weston House (designed by Sir John Vanbrugh) near Lawrence Weston. Once built, the new property was occupied successively by a number of well-to-do local families, including at one time a scion of the well-known Fry family, chocolate makers. When it was originally built, Stoke Lodge lay outside the boundaries of Bristol, in Gloucestershire. But by the end of the nineteenth century Bristol's boundaries had expanded, and Stoke Lodge was by then within them.

12. I set out below the relevant part of an Ordnance Survey map revised in 1912. This shows Stoke Lodge before the First World War. North is to the top of the map. It will be seen that when surveyed, the area was little built up. I make clear that I have included this map only to explain the historical development of the area, and do not rely on it in any way in deciding the issues that arise in this case.

13. A revision of the map in 1938 (published in 1944), set out below, shows that the modern urban pattern was taking shape. Again, this is included only to illustrate the historical development of the area, and not for any further purpose.

14. After the Second World War, part of the land in question (about 5.5 acres) was acquired from the then owner (Miss Emily Butlin) by the council of the county borough of Bristol, the successor to Bristol Corporation under the Local Government Act 1888. The acquisition was initially for temporary housing, but thereafter the land was appropriated to education purposes. ("Appropriation" is a formal process by which local authority assets are dedicated to a specific statutory purpose – or rededicated from one purpose to another: see currently section 122(1) of the Local Government Act 1972, set out later.) The remainder – about 16.5 acres according to documents I have seen, but the Inspector in 2016 put it at 22 acres – was acquired from Miss Emily Butlin, again for education purposes, by the county borough of Bristol in 1947.

15. In 1974, when local government in England and Wales was reorganised, pursuant to the Local Government Act 1972, the land was vested in the county borough's successor for education purposes, Avon County Council (the city of Bristol being demoted from county status for the first time since 1373, and becoming merely a district within the new county). But, in 1996, when, pursuant to the Local Government Act 1992, s 17, and the Avon (Structural Change) Order 1995, that county council ceased to exist, and Bristol became a unitary authority (styled the "City and County of Bristol"), the land was vested in that unitary authority – the City Council, by the Local Government Changes For England (Property Transfer and Transitional Payments) Regulations 1995, regulation 6. Regulation 11 of those regulations provided for the transfer of all the "functions" of an abolished authority to the transferee authority for that district. "Functions" is not defined, but appears to refer to "all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it" *Hazell v Hammersmith & Fulham LBC* [1992] 2 AC 1, 29.

16. I must note also regulation 12 of those regulations, to which I shall return. This provided:

> "12.—(1) All contracts, deeds, bonds, agreements, licences and other instruments subsisting in favour of, or against, and all notices in force which were given, or have effect as if given, by or to, a relevant authority in respect of any transferred matters shall be of full force and effect in favour of, or against, the body to whom such matters are transferred."

Photograph and plan

17. I set out below first a modern aerial photograph and then a modern plan of the relevant land, each taken from Google Maps. They have been re-oriented, so that north is to the north-west corner of both. Again, they are for expository purposes only, and have no legal significance.

18. Approximately in the centre of the lower half of both the photograph and the plan is the old Stoke Lodge House. To the west of the house is a children's play area, constructed in recent years. As will be made clear shortly, not all of the open land shown above was leased by the City Council to the claimant school. To add another layer of complexity, the land the subject of the registration is different again, although the leased land and the registered land largely overlap. I should record that in the present case I had the great advantage of a site visit on the first day of the trial, accompanied by counsel. I record here that I visited a second time, on my own, shortly before circulating my draft judgment, in order to make sure I had correctly remembered what I saw on the first occasion.

Cotham School

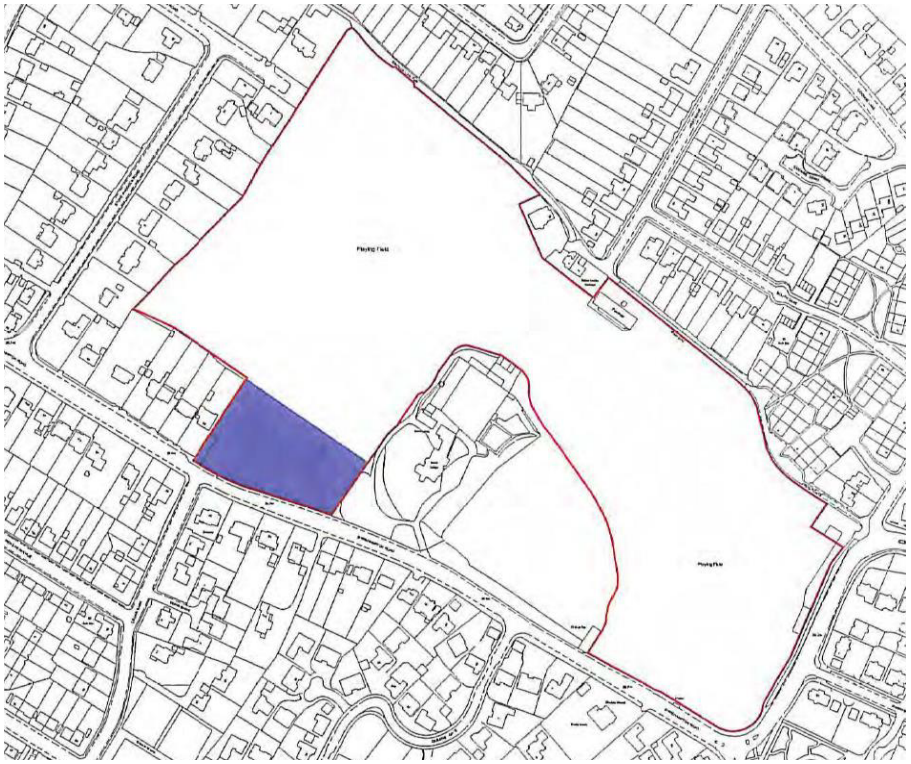
19. Stoke Lodge House became a nursery nurses' college, and subsequently an adult education centre, which it remains today. It is a Grade II listed building. The land surrounding it was used for a variety of purposes, including as the playing fields for Fairfield Grammar School, then a local authority school in the Montpelier district of Bristol (a school attended in much earlier days by one Archie Leach, better known later as Cary Grant). In September 2000, the then Cotham Grammar School, another local authority school, took over the use of the land from Fairfield for its own playing fields. (Cotham Grammar became a comprehensive school the following year.) The land is however not in the vicinity of the main school site, but lies some three miles away to its north-west. Following the enactment of the Academies Act 2010, Cotham School applied for and obtained academy status, as from 1 September 2011. On obtaining that status, it acquired independent legal personality, as a company limited by guarantee. It also acquired a long lease of the school buildings from the City Council, and henceforward obtained its funding from central government. The City Council as local education authority ceased to have any direct responsibility for the school, though of course it remains the school's lessor (in popular terms, landlord).

20. The funding agreement dated 1 September 2022 between the claimant and the Secretary of State requires the school to be conducted in accordance with the company's memorandum and articles, which cannot be amended without the consent of the Secretary of State. It also requires a restriction to be entered in the land register in relation to its land assets, prohibiting any disposition of such assets without the consent of the Secretary of State. The claimant is also a charity, exempt from registration with the Charity Commissioners. The current articles of association of the company include a provision at clause 6.1 restricting the use of the claimant's resources:

> "The income and property of the Academy Trust shall be applied solely towards the promotion of the Objects."

The lease

21. On 31 August 2011, the City Council granted a long lease (125 years) to the claimant of the land as school playing fields. The plan to the lease (with north at the top) shows the area of land demised:



22. The demised area is that surrounded by the red line. It will be seen that it *includes* an area coloured blue in the southwest corner (though the lease itself calls the colour 'purple'). This is the subject of an option for the City Council to break the lease, but only in respect of that part of the land. It will also be seen that a part of the grounds to the southeast of Stoke Lodge House is *not* included in the demise. This area is known as "the Arboretum". It is planted with trees and shrubs, and has never been used by the claimant for its educational purposes. It appears quite distinctly on the photograph included above, with more trees visible, and a different shade of green, compared to the rest of the grounds. What this means is that the first defendant holds part of its fee simple (freehold) estate in the land in possession (the Arboretum) but the remainder of it in reversion.

23. The lease itself includes the following provisions:

> "1. Definitions and Interpretation
>
> 1.1. In this Lease unless the context otherwise requires the following words and expressions shall have the following meanings:
>
> […]
>
> 'Funding Agreement' (a) an agreement pursuant to section 1 of the Academies Act 2010 made between (1) the Secretary of State for Education and (2) the Tenant …
>
> […]

'Plan 1'	the plan annexed to this Lease and marked Plan 1;
[…]	
'Property'	the property described in Part 1 Schedule 1 [which refers to the land part of Stoke Lodge Playing Fields "being part of the freehold land registered at the Land Registry under title BL 100993 and shown edged red on the Plan 1"]
'Rent'	a peppercorn;
[…]	
Term	125 years from and including the Term Commencement Date
Term Commencement Date	1 September 2011
[…]	

2. Demise Rents and Other Payments

2.1. The Landlord demises the Property to the Tenant for the Term (subject to the provisions for early termination contained in this Lease) together with the easements and rights specified in Schedule 2 excepted and reserved unto the Landlord and all other persons authorised by the Landlord from time to time during the Term the easements and rights specified in Schedule 3 and subject also to all existing rights and use of the Property including use by the community the Tenant paying therefor by way of rent throughout the Term without any deduction counterclaim or set off (whether legal or equitable) of any nature whatsoever:–

2.1.1 the Rent (if demanded);

2.1.2 all other sums (including VAT) due under this Lease from the Tenant to the landlord.

[…]

3. Tenant's Covenant

The Tenant covenants with the Landlord as follows:-

[With a few exceptions, here I simply summarise the headings of the subclauses]

3.1 [Rent and Payments]

To pay the Rent and all other sums reserved as rent by this Lease at the times and in the manner at and in which they are reserved in this Lease.

3.2 [Outgoings]

3.3 [Repair and Upkeep]

3.4 [Access of Landlord and Notice to Repair]

3.5 [Alterations and Additions]

3.6 [Signs and Advertisements]

3.7 [Statutory Obligations]

3.8 [Yield up]

3.9 [Use]

[…]

3.9.3. … not to use the Property otherwise than

(a) for the purposes of the provision of educational services by the Tenant (as set out in any charitable objects of and in accordance with the memorandum and articles association of the Tenant from time to time); and

(b) for community, fundraising and recreational purposes which are ancillary to the use permitted under clause 3.9.3 (a).

[…]

3.10 [Planning and Environmental Matters]

3.11 [Notices]

3.12 [Dealings]

3.12.1. Not to part with or share the possession or occupation of the whole or any part or parts of the Property …

[…]

3.12.3. Subject to the provisions of sub-clause 3.12.4, not to assign or transfer any part or parts or the whole of the Property;

3.12.4. The Tenant is permitted to assign or transfer the whole of the Property to a successor charitable or public body where

the Secretary of State has given approval to such an assignment or transfer;

3.12.5. Not to underlet the whole of the Property and not without the Landlord's consent (not to be unreasonably withheld) to underlet any part or parts of the Property for a term in excess of 5 years but excepting that the Tenant may without the consent of the Landlord allow other parties to use the Property for temporary sessional lettings and for the avoidance of doubt the Tenant may enter into a maintenance scheme which allows a third party to act as an agent on the Tenant's behalf in relation to such lettings

[…]

3.12.6. Not to charge the whole or any part or parts of the Property

3.13 [Rights of Light and Encroachments]

Not to obstruct any windows or lights belonging to the Property nor to permit any encroachment upon the Property which might be or become a detriment to the Landlord and in case any encroachment is made or attempted to be made to give immediate notice of it to the Landlord.

3.14 [Indemnity]

3.15 [Costs]

3.16 [VAT]

3.17 [Interest on Arrears]

3.18 [Landlord's Property]

4. Landlord's Covenants

The Landlord covenants with the Tenant

4.1 Quiet Enjoyment

That the Tenant may peaceably and quietly hold and enjoy the Property during the Term without any interruption or disturbance by the Landlord or any person rightfully claiming through or under the Landlord.

[…]

6. Provisos

6.1 Re-Entry

> Where there occurs a breach by the Tenant of Clause 3.9 and/or 5.1.2 of this Lease and the Landlord has served written notice specifying such breach and the remedial action required by the Tenant and if within a reasonable period (taking account of the breach complained of) the Tenant has not taken steps to remedy such breach or the Tenant is dissolved or struck off or removed from the Register of Companies or otherwise ceases to exist then it is lawful for the Landlord or any person authorised by the Landlord at any time afterwards to re-enter upon the Property or any part of it in the name of the whole and thereupon the Term absolutely determines without prejudice to any right of action of the Landlord in respect of any breach of the Tenant's obligations contained in this Lease.
>
> […]
>
> 6.7. Termination
>
> > 6.7.1. This Lease shall automatically determine on the termination of the Funding Agreement in circumstances where there is no other Funding Agreement in existence.
> >
> > […]
> >
> > 6.7.4. On the termination of this Lease under Clause 6.7.1 everything contained in the Lease ceases and determines but without prejudice to any claim by either party against the other in respect of any antecedent breach of any obligation contained in the Lease.

7. Break Clause

In the event that the Tenant finds suitable alternative playing fields … then subject to the Tenant giving the Landlord no less than three (3) months' written notice the Tenant may determine this lease at any time during the Term hereby created … but without prejudice to the respective rights of either party in respect of any antecedent claim of breach of covenant

8. Landlord's Powers

> 8.1. The Landlord enters into this Lease pursuant to its powers under sections 111 120 122 and 123 of the Local Government Act 1972 the Education Act 1996 section 2 of the Local Government Act 2000 and all other powers so enabling and warrants that it has full power to enter into this Lease and to perform all obligations on its part herein contained.
>
> 8.2. Nothing in this Lease shall fetter the Landlord in the proper performance of its statutory functions.

[…]

11. Landlord's option to determine

> 11.1 If at any time during the Term the part of the Property shown coloured purple on the plan 1 to the Lease ("the Surrender Land") is required by the Landlord for the provision of public facilities and provided always that the Property then left to the Tenant is sufficient to provide outdoor educational facilities as deemed appropriate in accordance with the number of children in accordance with any relevant legislation and national guidance then if
>
> > 11.1.1 the Landlord shall give to the Tenant not less than three (3) months previous notice in writing; and
> >
> > 11.1.2 the Landlord seeks representations from, and consults in a responsible manner with, nearby residents or local interest groups in relation to the proposed provision of public facilities
>
> then immediately after the expiration of the said notice period this Lease and everything in this Lease ceases and determines in relation to the Surrender Land but without prejudice to any claim by either party against the other in respect of and antecedent breach of any obligation contained in this Lease
>
> […]".

24. Apart from the terms of the lease themselves, I note that, under section 13 of and Sch 1 to the Academies Act 2010, the Secretary of State has power to give directions for transferring academy school land to others (including local authorities) in various circumstances. These include, for example, the cases where the school ceases to be an academy or to occupy the land for its purposes. The effect of this in substance is that the land, even though the subject of a 125-year lease, can be used only for the purposes of an academy school. A lease of land to a different kind of school (*eg* a private school) would not be subject to these statutory provisions.

First application for registration

25. On 7 March 2011, whilst the school was still a local authority school, a local resident called David Mayer made an application to register the land as a town or village green under section 15 of the Commons Act 2006. (He actually did so in the name of a community group called "Save Stoke Lodge Parkland".) As I have said, the commons registration authority for Bristol is the City Council. But the City Council has delegated its functions as such authority to a committee of itself, namely, the Public Rights of Way and Greens Committee ("PROWG"), under section 101(1)(a) of the Local Government Act 1972. This provides that "a local authority may arrange for the discharge of any of their functions … by a committee … of the authority". On 25 November 2011, the claimant lodged an objection to the application. The objection acknowledged informal use of the land by local residents, but stated that this had not been encouraged by the claimant, nor acknowledged as being "as of right".

Appointment of an inspector, and his first report

26. As appears to be common practice in such cases (see *R (Whitmey) v Commons Commissioners* [2004] EWCA Civ 951, [29]; *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674, [29], HL), the committee appointed a barrister, Mr Philip Petchey, experienced in this area of the law to conduct a (non-statutory) public inquiry to ascertain the facts, to report on the application, and to recommend whether it should be accepted or rejected. Mr Petchey issued directions for such an inquiry in August 2012. However, subsequently Mr Petchey advised the committee that in his view it was not necessary to hold a public inquiry, but that the matter could be determined on the basis of written representations. The committee agreed, and Mr Petchey received and considered such representations.

27. On 22 May 2013, Mr Petchey issued his report, recommending that the land be registered as a town or village green. In part this recommendation was based on the decision of the Court of Appeal in a case concerned with the doctrine of statutory incompatibility in town and village green cases, which I discuss later in this judgment. In part, the decision was based on the inspector's perception as to the signs on the land, which on the material before him he judged insufficient to negate user "as of right".

28. However, the land was not in fact registered at that time. It appears that the City Council as landowner changed its position, and now considered that there should be a public inquiry to hear evidence about notices. And the claimant considered that there should be one to hear evidence about the use of the land by the school and sports clubs. It then became known that there was to be an appeal to the Supreme Court in the statutory incompatibility case. It was decided to wait for the decision in that case to be handed down. That was done on 25 February 2015. The appeal was allowed and the decision of the Court of Appeal reversed. As a result, after considering submissions, Mr Petchey decided that it was appropriate to hold a public inquiry. The committee agreed to this.

The public inquiry, and the second report

29. A pre-inquiry meeting was held in February 2016, and directions were issued in March 2016. The inquiry itself sat in June and July 2016. It sat for 8 days, and heard 28 witnesses. The applicant, the school, local residents and the City Council all participated in this. The applicant Mr Mayer appeared in person. The school and the City Council were represented by counsel, the former by Richard Ground QC and Ashley Bowes, and the latter by Leslie Blohm QC. Both the school and the City Council advanced the case that the land should *not* be registered because (*inter alia*) the use of the land by the public was contentious. (I take this opportunity to say that Mr Blohm QC is now himself a judge, also sitting in Bristol, but also that he and I have obviously not discussed this matter.)

30. The inspector's second report, dated 14 October 2016, this time recommended that the application be rejected. City Council officials subsequently produced a report recommending that the authority reject the application, for the reasons given by Mr Petchey. It also recommended that, if it were to approve the application, it should provide reasons for its decision. But, on 12 December 2016, the PROWG committee resolved not to follow the inspector's

recommendation, and instead decided to register the land as a town or village green. The committee was split 3-3, apparently on political party lines, and the resolution was passed only on the casting vote of the chair. It is clear from the decision of Sir Wyn Williams of 3 May 2018 (to which I am about to refer) that the decision was a highly contentious one, and that the members of the committee were subject to lobbying by interested persons.

31. I should add that, although the inspector recommended that the application be rejected on the grounds that the use of the land was not "as of right", he rejected the argument based on statutory incompatibility. This was in line with the recent decision of the Court of Appeal in the *Lancashire* case, before that decision was reversed by the Supreme Court.

Judicial review

32. Before the committee's decision was implemented, however, the claimant on 10 February 2017 sent a pre-action letter, and on 9 March 2017 commenced judicial review proceedings in relation to that decision. On 3 May 2018, Sir Wyn Williams, sitting as a judge of the High Court, quashed the decision: *R (Cotham School) v Bristol City Council* [2018] EWHC 1022 (Admin). His decision to do so was based on (i) an error of law by the authority in concluding that the use of the land by local inhabitants between 1991 and 2011 was "as of right", and (ii) its failure "to provide adequate and sufficient reasons" for that conclusion.

33. In the course of his judgment the judge stated that Mr Mayer had "engaged in a campaign to persuade the [PROWG] committee that it should not accept the Inspector's recommendation". Moreover, he "sought to galvanise public support for the view that the land should be registered. At least one public meeting was held … " However, the judge did not accept a further argument from the claimant, based on statutory incompatibility, in the light of the then recent decision of the Court of Appeal. On 25 June 2018, in accordance with the quashing decision of Sir Wyn Williams, the committee retook the decision, and this time resolved to reject the application by the casting vote of the chair (the committee again being split 3-3 on party lines).

Second and third applications for registration

The inspector's third report

34. On 14 September 2018, a lady called Emma Burgess (who also gave evidence in this case) made a second application to register the land. On 22 July 2019, a third application so to register the land was made, by the second defendant, also a local resident. The reason for two separate applications is this. Ms Burgess's application was made under section 15(2) of the 2006 Act, in respect of the 20 years immediately before that date. But that would involve consideration of the effect in law of the new notices erected in July 2018. The application could be amended, but, in order to sidestep the issue, the second defendant made a further application, this time under section 15(3) of the Act, in respect of the 20 years immediately before the erection of the new notices. As on previous occasions,

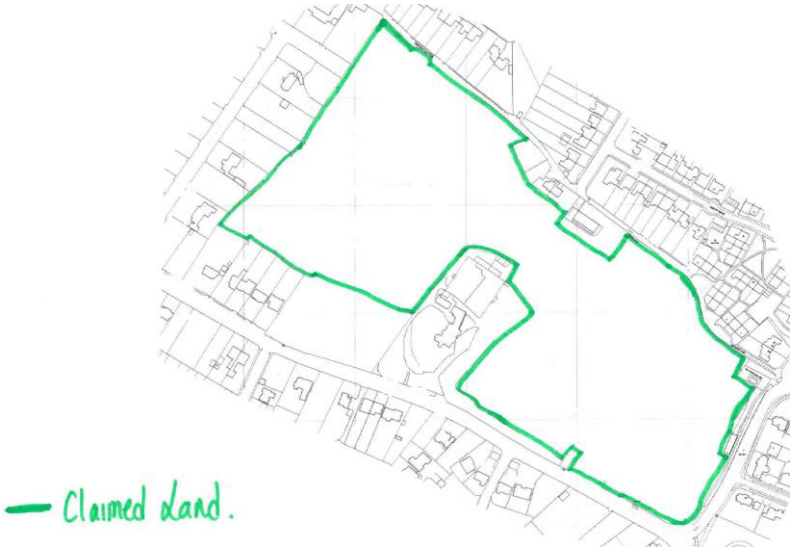
the PROWG committee appointed Philip Petchey to report and make a recommendation.

35. First of all, Mr Petchey considered whether it was necessary to hold a public inquiry. In his report, dated 2 March 2021, he advised that a public inquiry was not needed. On the other hand, having considered the second and the third applications, his recommendation was to reject both of them. His report was given to the interested parties, and they commented on it. Indeed, Ms Burgess and the second defendant "adduced additional arguments and submitted additional material in support of them". The claimant and the first defendant (both at that stage objectors to the applications) also made further representations. In the light of the further arguments and material, Mr Petchey reconsidered the matter, and produced a further report, dated 14 March 2023. He recommended that the applications be refused. Once again the report was provided to the interested parties who once again commented on it. Mr Petchey was asked to consider those comments, which he did. He produced a Note dated 18 May 2023, in which he adhered to his recommendation.

The decision to register

36. However, on 28 June 2023, the PROWG committee resolved, by six votes to one, to register the land as a town or village green on the second defendant's application, despite Mr Petchey's report. (No formal determination was made by the committee on Ms Burgess's application.) Following that decision, a pre-action protocol letter was sent on behalf of the claimant on 20 July 2023, intimating a (fresh) claim for judicial review. A response was sent by the City Council on 3 August 2023. And then, on 22 August 2023, the land was so registered. Following that registration, the claimant commenced judicial review proceedings for a second time. However, on 11 September 2023, Eyre J stayed these proceedings until 1 March 2024. On 20 November 2023 the claimant issued the present claim under CPR Part 8, pursuant to section 14 of the Commons Registration Act 1965. On 25 April 2024, the judicial review claim was formally discontinued, leaving the present proceedings alone to be resolved.

37. I set out below a plan of the area of land claimed by the second defendant to be, and accordingly later registered as, a town or village green. Once again, north is at the top of the plan. It will be seen that the area claimed, and then registered, does *not* include the area coloured blue on the plan of the demised land, but *does* include the Arboretum, which is *not* part of the demise, and in respect of which the City Council is the owner in fee simple absolute *in possession*. The City Council is the owner of the remainder of the land registered as a town or village green in fee simple absolute *in reversion*, that is, subject to the long lease granted to the claimant.



APPLICABLE LAW AND PRACTICE

General

38. Having briefly sketched the history of the events leading to the present proceedings, it is desirable that I say something at this stage to introduce the applicable law and practice, though without going into too much detail. There are two main pieces of primary legislation which are relevant to this case, both of which I have already mentioned. They are the Commons Registration Act 1965 and the Commons Act 2006, each of which has been amended by subsequent legislation. The intention is that the regime of the latter should eventually replace that of the former. To this end, the 2006 Act prospectively repeals the whole of the 1965 Act. However, at present, that general repeal (and the new regime) applies to only a handful of so-called "pilot" or "pioneer" areas. Bristol is not one of them. But some elements of the new system do apply even in non-pilot areas. For example, the second defendant's successful application to register the land was made under the 2006 Act and not the 1965 Act, though the entry was made in the register constituted under the 1965 Act. This makes the ascertainment of the relevant law much more difficult than it needs to be, especially when (as is obvious) this area of the law is of great interest to ordinary people who are not lawyers (much less, judges) but who have an interest in green open spaces in their locality, whether as owners or as would-be users. We are all better off for knowing where we stand.

Section 14 of the 1965 Act

39. This claim is actually brought under section 14 of the Commons Registration Act 1965. As originally enacted (but not yet repealed by the 2006 Act for land in Bristol), this provides that:

> "The High Court may order a register maintained under this Act to be amended if—
>
> > (a) the registration under this Act of any land or rights of common has become final and the court is satisfied that any person was induced

> by fraud to withdraw an objection to the registration or to refrain from making such an objection; or
>
> (b) the register has been amended in pursuance of section 13 of this Act and it appears to the court that no amendment or a different amendment ought to have been made and that the error cannot be corrected in pursuance of regulations made under this Act;
>
> and, in either case, the court deems it just to rectify the register."

This claim is not brought under section 14(a), and so only section 14(b) is relevant.

Section 13 of the 1965 Act

40. It will be noted that section 14(b) refers to "amendment in pursuance of section 13" of the 1965 Act. This latter section, as amended by the Law of Property Act 1969, provided that:

> "Regulations under this Act shall provide for the amendment of the registers maintained under this Act where—
>
> (a) any land registered under this Act ceases to be common land or a town or village green; or
>
> (b) any land becomes common land or a town or village green; or
>
> (c) any rights registered under this Act are apportioned, extinguished or released, or are varied or transferred in such circumstances as may be prescribed;
>
> […]"

41. I say "provid*ed*", because paragraph (a) of section 13 was repealed by the 2006 Act, as partially brought into force on 1 October 2006 by virtue of the Commons Act 2006 (Commencement No 1, Transitional Provisions and Savings) (England) Order 2006, SI 2006 No 2504. Yet article 3(3) of the order provides that

> "(3) In relation to any area of England, section 13(a) of the 1965 Act and regulations made under it shall, until the coming into force of section 14 of the 2006 Act in relation to that area, continue to have effect insofar as they relate to land which ceases to be common land or a town or village green by virtue of any instrument made under or pursuant to an enactment."

42. In like fashion, section 13(b) was repealed by the 2006 Act as partially brought into force on 20 February 2007 by virtue of the Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007, SI 2007 No 456. But article 4(1) of the order provided that

> "(1) Where a commons registration authority grants an application under section 15 of the 2006 Act for the registration of land as a town or village

green before section 1 of the 2006 Act has come into force in relation to the area in which the land is situated—

(a) it shall register the land in the register of town or village greens maintained for that area under the 1965 Act; and

(b) until the coming into force of section 1 of the 2006 Act in relation to that area, the 1965 Act shall apply in relation to the registration as if it had been made pursuant to section 13(b) of that Act."

Section 15 of the 2006 Act

43. Neither section 1 nor section 14 of the 2006 Act has yet come into force in relation to land in Bristol. As I have already said, the second defendant's successful application was however made under section 15 of the 2006 Act. That section relevantly provides:

"(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

[…]

(3) This subsection applies where—

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

(b) they ceased to do so before the time of the application but after the commencement of this section; and

(c) the application is made within [the relevant period].

[(3A) In subsection (3), 'the relevant period' means—

(a) in the case of an application relating to land in England, the period of one year beginning with the cessation mentioned in subsection (3)(b);

[…]

(8) The owner of any land may apply to the commons registration authority to register the land as a town or village green.

(9) An application under subsection (8) may only be made with the consent of any relevant leaseholder of, and the proprietor of any relevant charge over, the land.

(10) In subsection (9)—

'relevant charge' means—

> (a) in relation to land which is registered in the register of title, a registered charge within the meaning of the Land Registration Act 2002 (c. 9);
>
> (b) in relation to land which is not so registered—
>
> (i) a charge registered under the Land Charges Act 1972 (c. 61); or
>
> (ii) a legal mortgage, within the meaning of the Law of Property Act 1925 (c. 20), which is not registered under the Land Charges Act 1972;
>
> 'relevant leaseholder' means a leaseholder under a lease for a term of more than seven years from the date on which the lease was granted."

44. In construing section 15, it is relevant to note two other provisions. The first is section 5, which explains the phrase "land to which this Part applies" in sub-s (1). Section 5 relevantly provides:

> "(1) This Part applies to all land in England and Wales, subject as follows.
>
> (2) This Part does not apply to—
>
> (a) the New Forest; or
>
> (b) Epping Forest.
>
> (3) This Part shall not be taken to apply to the Forest of Dean.
>
> […]"

(The change in statutory language between sub-s (2) and sub-s (3) is mystifying, but there it is.)

45. The second is section 61(1) of the 2006 Act. This provides that, in the Act, "'land' includes land covered by water", but there is no further elucidation of the concept of land as such. However, by section 61(3),

> "In this Act –
>
> (a) references to the ownership or the owner of any land are references to the ownership of a legal estate in fee simple in the land or to the person holding that estate;
>
> (b) references to land registered in the register of title are references to land the fee simple of which is so registered."

I shall return to these provisions in due course.

46. The application of the second defendant was made on 20 July 2019. It stated both (i) that it was made under section 15(3), and (ii) that the "relevant period"

for the purposes of that provision ended on 23 July 2018. As will be seen, this was the date when the claimant erected certain signs on the land. It is thus clear that the second defendant's application was based on local inhabitants' indulging *as of right* in lawful sports and pastimes on the land between at least July 1998 and July 2018. As will also be seen, the phrase "as of right" is a legal term of art, featuring in a number of judicial decisions at the highest level. In effect, it requires a careful consideration of the precise circumstances in which the "indulging" took place. However, and as noted later, the parties have agreed that *some* (though not all) of the conditions set out in section 15(3) have been met in this case.

47. But there is a further point which must be investigated for the purposes of this claim. Unfortunately, however, this further point does not appear in the statutory text at all. Instead, it is recognised only in the caselaw (although, again, at the highest level). This is whether there would be any sufficient incompatibility between (i) the statutory purposes for which the land is held by the owner and (ii) the effect of its being designated as a town or village green under the 2006 Act. That in turn will require careful attention to the statutory provisions under which the land is held.

48. In the result, this claim concerning land in Bristol which has been registered as a town or village green pursuant to the second defendant's application continues to be subject to section 13 of the 1965 Act in the form in which it is set out above, notwithstanding that the relevant provisions of the 2006 Act repealing section 13(a) and (b) have been brought into force. Moreover, the tests that have to be applied in law depend on the true effect of a number of important legal authorities. As I said in my decision last year, this kind of legal treasure hunt, searching in the interstices of secondary legislation for the text of the currently applicable law, and holding several inconsistent ideas in your mind simultaneously, is certainly not for the faint-hearted. In addition, the substantial caselaw, glossing the statutory text, especially in relation to the doctrine of statutory incompatibility, has to be taken into account. And, as to that, I had the benefit of a full day's argument by three counsel, each expert in this somewhat arcane area of the law. "Ignorance of the law is no excuse", as a proposition applying to the public at large, has a rather hollow ring in this context.

Section 16 of the 2006 Act

49. I will take the opportunity here to mention also section 16 of the Act, because it becomes relevant later on. This section enables the owner of land registered as a town or village green in certain circumstances to release the land from registration by offering equivalent land in exchange. It relevantly provides:

> "(1) The owner of any land registered as common land or as a town or village green may apply to the appropriate national authority for the land ('the release land') to cease to be so registered.
>
> (2) If the release land is more than 200 square metres in area, the application must include a proposal under subsection (3).

> (3) A proposal under this subsection is a proposal that land specified in the application ('replacement land') be registered as common land or as a town or village green in place of the release land.
>
> […]
>
> (9) An application under this section may only be made with the consent of any relevant leaseholder of, and the proprietor of any relevant charge over—
>
> (a) the release land;
>
> (b) any replacement land.
>
> (10) In subsection (9) 'relevant charge' and 'relevant leaseholder' have the meanings given by section 15(10)."

"As of right"

50. I shall have to discuss the law in more detail later in this judgment, but in considering the facts of the case it will be helpful to bear in mind the following points. User of land *as of right* is user which is neither by force, nor in secret, nor by permission. In the traditional Latin phrase, it is "*nec vi, nec clam, nec precario*". The use of the phrase "by force" (the ablative *vi*) in this expression is misleading. A better word might be "contentious", in the sense that the owner objects to the user, even though not resorting to force to expel trespassers, or, indeed, resorting to it to prevent them entering. Depending on the circumstances, signs placed by the owner on the land (for example) may well indicate that the user is contentious, and thus is not user *nec vi*. The meaning of the words on any sign is a question of law for the court. In the present case the claimant says that the user of the land by local residents for "sports and pastimes" was contentious, both because of the use of signs and also because of other expressions of objection. The defendants, however, say that it was not. Lastly, user of land *as of right* must be uninterrupted during the whole 20-year period. If it is interrupted, the period starts again. The claimant says it was interrupted in the relevant period. The defendants say that it was not.

"Lawful"

51. In order to satisfy the statutory requirements, the sports and pastimes indulged in by local residents over the 20-year period must be "lawful". I shall come back to this question later.

Statutory incompatibility

52. The doctrine of statutory incompatibility in the context of the law of town and village greens does not appear expressly in the legislation. It was first enunciated by the Supreme Court in a case which it decided in 2015. It has since been further discussed in three further cases, two decided in the Supreme Court in 2019, and another in the same court in 2021. I shall have to refer to these cases in more detail later on in this judgment, but for present purposes I can say

this. The cases hold that town and village green legislation does not apply to land where there is an incompatibility between (i) the statutory purposes for which the land is held and (ii) the use of that land as a town or village green. It will therefore be necessary for me to examine in some detail the purposes for which the land is held, and by whom. The claimant says that this doctrine applies in the present case. The defendants say that it does not.

Relevant education law

53. I also need at this stage to refer shortly to a number of statutory provisions relating to education. Section 40 of the Local Government (Miscellaneous Provisions) Act 1982 dealt with nuisances committed on school premises. It relevantly provided that:

> "(1) Any person who without lawful authority is present on premises to which this section applies and causes or permits nuisance or disturbance to the annoyance of persons who lawfully use those premises (whether or not any such persons are present at the time) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £50.
>
> (2) This section applies to premises, including playgrounds, playing fields and other premises for outdoor recreation—
>
> (a) of a school maintained by a local education authority … "

(These provisions are now in substance contained in the Education Act 1996, section 547. It is not necessary to set them out.)

54. The Education Act 1996, section 10 (replacing section 1(1) of the Education Act 1944) imposed a general duty on the Secretary of State to promote education:

> "The Secretary of State shall promote the education of the people of England and Wales."

55. Further, by section 11(1),

> "The Secretary of State shall exercise his powers in respect of those bodies in receipt of public funds which—
>
> (a) carry responsibility for securing that the required provision for primary, secondary or further education is made—
>
> (i) in schools ...
>
> […]
>
> in or in any area of England or Wales, or
>
> (b) conduct schools … in England and Wales,

> for the purpose of promoting primary, secondary and further education in England and Wales."

(By section 4(1) of the Act, "school" is defined to include "an educational institution which is outside the further education sector and the [wider] higher education sector and is an institution for providing—

> […]
>
> (b) secondary education, or
>
> […]".)

56. Section 14(1) of the 1996 Act (replacing section 8(1) of the Education Act 1944), imposes a general duty on local authorities to provide sufficient schools. It provides:

> "A [local authority] shall secure that sufficient schools for providing—
>
> (a) primary education, and
>
> (b) education that is secondary education by virtue of section 2(2)(a),
>
> are available for their area."

57. In addition, section 13(1) of the 1996 Act, as amended, provides that

> "A [local authority] shall (so far as their powers enable them to do so) contribute towards the spiritual, moral, mental and physical development of the community by securing that efficient primary education, [and secondary education] [and, in the case of a [local authority] in England, further education,] are available to meet the needs of the population of their area."

58. Turning to standards for schools, section 542 of that Act, as amended, relevantly provides:

> "(1) Regulations shall prescribe the standards to which the premises of schools maintained by [local authorities] … are to conform; and without prejudice to the generality of section 569(4) different standards may be prescribed for such descriptions of schools as are specified in the regulations.
>
> (2) Where a school is maintained by a [local authority], the authority shall secure that the school premises conform to the prescribed standards."

59. The relevant regulations are the School Premises (England) Regulations 2012 (SI 2012/1943), regulation 10(1) of which provides that

> "Suitable outdoor space must be provided in order to enable—

> (a) physical education to be provided to pupils in accordance with the school curriculum; and
>
> (b) pupils to play outside."

60. Next, there is safeguarding. Section 175 of the Education Act 2002, as amended, relevantly provides:

> "(1) A [local authority] shall make arrangements for ensuring that [their education functions] are exercised with a view to safeguarding and promoting the welfare of children.
>
> (2) The governing body of a maintained school shall make arrangements for ensuring that their functions relating to the conduct of the school are exercised with a view to safeguarding and promoting the welfare of children who are pupils at the school."

61. That deals with local authority schools. Under the Academies Act 2010, section 1, the Secretary of State may enter into "Academy arrangements" with any person, under which the other person gives the undertakings (i) to establish and maintain an educational institution in England which meets the requirements of (amongst other things) academy schools, and (ii) to carry on, or provide for the carrying on, of the institution.

62. Because section 542 of the 1996 Act does not apply to academies, there are equivalent regulations made under section 94 of the Education and Skills Act 2008, namely, the Education (Independent School Standards) Regulations 2010 (as amended in 2014), regulation 3 and paragraph 7 of schedule 1 of which provide that:

> "The standard in this paragraph is met if the proprietor ensures that—
>
> (a) arrangements are made to safeguard and promote the welfare of pupils at the school; and
>
> (b) such arrangements have regard to any guidance issued by the Secretary of State."

The claimant is inspected under section 108(1) of the 2008 Act for compliance with the standards, and there are consequences for failure to comply, ultimately involving potential criminal liability.

Local authority powers

63. Finally in this section of my judgment, for completeness I set out here certain provisions of the Local Government Act 1972 dealing with the powers of local authorities to acquire, appropriate and dispose of land. These provisions are relevant in considering what the local authorities have done. They relevantly provide:

> "120. (1) For the purposes of—

(a) any of their functions under this or any other enactment, or

(b) the benefit, improvement or development of their area,

a principal council may acquire by agreement any land, whether situated inside or outside their area.

(2) A principal council may acquire by agreement any land for any purpose for which they are authorised by this or any other enactment to acquire land, notwithstanding that the land is not immediately required for that purpose; and, until it is required for the purpose for which it was acquired, any land acquired under this subsection may be used for the purpose of any of the council's functions.

(3) Where under this section a council are authorised to acquire land by agreement, the provisions of Part I of the Compulsory Purchase Act 1965 (so far as applicable) other than section 31 shall apply, and in the said Part I as so applied the word "land" shall have the meaning assigned to it by this Act

[…]

122. (1) Subject to the following provisions of this section, a principal council may appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation; but the appropriation of land by a council by virtue of this subsection shall be subject to the rights of other persons in, over or in respect of the land concerned.

[…]

123. (1) Subject to the following provisions of this section, [and to those of the Playing Fields (Community Involvement in Disposal Decisions) (Wales) Measure 2010,] a principal council may dispose of land held by them in any manner they wish.

(2) Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.

[…]

270. (1) In this Act, except where the context otherwise requires, the following expressions have the following meanings respectively, that is to say—

[…]

'land' includes any interest in land and any easement or right in, to or over land;

[…]"

THIS CASE

What this case *is* about

64. This claim is brought under section 14 of the 1965 Act, set out above. What the court must do is to decide whether, at the point of registration, the land the subject of the claim met the statutory criteria for a town or village green. If the court decides that it did, then that is the end of the claim. However, if the court decides that it did not, then it must go on to consider whether it deems it "just" to rectify the register. If the court deems it just to do so, then the court "may order" that rectification. It appears from the language used that, in those circumstances, the court enjoys a measure of discretion as to whether to order rectification. Given that the court must consider that it is "just" to rectify the register before it can arrive at that position, it is not easy to see what any further discretion adds to the position. One might have thought that, if it were just to rectify the register, any exercise of discretion not to do so would be regarded as irrational.

The grounds relied on

65. The claimant puts forward six grounds upon which it says it is entitled to succeed in its claim. I shall have to discuss these in more detail later in this judgment, but for present purposes I can summarise them as follows.

66. **The first ground** is that registration was precluded by the doctrine of statutory incompatibility. The claimant says that this arises in three ways, namely (i) in relation to the purpose for which the first defendant holds the freehold reversionary interest in the land, (ii) in relation to the purpose for which the Secretary of State for Education uses the land, and (iii) in relation to the purpose for which the claimant holds the leasehold interest in the land.

67. **The second ground** is that the signs which were erected on the land was sufficient to render use of the land by the public "contentious", and thus not "as of right".

68. **The third ground** is that the claimant's objection to the first application (in 2011) also operated to render use of the land by the public "contentious".

69. **The fourth ground** is that the terms of the lease rendered use of the land by the public by permission, so that it could not be "as of right".

70. **The fifth ground** is that use of the land by the public was not continuous over the whole land throughout the 20-year period. It is said that the land was so extensively used for cricket, football and athletics as to interrupt use by the public.

71. **The sixth ground** is that the inhabitants' use was not lawful, as contrary to various provisions of education legislation.

72. It goes almost without saying that the defendants deny that any of these grounds justifies the court in making the order sought by the claimant.

How judges decide cases

73. For the benefit of the lay parties concerned in this case I will say something about how English judges decide civil cases like this one. I borrow the following words largely from other judgments of mine in which I have made similar comments. The point is that there are a number of important procedural rules which govern the decision-making of judges, and which are not as well-known as they might be. I shall briefly mention some of them here, because non-lawyer readers of this judgment may not be aware of them.

Burden of proof

74. The first is the question of the *burden* of proof. Where there is an issue in dispute between the parties in a civil case (like this one), one party or the other will bear the burden of proving it. In general, the person who asserts something bears the burden of proving it. Here the claimant bears the burden of proving its case, *ie* (i) that the land did not satisfy the legislative test for a town green and (ii) (if so) that it is just to amend the register accordingly. The importance of the burden of proof is that, if the person who bears that burden satisfies the court, after considering the material that has been placed before the court, that something happened, then, for the purposes of deciding the case, it *did* happen. But if that person does *not* so satisfy the court, then for those purposes it did *not* happen. The decision is binary. Either something happened, or it did not, and there is no room for *maybe*. That may mean that, in some cases, the result depends on who has the burden of proof.

Standard of proof

75. Secondly, the *standard* of proof in a civil case is very different from that in a criminal case. In a civil case like this, it is merely the balance of probabilities. This means that, if the judge considers that something in issue in the case is *more likely to have happened than not*, then for the purposes of the decision it *did* happen. If on the other hand the judge does *not* consider that that thing is more likely than not to have happened, then for the purposes of the decision it did *not* happen. It is not necessary for the court to go further than this. There is certainly no need for any *scientific* certainty, such as (say) medical or scientific experts might be used to.

The role of judges

76. Thirdly, in our system, judges are not investigators. They do not go looking for evidence. Instead, they decide cases on the basis of the material and arguments put before them *by the parties*. They are umpires, or referees, AND not detectives. So, it is the responsibility of each party to find and put before the court the evidence and other material which each wishes to adduce, and formulate their legal arguments, in order to convince the judge to find in that party's favour. There are a few limited exceptions to this, but I need not deal with those here.

The fallibility of memory

77. Fourthly, more is understood today than previously about the fallibility of memory. People misremember. They make mistakes. In commercial cases, at least, where there are many documents available, and witnesses give evidence as to what happened based on their memories, which may be faulty, civil judges nowadays often prefer to rely on the documents in the case, as being more objective: see *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22], restated recently in *Kinled Investments Ltd v Zopa Group Ltd* [2022] EWHC 1194 (Comm), [131]-[134]. As the judge said in that case,

> "a trial judge should test a witness's assertions against the contemporaneous documents and probabilities and, when weighing all the evidence, should give real weight to those documents and probabilities".

In the present case, there are a large number of useful documents available. This is important in particular where, as here, the relevant facts have occurred over many years.

78. In deciding the facts of this case, I have therefore had regard to the more objective contents of the documents in the case. In addition to this, and as usual, in the present case I have heard witnesses (who made witness statements in advance) give oral evidence while they were subject to questioning. This process enables the court to reach a decision on questions such as who is telling the truth, who is trying to tell the truth but is mistaken, and (in an appropriate case) who is deliberately not telling the truth. (Different considerations apply to the witnesses who gave evidence before the inspector, as I discuss below.) I will therefore give appropriate weight to both the documentary evidence and the witness evidence, both oral and written, bearing in mind both the fallibility of memory and the relative objectivity of the documentary evidence available.

Reasons for judgment

79. Fifthly, a court must give reasons for its decisions. That is the point of this judgment. But judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered. Judges deal with the points which matter most. Put shortly, judgments do not explain all aspects of a judge's reasoning, and are always capable of being better expressed. But they should at least express the main points, and enable the parties to see how and why the judge reached the decision given.

EVIDENCE

Live witnesses

80. In the present case I heard from the following witnesses of fact on behalf of the claimant: Alison Crosland (Director of Finance and Resources at the claimant school), Joanne Butler (Headteacher of the claimant school), and Nathan Allen (former IT Manager and later Facilities Manager at the claimant school). I heard from the following witnesses of fact on behalf of the second defendant: the second defendant herself (local resident), John Goulandris (local councillor),

Susan Mayer (wife of the applicant in the first application in 2011), Emma Burgess (applicant in the second application) and Helen Powell (local resident). As I have said, the first defendant called no witnesses of fact. It did however supply some copies of local user forms (created for the purposes of the second application) which had not found their way into the trial bundle.

81. I carefully observed all of the witnesses called whilst they were being cross-examined. I may say at once that, in my judgment, all of them were attempting to assist rather than to mislead the court. They told me what they believed to be true. I therefore reject any suggestion that any witness was deliberately telling lies. Nevertheless, I think that some memories were better than others, and on a few occasions I thought that one or two witnesses had convinced themselves that what they mistakenly believed to have happened had actually happened. This is a common phenomenon, and is frankly is not unexpected in any case where the witness has had a long time to think about what happened about events that happened many years ago. False memories can easily take the place of genuine ones, and be as convincing as any to the witness. Part of my function is to bring a measure of objectivity to the evaluation of the evidence.

The inspector's reports

82. At the outset of the trial, I raised the question of the admissibility in evidence of the material contained in the inspector's various reports (including his own opinions as to findings of fact). It was submitted to me that the contents of the reports were admissible, not least having regard to certain observations of Lightman J at first instance in *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2007] 2 All ER 1000, [15], [20]. That was a case like the present, in which the owner of land which had been registered as a town or village green applied under section 14 of the 1965 Act for an order removing the land from the register. Two preliminary issues were ordered to be tried. One was "Whether the jurisdiction conferred by section 14(b) of the Commons Registration Act 1965 is by way of rehearing or appellate or on some other basis?"

83. The judge summarised the parties' submissions on this issue as follows:

> "11. The rival contentions of the parties as to the true construction of Section 14 focus on the evidential basis on which the court can decide that no amendment or a different amendment to the register ought to have been made. The Defendant contends that the court is required to decide this question in the same way as it would be required to decide an appeal by way of rehearing from the decision of the registration authority, that is to say on the evidence before the Panel but subject to the qualification that further evidence may be admitted if the '*Ladd v Marshall* test' is satisfied and in particular if the evidence in question could not reasonably have been adduced before the Panel. The Claimant contends that the hearing before the court is not an appeal and that the procedure to be adopted on appeals is accordingly inapplicable, and that the parties are subject to no constraint as to the issues of law and fact which they raise subject only to the exercise by the court as master of its own procedure of its case management powers and in particular its powers regarding the admission of evidence."

84. It will be seen that the issue did not concern the rules of evidence as such. Instead, it concerned the question whether the court was in principle confined to the evidence before the registration authority (as the authority said), or whether the parties were free to adduce whatever evidence they wished, whether it had been before the authority or not (as the applicant said). No attention was paid to, and no cases were cited on, the question of *admissibility* of certain kinds of evidence in the proceedings.

85. The judge considered the statutory language used, and said:

> "14. … The issue is one of the construction of Section 14. The language of the section affords no basis for any suggestion that the role of the court is the exercise of an appellate or supervisory jurisdiction or that the jurisdiction should only be exercisable if the registration authority in directing registration made an error on the evidence adduced before it or an error of law: compare the position in respect of decisions of Commons Commissioners under sections 6 and 16 of the 1965 Act. The section requires only that it should appear to the court on the evidence before it that for any reason (factual or legal) no amendment or a different amendment should have been made and that it is just to rectify the error on the register."

86. Then follow the observations relied on in the present case:

> "15. In my judgment on the face of the statute the court is free to adopt the procedure best calculated to enable a just and fully informed decision to be reached whether 'no amendment or a different amendment ought to have been made', whether it is just to rectify the register, what should stand as evidence and what evidence should be admitted. The court in exercise of its case management powers will have regard to the process adopted by the registration authority or any panel when the amendment of the register under section 13 of the 1965 Act was made and the evidence adduced before it. It will no doubt have in mind that with the passage of time recollections will have dimmed and potential witnesses may have died or ceased to be available. It may (for example) direct that evidence (in particular if unchallenged) adduced before the registration authority or any panel shall stand as evidence and any finding by it shall stand: (a) as a finding of fact at the hearing before the court; (b) as evidence; or (c) as a finding of fact in the absence of evidence to the contrary; and in deciding on the admissibility of evidence the court will no doubt bear in mind that no amendment shall be rectified unless it is just to do so and that it may be unjust to order rectification on the basis of new evidence e.g. which cannot now be challenged but could have been when registration took place.
>
> […]
>
> 20. I accordingly hold in answer to the first question that Section 14 imposes no fetter on the evidence or arguments which may be relied on to establish that no amendment or a different amendment should have been made, even as it imposes no fetter on the evidence or argument which may be relied on to establish that it is or is not just to rectify the register; and that it is a matter for the judge hearing the application under Section 14 in

> the exercise of his case management powers to decide the procedure to be adopted and what should stand as evidence and what should be admitted as evidence at the trial."

87. It is thus apparent that the judge was directing his attention to *the kind of proceeding* that was to be conducted. It was not to be an appeal, or a review, but a proceeding *de novo*, in which evidence was to be at large. I cannot regard the judge's observations set out above as dealing with the rules as to admissibility of whatever evidence the parties wished to adduce. That was simply not before him. It did not arise as part of the issue as to whether it was an appeal or a new proceeding, and none of the relevant authorities was referred to. The decision of Lightman J was taken to the Court of Appeal, which affirmed his decision on both preliminary points: [2009] 1 WLR 334. Lloyd LJ (with whom Laws and Rix LJJ agreed) cited paragraph 15 of Lightman J's judgment, and expressly stated (at [28]) that he agreed with it. Once more, however, there was no discussion of the rules of the admissibility of evidence, or any citation of authority relating to that.

88. I further note that the observations of Lightman J were subsequently cited with apparent approval by Patten LJ in the Court of Appeal in its later decision in *Taylor v Betterment Properties (Weymouth) Ltd* [2012] 2 P & CR 3, [18]. This was an appeal from the decision of Morgan J, who had heard the substantive application in the same case under section 14. That judge held ([2010] EWHC 3045 (Ch)) that the land should not have been registered, and that it was just to rectify the register to remove it. A local resident sought to appeal that decision. But the observations of Patten LJ were preceded by these introductory words:

> "18. The hearing of the preliminary issues took place before Lightman J in March 2007: see [2007] EWHC 365 (Ch). He held that the jurisdiction exercised by the court on a s.14(b) application was not merely appellate or supervisory."

Once again, therefore, the court was simply not concerned with admissibility of evidence, but with the very nature of the proceeding. No authorities on admissibility were cited.

89. In these circumstances I consider that the matter is *res integra*, and that I must deal with the matter of admissibility myself. Hearsay evidence was formerly inadmissible in civil proceedings. It was not on oath, the demeanour of the witness could not be observed, and there could be no cross-examination, with the result that the evidence could not be tested. Such evidence was first rendered admissible in civil proceedings by the Civil Evidence Act 1968, section 1 and 2, now replaced by the Civil Evidence Act 1995, sections 1 and 2. Accordingly, the court is well able to admit in evidence in these proceedings the evidence that was received by the inspector in holding his non-statutory inquiries, even though it is conveyed through the medium of his reports. Indeed, the oral evidence recorded by the inspector differs from most oral hearsay evidence, because it was in fact subject to cross-examination before the inspector. So it was tested.

90. However, what does concern me is how it is possible for the court to admit or even accept *the findings of fact* which the inspector made after receiving that evidence. The inspector is not thereby giving evidence of what he himself heard or saw. Instead, basing himself upon what he heard or saw, he is giving *his opinion* as to what happened. In the general law of evidence, such opinions as to matters of fact in issue in this case are inadmissible as opinion evidence going to issues before the court. This often referred to as the rule in *Hollington v Hewthorn* [1943] KB 857, where the conviction of a driver for careless driving was held by the Court of Appeal to be inadmissible in evidence in a claim against the driver for negligence. Thus, in *Land Securities plc v Westminster City Council* [1993] 1 WLR 286, Hoffmann J held that the findings of an arbitrator in an earlier arbitration were not even admissible evidence in a subsequent proceeding.

91. In *Rogers v Hoyle* [2015] 1 QB 265, the Court of Appeal pointed out that, although the rule has in fact been abrogated *in relation to criminal convictions*, it still

> "34. … applies to the findings of facts of arbitrators … of coroners or coroners' juries … of persons conducting a Wreck Inquiry … and to the findings of individuals, of however great distinction, conducting extra statutory inquiries such as Lord Bingham's Report into the Supervision of BCCI … "

92. The Court concluded that

> "39. The foundation on which the rule [in *Hollington v Hewthorn*] must now rest is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ('the trial judge'), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard."

93. Of course, it is possible for Parliament to make legislative provision inconsistent with the rule in *Hollington v Hewthorn*, just as it did in relation to criminal convictions. But I do not think that Lightman J in the *Betterment* case thought that it had also done so in the town and village green legislation. He did not advert to the rule, or to any specific provisions of the legislation, and neither did he explain any reasoning by which he might have considered that the terms of that legislation had partially abrogated the rule for its own purposes. Nor did the Court of Appeal on appeal from him, or indeed in the later *Betterment* case. For myself, I see nothing in the terms of the legislation even to suggest, much less to require, that the rule in *Hollington v Hewthorn* should not apply to the

findings of fact of the registration authority or some person acting on its behalf. Indeed, the statute is completely silent on questions of evidence. I see no scope for inferring that the legislation has effected such an important change to the rules of evidence in applications under section 14.

94. Accordingly, I hold that the inspector's *findings of fact* are inadmissible in evidence in these proceedings. However, that may not make much difference in this case. Partly, this is because the parties have helpfully agreed certain important facts in advance (I deal with this in more detail below). And partly this is because the inspector has recorded the evidence before him in the 2016 inquiry in some detail, and I accept that what he records is an accurate account of what he was told. Obviously, I have not seen the witnesses as they gave evidence then, but, whilst a judge obtains a better appreciation of the evidence by doing so, this is not the kind of case where that is essential for the finding of facts. In practical terms, in reading his record of the evidence, I am not much worse off than he was. Moreover, his findings of fact appear to me to be (as one would expect) generally in line with the evidence before him on the particular occasion. In these circumstances, I have read and concentrated on the evidence and not on the inspector's findings.

95. I note that the inspector commented in his report on the evidence of several witnesses before him. They include that of Bob Hoskins. The inspector gave his opinion that Mr Hoskins' recollection was "not altogether reliable". This was however in relation to a particular point, dealing with the positioning of a sign on the land, with which I deal below. It was not a general comment, and I do not think I should seek to apply it more generally. The inspector did not say, for example, that he thought Mr Hoskins was lying.

The trial bundle

96. In the usual way a trial bundle was prepared for use of the court and the parties and witnesses at the trial. Subject to one point, this was well prepared, and I found it of great assistance. But I call attention to that one matter which concerned me. This was that far too many of the documents in the bundle had been redacted, usually to remove names and other personal details of individuals. As a general proposition, this should not happen.

97. I do understand that in these modern times those who handle documents containing personal data (particularly in public sector occupations) are used to routinely redacting documents before allowing third parties to see them, because they do not wish to fall foul of data protection rules. But, in deciding a case like this, with events over many years to consider, and many people involved from different organisations, it makes the court's job much more difficult if the identities of those sending or receiving letters or emails, or taking part in meetings, are anonymised from an excess of data protection zeal. I remind all parties (and indeed all readers of this judgment) that the data protection legislation contains wide exemptions for the use of personal data in legal proceedings, so that liability will not attach to the disclosure of personal data for the purposes of these proceedings: see *eg* the Data Protection Act 2018, section 15, Sch 2 paras 5 and 14.

98. Of course, there are types of litigation (such as where the interests and welfare of children are concerned) where a different regime applies. But this is ordinary litigation in the Business and Property Courts, and such special regimes do not apply here. I also accept that there may be exceptional cases even in ordinary civil litigation where some special harm may ensue from the disclosure of personal data, quite outside the data protection rules. However, lawyers are well used to dealing with such cases, for example by specific redaction (justified in advance), the non-provision of certain documents to the public, or even the court sitting in private. But there should be no such wholesale and general redaction of personal data as has taken place here.

FACTS ASSUMED OR FOUND

99. Certain matters were agreed by the parties without the need for evidence to prove them. They are set out in paragraph 11 of the order of 14 May 2024, which provided as follows:

> "By consent of the Parties, the Court will proceed on the following agreed factual basis:
>
> a. It is common ground between the three parties that the following elements of the statutory definition of a Town and Village Green in s 15 Commons Act 2006 are met and the Court will therefore proceed on the basis that they are met without the need for parties to lead any evidence on them:
>
> i. the users of the land came from a neighbourhood within a locality;
>
> ii. The users amounted to a significant number; and
>
> iii. the use was not in secret.
>
> b. In relation to continuity of use over the relevant 20-year period, it is common ground between the three parties that the pattern of use of the land in question by local inhabitants is accurately set out in the Inspector's report dated 14 October 2016 (concerning the period 1991-2011). Further, it is common ground between the Claimant and Second Defendant that the pattern of use by local inhabitants did not change during the period 2011-2018 (save that the School ceased to use the land for PE in April 2014 (on the School's understanding) or sometime in 2013 (on the 2nd Defendant's understanding), and the University of Bristol and clubs ceased to use the land in 2016). The First Defendant does not take issue with this common ground. The Court will therefore proceed on this factual basis without the need for parties to lead any evidence on it. However, there is a dispute as to whether such a pattern of use is legally sufficient to meet this element of the TVG definition in s 15 Commons Act 2006. This legal issue will need to be determined by the Court.
>
> c. In relation to the use of the land for lawful sports and pastimes, it is common ground between the three parties that a significant number of local inhabitants have used the land in issue for sports and pastimes, as detailed

> in the various Inspector's reports, during the time periods that have been the subject of the TVG applications. The Court will therefore proceed on the basis that this element of the statutory definition of a Town and Village Green in s 15 Commons Act 2006 is met without the need for parties to lead any evidence on it. However, there is a dispute between the parties about the legality of this use with the Claimant contending that such use was unlawful by virtue of s 40 Local Government (Miscellaneous Provisions) Act 1982 (prior to 1 October 2002) or s 547 Education Act 1996 (post 1 October 2002). Whether such use was lawful will need to be determined by the Court."

100. On the basis of the evidence and documents before me, I find the following facts. These are in addition to the assumptions agreed between the parties and the matters recited summarily earlier as to the history of the land and its ownership, and of the three applications to register it under the town and village green legislation. As I have noted, the critical period is that of the twenty years from July 1998 to July 2018.

The land

General

101. I begin with a physical description of the land. This is a good-sized piece of land, mostly grassed over, about 22 acres in extent, and roughly rectangular in shape, though with a bite taken out on the south side where the original mansion house stands, now used as an adult learning centre. Though nothing turns on this, it appears that the original grounds of the house extended further, but were reduced by increasing development at the edges, until the land was acquired by the county borough of Bristol in more or less its present extent (though in two separate tranches) just after the Second World War.

102. The land is not currently laid out as a public park. Whereas in the grounds of the house there are metalled driveways and paths, and even a car park, on the land there are no marked paths, seats or public facilities, except for the children's play area is the south-west quadrant (which is the area the subject of the landlord's break option). There are no ornamental features, such as statues, memorials, flower beds and the like. Instead, there are just trees and shrubs, albeit of considerable variety and natural interest, especially in the Arboretum area to the east of the house. Some of the trees on the land are subject to Tree Protection Orders. There are no signs to indicate dedication to the public, or hours of access by the public, such as one might expect to find in a public park. In wet weather, the land becomes muddy and difficult to traverse without boots. Apart from two fine trees in the middle of the west and east halves respectively, the land more resembles a recreation ground or sports field than a public park.

103. The land is edged with residential properties on its north, west and south-western sides, though on the north side there is a narrow pathway (Ebeneezer Lane) between the houses and the boundary of the land. On the southern side the land goes right up to the public highway (Shirehampton Road) from which it is separated by a low stone wall. On the eastern side the matter is more complicated. It appears that the land ran up to the public highway (Parry's

Lane), from which it was separated by a similar low stone wall. But, in modern times, Parry's Lane has been widened by taking over the pedestrian pavement running up the western side of the road and turning it into roadway. The pedestrian pavement has been diverted *inside* the low stone wall that formerly indicated the Stoke Lodge boundary. That wall instead now separates the pavement from the roadway on Parry's Lane. Meanwhile, the Stoke Lodge boundary has retreated to a wire fence a few feet to the west. Overall, the land looks like exactly what it is, namely, the former grounds of a large country house, now surrounded by modern urban development. For those who can see into it (whether from the roadway or from adjacent houses) it presents an attractive prospect of *rus in urbe*. It is easy to see why this land is important to local residents.

Access to the land

104. The evidence is that, by the 1990s, there were a considerable number of ways in which the public could gain access to the land. These seem all still to be in existence. On the photograph/plan shown below, these public access points are indicated by yellow arrows.

105. First, there was the main entrance to the property on Shirehampton Road. On the photograph/plan set out above, this is marked by an arrow numbered 1. This is a gated entrance in the low wall running along the south side of the land. The gate was open at the time of my visit. At the top right corner of the photograph/plan is another gated entrance, marked by an arrow numbered 2. At the time of my visit, it was padlocked shut. Historically there were a service yard and building here. Now there is a gas converter, which is fenced off. It was built in about 2010. In the middle of the top of the photograph/plan is a third entrance, marked by an arrow numbered 3. Historically, it seems that there was a lodge entrance on the north side of the property, which is shown on the old maps set out earlier. Entrance 3 is slightly to the east of that, opposite the bottom of West Dene, and now consists of a clear and intentional gap (wide enough for

pedestrians, but not vehicles) in the low wall running along Ebeneezer Lane at that point. There is a sports pavilion in poor condition on the land adjacent to entrance 3.

106. These three entrances are significant as places where it is common ground that signs were placed. The claimant relies on such signs (among other things) as having made the public's use of the land "contentious". A red dot on the photograph/plan shows approximately where the evidence indicates that the signs were and their replacements still are. In the case of entrance 1, this is a little way from the entrance and on the way up the left side of the house.

107. Entrance 4 is on the left-hand side of the photograph/plan marked by an arrow so numbered. It is at the end of an unadopted cul de sac called Cheyne Road. At the junction further up Cheyne Road with Bell Barn Road, there is a sign indicating that Cheyne Road is a "Private Road". There is accordingly no public right of way along it, as demonstrated by the interactive public rights of way map included in the trial bundle. The access to the land consists of a gap between the end of a wire fence and a large tree. This gap permits level access to the land. It appears that in the past a bollard was placed in the gap to prevent the access of motorcycles. It is not there now. In more recent times a large and very heavy tree branch has been placed in front of the gap, no doubt with the same objective. It would not impede an able-bodied person seeking to enter the land. Entrance 5 is a little to the north of entrance 4, at the corner of the land, and is marked by an arrow so numbered. It too provides a level access to the land, but here from Ebeneezer Lane.

108. There are four access points marked with arrows numbered 6 along the edge of Ebenezer Lane. But these are simply gaps in the hedge which grows – or at least grew – on the top of an earthbank between Ebenezer Lane and the land. They were obviously not intended originally to be used as access points, and do not provide level access to the land. Nevertheless, they are there. Bob Hoskins, who was an Area Landscape Manager in the Parks Team of the Neighbourhoods Department of Bristol City Council, and before that was a district supervisor with Avon County Council from 1981, told the inspector in 2016 that although the boundary was intact until about 2005, it was persistently breached by the public, causing a number of gaps to appear, and enabling the public to access the site without difficulty. Entrance 7 is similar, though also through a gap in a low stone wall which forms the boundary at that point, but further to the east along Ebenezer Lane, close to Parry's Lane.

109. Entrance 8 is from that part of the pavement on Parry's Road which runs to the *west* of the original stone wall boundary. The wire fence which represents the current boundary between the pavement and the land has been rolled back, so that there is a significant gap through which pedestrians can access the land on the level. Peter Faulkner Hudson, then grounds manager for the University of Bristol, told the inspector in 2016 that (during 2012) a branch of a tree grew into the fence so that it was necessary to remove a section of it, which then became a new access point.

110. Entrance 9 is different. It arises out of the work done in widening the roadway in Parry's Lane. When the pavement was moved to the inside of the stone wall,

the stone wall was pierced accordingly. The wire fencing which was to form the new boundary between the land and the pavement was constructed some feet away, that is, the width of the new pavement. But a gap was left between the end of the wire fencing and the pierced wall, through which there was (and still is) access to the land. But this is not level access. The land is significantly lower than the pavement and the roadway. If there were any steps down to the land, they have gone. It is not straightforward to negotiate the change in level from the roadway down to the land. In wet weather it will be more difficult.

111. I have described the low stone wall which surrounds a considerable part of the land. It is a clear boundary between the public highway and the playing field,, but it is not difficult to surmount. Some hardy local residents have accordingly found it possible to go straight "over the wall" to access the land, particularly at the point on the Shirehampton Road marked with an arrow numbered 10 on the photograph/plan. The entrances marked with arrows numbered 11 and 12 on the photograph/plan represent alternative ways to access the land from the main entrance (entrance 1). Entrance 11 passes to the left of the house and thus past the sign to be found there. Entrance 12 passes to the right of the house and through the Arboretum. However, it is clear that a wire fence was built to the right of the house and this appears to have prevented access to the Arboretum. But the fence is broken and there are now gaps through which pedestrians may easily access the land. Lastly, the photograph/plan shows an entrance number 13, from the children's playground to the rest of the land, and entrance number 14, which goes to the land round to the west of the playground without going through it.

112. In addition to these public access points, some 14 properties backing onto the land have gates (whether they actually open nowadays or not I do not know) directly onto the land. They are marked on the photograph/plan by blue arrows. Some of those who completed forms supporting the application for registration were occupiers of some of these properties. There is no evidence that I have seen as to how these properties acquired such gates and when. The two Ordnance Survey map extracts reproduced above show that these properties were not there in 1912, but that most of them were built by 1938. This would have been during the time that the land was in private ownership, and formed part of the grounds of Stoke Lodge as a private dwelling. I infer that the private owner or owners of Stoke Lodge sold off the plots of land for the construction of the properties. It is implausible in those circumstances that the owner or owners would have granted rights to the purchasers to use the remaining land for any purpose, since that would reduce the estate's privacy, and gates would therefore have served no purpose. There was certainly no evidence before me that any adjoining landowner had any such rights, or had been granted them since. I find therefore that the gates have been installed since then, but without any grant of rights to use the land. However, nothing appears to turn on this here, and the adjoining occupiers were not joined as parties to this claim.

113. For the sake of completeness, I add that the position may be different for the former Stoke Lodge cottage, on Ebenezer Lane. There would have been a reason for direct access from the cottage to the land at the time when it was privately

owned with the main house, and this may have carried through into later conveyancing. But I need not explore this further here.

Use of the land by local residents

114. As stated in paragraph 11 of the order of 14 May 2024, it is agreed between the parties that local residents have made use of the land for the purposes of sports and pastimes in the twenty years to 25 June 2018. The evidence shows that these have included walking, whether with dogs or without, running and other athletics, meeting friends, playing with children, teaching them to ride a bicycle, flying kites, observing wildlife, taking part in games, whether formally or informally organised, fruitpicking, picnicking and partying. There is even a photograph in the bundle of a hot-air balloon (a Bristol speciality) about to take off from the land in 1989. Use has also been made for other purposes, such as taking a shortcut to a destination on the other side of the land. However, this is neither a sport nor a pastime, and so is irrelevant for this purpose, though of course it may be important for the purpose of acquiring a public right of way across the land. But that is a separate issue, with which I am not concerned.

115. The evidence before the public inquiry in 2016 was that, in the early years of ownership of the land by Bristol county borough, members of the public were not as tolerated on the land as they are have been in more modern times. Groundsmen might come and check up on what they were doing. Indeed, in the early days they were sometimes told to leave as trespassers. But gradually, over the decades, members of the public have used it more and more, and, as one might expect in such circumstances, a sense of public entitlement has arisen.

116. By 2016 this had reached the point where ground staff and teachers remonstrating with (say) the owners of dogs that are annoying students or defecating on the pitches had been verbally abused, if not worse. Bob Hoskins, the City Council Area Landscape Manager, gave evidence to the inspector that a member of his staff had been assaulted by a dog walker when challenged to pick up faeces deposited by her dog. Of course, such behaviour was not then and is not now the norm. The vast majority of members of the public using the land do not conduct themselves in this way. But it indicates a sense in which the landowners are increasingly on the defensive, and nowadays would hesitate to challenge anti-social behaviour. That is relevant later on, in considering what it is reasonable for the landowner to say and do in protesting unrestricted use.

Avon County Council's ownership

117. On 7 September 1982 the Education Committee of Avon County Council noted the imminent coming into force on 13 September of section 40 of the Local Government (Miscellaneous Provisions) Act 1982. I set out the terms earlier. It will be recalled that this created the criminal offence of being on educational premises and permitting or causing a nuisance to the annoyance of persons lawfully there.

118. At a meeting of a joint ad hoc Sub-Committee on Community Use of County Council Premises on 17 September 1982, the Director of Education's report

(under the heading "Problems of Operation") stated that informal public use of playing fields was increasing. The Chairman was recorded as saying that

> "there were a number of playing fields that were not being used to their full extent and suggested that notices could be published locally to improve and encourage their use. There was an impression amongst the public that informal use of playing fields was a right, and in some areas, fencing of these areas had been abandoned due to this, which in turn created the problem of nuisance for home-owners overlooking these fields."

119. During the time that Avon County Council owned the land, the land was used as a playing field by Fairfield Grammar School, a local school operated and maintained by that council. The minutes of the Land and Buildings Sub-Committee of the county council disclose complaints about unauthorised use of the land in the 1980s, including by motorcyclists racing on it and people dumping rubbish. In 1985 or 1986, signs were erected on the land by the council, pursuant to a policy applied to all council education playing field sites which the public could physically access. This followed discussions with the county council as to how to discourage trespassory use of the council's educational playing fields. Unfortunately, the detailed files relating to this land were destroyed as a result of an office move in mid-2000.

120. Nevertheless, in relation to this land, signs were erected near entrance 2 and entrance 3, and apparently at four other points on the land. The existence of those at entrances 2 and 3 as at 2016 was recorded by the Inspector in his 2016 Report, on the basis of evidence before him to that effect. The other four signs included one nailed to a large beech tree on Ebenezer Lane, one on a post on the path to the left of the house, and one on either side of the main entrance (entrance 1) on Shirehampton Road. The evidence of Mr Hoskins to the inspector was that these four signs were in place until at least 2002, but had disappeared some time after that. One of those at the main entrance gates apparently was lost when a gate was destroyed in a car accident.

121. In his report, the inspector cast doubt on Mr Hoskins' evidence about the sign nailed to the beech tree, and also about those on either side of the main entrance. He saw Mr Hoskins, but all that he says is that his recollection was "not altogether reliable". The inspector based this apparently on his own view that a metal Avon County Council sign would not have been nailed to a tree. But he does not say that he disbelieved him. In my view, the evidence of the signs on the tree and at the main entrance is both too striking and too detailed to be dismissed as an error of memory, and the evidence of Mr Faulkner Hudson relied on by the inspector does not persuade me to take a different view. For myself, therefore, allowing of course that I have not seen Mr Hoskins, I can see no reason not to accept his evidence, and I do.

122. All the Avon County Council signs were in the same form, which read as follows;

"MEMBERS OF THE PUBLIC ARE WARNED

NOT TO TRESPASS ON THIS PLAYING FIELD

In particular the exercising of dogs or horses, flying model aircraft, parking vehicles or the use of motorcycles and the carrying on of any other activity which causes or permits nuisance or disturbance to the annoyance of persons lawfully using the playing field will render the offender liable to prosecution for an offence under section 40 of the Local Government (Miscellaneous Provisions) Act 1982.

Requests for authorised use should be made to the Director of Education.

COUNTY OF AVON"

123. It appears from witness statements prepared for the purposes of the second and third applications for registration that at some time during the 1980s (probably 1987 or 1988) a groundsman employed by Avon County Council decided to lock the gate at the West Dene entrance. It is not clear from the evidence why this was done. But it also appears that this practice did not persist for more than a few days.

124. In the summer of 1989 entrance 4, at the end of Cheyne Road, had been blocked. It is not clear who did this. But in January 1990, a group of local residents turned up early one Saturday morning with a van and cleared the obstruction in about thirty minutes. The matter was reported in the *Bristol Evening Post* for 8 January 1990. Part of the article said:

> "'This access to Stoke Lodge has been in use for at least 40 years until it was filled in by someone during the summer,' said one woman. 'It is a favourite short-cut to Stoke Lodge, the shops and the playing fields'."

The article concluded:

> "A spokeswoman for Avon County Council, which owns the land, said there were worries about motorcycles being ridden onto the fields and a fence with a kissing gate is to be put up."

The provision of a gate appears to be confirmed by a letter from the Education Department at Avon County Council dated 4 January 1990, headed "Access onto Stoke Lodge Playing Field" and saying that an order had been placed for "a fence with a gate for pedestrian access".

125. It is relevant to an argument made by both defendants to note that, by section 42 of the Education (No 2) Act 1986,

> "The articles of government for every county and maintained special school shall provide—
>
> > (a) for the use of the school premises at all times other than during any school session, or break between sessions on the same day, to be under the control of the governing body;
> >
> > (b) for the governing body to exercise control subject to any direction given to them by the local education authority and in so doing to have regard to the desirability of the premises being made available (when

> not required by or in connection with the school) for use by members of the community served by the school."

126. On 24 January 1990, the Education Committee of Avon County Council resolved that policy option 2 contained in para 5.9 of a report to it on non-school use of school premises be directed to its schools. This option was to issue a direction to schools under section 42 of the 1986 Act in the following terms, so far as relevant:

> "In exercise of its statutory responsibility to ensure adequate facilities for further education, the County Council requires school governing bodies to ensure that
>
> > (a) Subject to the provision within the 1944 Education Act regarding voluntary schools, the school premises are available out of school hours when not in use for school purposes, for adult education … youth and community services … other educational activities of the Authority; and other statutory use, as defined in the Authority's lettings handbook.
> >
> > (b) The premises be made available at a cost neutral, ie at the economic cost only, to recognise that
> >
> > > (i) schools' formula budgets should not be subsidising such use; and
> > >
> > > (ii) the Authority's policy is to encourage community use of County Council budgets.
>
> […]
>
> Except as outlined in this directive, governing bodies would be free to determine the use to be made or their premises and to establish appropriate charges."

127. The minutes of a meeting of the joint Avon Council Council/Bristol City Council sub-committee, dated 8 April 1994, record that the meeting considered an undated joint report from the Direction of Planning and Development Services, Bristol City Council and the Director of Property Services, Avon County Council. One of the stated purposes of the report was to

> "inform the subcommittee of the current situation with regard to Education land currently under review by Avon County Council and which is held in excess of minimum statutory requirements for school playing fields, or where school use has ceased".

128. This report relevantly stated:

> "4. The disposal of school playing fields has attained national significance recently with the publication of a survey carried out by the National Playing Fields Association (NPFA). The survey draws attention to the increasing development pressures on areas of open space within towns and cities,

particularly those in education use. It is clear that problems over how to deal with no longer required for educational use school playing fields are being experienced by local authorities throughout the country.

5. At the local level strong concerns have been expressed by Bristol residents. During the consultation period on the Draft Bristol Local Plan the loss of open space was a major issue of debate. Recently two deputations from the Bristol Conservation Group have been presented to Bristol City Council urging action to prevent the loss of important areas of open space, and requesting that full public consultation by Avon County Council takes place on all proposals to dispose of land, playing fields, open space and historic buildings … A full list of 'surplus' sites was requested to be made public and that land be handed over to sporting groups and resources allocated to maintain sites.

[…]

8. Officers from Avon's Education and Property Services Departments are continuing a review of the land requirements of the Education Service in Avon. The review has focused specifically on assessing the current level of school playing field provision with respect to minimum statutory requirements. The review has identified a number of school sites where the playing field area appears to be in excess of those statutory requirements.

[…]

10. A report to Avon County Council's Education Committee of 1 February 1994 considered the results of the review. The Committee resolved the consideration of the report be deferred and a further report providing additional information be presented to a future meeting of the Education Committee The Education Committee is to consider a further report on the review at its meeting on 12th April. At this meeting the Education Committee will be requested to consider specific proposals in respect of three sites in the city. The sites are set out in Table 1. It is anticipated that further areas of land currently listed in Table 2 will be brought forward for detailed consideration by the Education Committee in due course.

[…]

13. The Education Committee only holds land for two purposes:

(i) to meet statutory requirements concerning minimum standard [sic] at individual schools; and

(ii) to secure adequate facilities for recreation, social and physical training, for school aged pupils in the LEA area vas a whole."

129. Table 1 to the report is headed "Education Sites to be Declared Surplus. 14th April 1994." The first of the three entries in this table is "Stoke Lodge Playing Field". The total site area was given as 11.08 hectares, and the area to be declared surplus was given as 7.5 hectares.

130. At its meeting on 12 April 1994, the Education Committee of Avon County Council resolved (inter alia)

> "that in respect of Stoke Lodge Playing Field:
>
> (i) 3.5 ha of land at Stoke Lodge playing field be retained for school playing fields, and the Resources Coordination Committee be asked to determine the future of the remainder of the playing field site (7.5 ha);
>
> (ii) the Resources Coordination Committee be recommended that consideration be given to the potential use of the surplus Education land to provide alternative playing fields for Colston Girls School should the decision on the development of the Redland Court site for primary school purposes require such provision to be identified; and
>
> (iii) the Resources Coordination Committee be requested to agree that any Capital Receipt from the sale of the land be used on an in and out basis to fund Education capital receipts to be identified depending on the value of any receipt".

In the event, the land was not disposed of or allocated to other purposes before the county council was abolished, and so the land was transferred to Bristol City Council, as set out below.

131. It is not known what was the basis of the statement of land-holding purposes set out in paragraph 13 of the report. It appears not to have been discussed in the meeting of the subcommittee on 8 April 1994, or in the meeting of the Education Committee on 12 April 1994. I have not seen any documents relating to the acquisition of the land in the post-war period (*eg* council minutes, conveyances, *etc*), so this is very little to go on. The reference to meeting statutory requirements (sub-para (i)) is probably a reference to the local education authority's duty under section 10(2) of the 1944 Act "to secure that the premises of every school maintained by them conform to the standards prescribed for schools of the description to which the school belongs". The reference to securing adequate facilities for recreation etc (sub-para (ii) was almost certainly a reference to the authority's duty under section 53(1) of that Act "to secure that the facilities for primary secondary and further education provided for their area include adequate facilities for recreation and social and physical training".

132. It is further not known why the writers of this report in 1994 focussed only on these two statutory duties of local education authorities and no others. Another important duty (already referred to above) was that under section 14 of the 1944 Act, to "secure that sufficient schools" were available in its area. The authority would have been able, for example, to use the land to build a new school at Stoke Lodge. (Indeed, council meeting minutes show that Bristol City Council was considering this very thing in late 1999.) If the lease in the present case came to an end, Bristol City Council could still decide, if circumstances warranted it, that a school needed to be built on the land.

133. The 1944 Act was repealed and replaced by the Education Act 1996 as from 1 November 1996. Section 10 of the 1944 Act was replaced by section 542 of the 1996 Act, and section 53 of the 1944 Act was replaced by section 508 of the 1996 Act. Section 508 was subsequently amended in 2007 to apply only to Wales, and a new section 507A inserted to apply broadly similar rules to England. I have to say that I place little store by this unexplained and unsupported remarks in paragraph 13 of the report to the joint sub-committee, limiting the purposes of holding the hand to two.

134. The provisions in section 42 of the Education (No 2) Act 1986 were replaced by the Education Act 1996, section 149(1). This relevantly provided that

> "(1) The articles of government for every county and maintained special school shall provide—
>
> […]
>
> (b) for the governing body in exercising control of the use of the school premises outside school hours—
>
> (i) to comply with any directions given to them by the local education authority by virtue of this sub-paragraph; and
>
> (ii) to have regard to the desirability of the premises being made available for community use … "

135. From 1 September 1999, these provisions were themselves replaced by similar provisions made by the School Standards and Framework Act 1998, section 40 and Sch 13, para 1. For ease of reference, these are relevantly as follows:

> "(1) This paragraph applies to a community or community special school.
>
> (2) The occupation and use of the premises of the school, both during and outside school hours, shall be under the control of the governing body, subject to—
>
> (a) any directions given by the [local authority] under sub-paragraph (3);
>
> […]
>
> (3) The [local authority] may give such directions as to the occupation and use of the premises of a community or community special school as they think fit.
>
> (4) In exercising control of the occupation and use of the premises of the school outside school hours the governing body shall have regard to the desirability of those premises being made available for community use."

136. Thus, during the relevant 20-year period from 1998 to 2018, a local education authority had power to give directions to the governing body of, originally, a county school, and, later, a community school, about "exercising control of the

use of the school premises outside school hours" (later, as to "the occupation and use of the premises") with which the governing body had to comply. The same provisions required the governing body in exercising control of the use of the land "to have regard to the desirability of the premises being made available for community use". Although Avon County Council had resolved to direct schools under the 1986 Act, in the terms set out above, which limited the use to be made out of hours to certain purposes connected with education, it is common ground that neither Avon County Council nor the City Council ever issued a direction to the governing body of either Fairfield School or Cotham School under section 149(1) or its successor provisions. To my mind it is inconceivable that the governing bodies were unaware of the signs on their own playing fields, and I find that they were so aware. But there is no evidence that during the relevant 20-year period the governing body of either school ever sought the removal of the Avon County Council or Bristol City Council signs, and I find that they did not do so.

Bristol City Council's ownership

137. The City Council became the owner of the land in 1996, on the abolition of Avon County Council and that council's replacement by itself. In September 2000, Fairfield Grammar School ceased using the land, as it was too big for that school's needs. Instead, Cotham Grammar School (as it was then called), which needed more sports/recreational space than Fairfield, began to use the land for sports activities. At the same time, management of the sports bookings of the land was taken over by the Department of Sports Exercise and Health of the University of Bristol, based at the Coombe Dingle Sports Complex, which is a little way to the north of the land, at the top of West Dene.

138. From 2004 that department took over the general maintenance of the land from the city council. This included a programme of improvements to the turf, including heavy scarification, aeration and regular mowing, with heavy machinery. There was about 1,924 hours of work to the land per annum. It also involved improving the security of the land, by locking the entrances which had gates with padlocks. (The arrangement was formalised in several successive written agreements, in 2004, 2005, 2008 and 2010. Each agreement contained the statement that the land was "open, at present, to the public and dogs". The agreement with the University was not formally terminated until 2019, though it stopped using the land in 2016.)

Voluntary associations

139. I interpolate here that a number of voluntary associations have been formed, at different times, of local people interested in preserving their and the general public's ability to use the land. These associations work to call attention to the current situation and any potential problems, and also they work to galvanise public opinion. Here I simply record their existence and purposes. They include The Friends of Stoke Lodge, Save Stoke Lodge Parkland, and We Love Stoke Lodge. To judge from the documents in the trial bundle, the Friends of Stoke Lodge have been active from at least 2005. At a meeting on 26 June 2005 between the City Council, the University of Bristol and the Friends, the City Council said that it did not "categorise Stoke Lodge as a public park and indeed

there were signs at some (not all) of the accesses confirming that it was a sports site." On the other hand, "it permitted public use provided that it did not impede sports use or damage the facilities". For their part, the Friends of Stoke Lodge (one of whom shown as attending was David Mayer) made clear that they were in favour of control over dogs and excluding motorbikes (amongst other things) but opposed restricting local casual access and fencing the land, for example. I note that Cotham School was not represented at the meeting.

140. As for Save Stoke Lodge Parkland, the first application for registration of the land, in 2011, was actually made by David Mayer in the name of "Save Stoke Lodge Parkland". The letter accompanying the application said that the association

> "was formed on 28th July 2010 at a public meeting attended by approximately 240 members of the community to co-ordinate the response to a Briefing Note used as a consultation document issued by Bristol City Council … This council document contained the proposal and recommendation to fence off the perimeter of the Parkland to exclude free public access with the twin objectives of (a) developing the site to provide enhanced sports facilities and creating a gated facility with the potential for greater commercialisation of the site, and (b) more worryingly, aiming to preclude and frustrate the opportunity to secure Town or Village Green status by preventing unfettered public access as of right … "

141. We Love Stoke Lodge was formed only in May 2018, but (according to its website) has been particularly involved in the second and third applications to register the land. Its role in this matter is accordingly much more recent, though nevertheless significant.

Dog control

142. I should also note that Bristol has had Dog Control Orders/Public Space Protection Orders in place since 2007. The current order is the City of Bristol (Dog Control) Public Space Protection Order 2023, which remains in force until December 2026. It creates offences and imposes penalties on persons in charge of dogs in respect of both (i) walking dogs without a lead and (ii) failing to pick up dog faeces deposited by their dogs. The order applies to

> "all land within the city and county of Bristol which is open to the air, including covered land which is open on at least one side, and to which the public are entitled and permitted to have access (with or without payment) … "

There are exceptions listed in the Schedule to the Order. But the land the subject of this claim is not one of them.

Erection of Bristol City Council sign

143. The Avon County Council sign on the path to the north-west of the house was replaced by the City Council in June 2009. There was some evidence that it had disappeared before then, but nothing turns on that. Tony Havens, an employee

of Bristol City Council from 1985 to 2014, told the inspector in 2016 that the sign was put here because it was considered to be the main entrance to the site accessed by the public. He also told the inspector that "this sign was put up because the council did not want members of the public to use the site". He further said that

> "the main reason for the new signage was to safeguard the children who are using the site with permission due to a number of issues such as people walking their dogs on the site and failing to clear up after them, acts of vandalism, graffiti and general trespassing".

144. By the time of my visit this sign was no longer there. Photographs show that it read as follows:

"[BRISTOL CITY LOGO]

Private grounds

These grounds are private property and there is no right of public access.
Legal action will be taken against any trespassers.

Any request for the use of these grounds should be made in writing to the Divisional Director of Property and Local Taxation.

The exercising of dogs on these grounds is forbidden."

145. Unlike the earlier signs, this sign was erected on a single post, which was therefore capable of being swivelled manually to face in different directions. Before me there was conflicting evidence as to the direction it had originally faced when it was first installed. This gave rise to suggestions by some witnesses that the sign was intended to be directed at people on the playing field coming from the field onto the curtilage of the house. That is implausible. The City Council owned both the house and the playing field. The playing field was (and is) just the sort of place that dogs might be exercised. The limited grounds of the house were (and are) not. More importantly, if the City Council wished to protect the grounds of the house (and not the playing field) from the exercising of dogs, this would not be restricted simply to dogs coming from the playing field. It would apply just as much to dogs coming from the main entrance on Shirehampton Road. But there is no similar sign facing the road. Thirdly, there are other signs relating to the adult learning centre located in the house grounds, but they are in quite different terms.

146. Moreover, none of the witnesses who gave evidence before me was involved in the erection of the sign. Most of them simply gave evidence as to the direction it was facing when they saw it. The exception was Mrs Mayer, who gave evidence that "people were walking their dogs across the garden" of the house and the sign was installed to prevent that. Yet the evidence of Bob Hoskins (who *was* involved in the erection of the sign) to the inspector in 2016 was that when it was erected it faced "onto the car park area and not into the playing field". That evidence, from someone involved in the erection, seems to me both more cogent and more plausible. Mrs Mayer may have misremembered, or it may

simply be that the occupants of the learning centre were concerned with dogs fouling the grounds at about the same time that the sign was erected. I therefore find that that the original direction of the sign was facing the car park. But I also accept that, if it was manually swivelled round by an unauthorised person, it may have faced different directions thereafter, and some residents may have seen it facing the "wrong" way.

Assurance of open access

147. At the end of 2009, the City Council proposed a major refurbishment of the land, including the development of community facilities, but also fencing the perimeter of the site. This latter part of the proposal was not popular with local people. An article was published in the *Bristol Observer* newspaper for 8 July 2010, entitled "*Anger at fencing plans*". This said in part:

> "One of Bristol's most picturesque playing fields could be fenced off from the public at a cost of £1 million, to the outrage of people living nearby. The City Council has tabled plans to enclose Stoke Lodge fields in Stoke Bishop to preserve them for use by Cotham School, improve the quality of the football pitches and satisfy health and safety concerns …
>
> Technically, the public have never been allowed access to the fields, which are council-owned …"

148. There were various meetings. On 15 September 2010, the status and use of the land was considered by the Henleaze, Stoke Bishop and Westbury on Trym Neighbourhood Partnership and Committee Meeting. This was attended by local councillors, elected neighbourhood representatives, council officers and members of the public. The Meeting resolved:

> "THAT the strength of feeling expressed at the Stoke Bishop neighbourhood forum be noted and that its views had been relayed to the Director of CYPS. It was further noted and that the Executive Member had given an assurance that the proposal to fence Stoke Lodge had categorically been dropped and that the parkland would remain with open access for all as of right."

(I do not think anything turns on it, but it appears that "CYPS" means "Children and Young People's Services".)

149. The Cabinet meeting of the City Council on 27 January 2011 had before it an undated report from its Service Director, Finance, concerned to summarise the budget process and provide information in relation to the final draft budget proposals. The original proposals had been published in October 2010. The report said in part:

> "From the initial consultation, ideas were invited about how the council should best set its spending priorities for the coming year and beyond. The comments returned largely fell in around 70 different themes. These are summarised, together with the Council's outline responses in Appendix 4."

150. Appendix 4 is headed "Bristol's budget conversation". One part from it (in the section headed "Educational and achievement and school improvement") reads as follows:

> "***Idea***: I feel further fencing off of school playing fields as [sic] a waste of money. The £1,000,000 of BCC education money earmarked for fencing and other improvements to Stoke Lodge parkland could be better spent on other capital projects in the education department (CYPS). Schools such as Cotham and Brightstowe could share much underused facilities such as playing fields.
>
> ***Response***: we are happy to reassure people, once again, that we will not be fencing off the Stoke Lodge playing fields, quashed this rumour once and for all."

Plainly this was an idea engendered by the press report in the *Bristol Observer* of 8 July 2010 (referred to above) that the city council was proposing to spend £1 million on fencing the playing fields at Stoke Lodge. These documents are concerned with ideas for saving money from the council's budget. They are not concerned with the status or the use of the land at all.

151. A further section in this document is headed "Parks and Sports". This includes the following:

> "**Idea**: ***School playing fields*** – could they not be used as recreation grounds used by local people of all ages and facilitated by play rangers, specialist sports coaches, fitness coaches, tai chi practitioners, etc? Might the costs be offset by a reduction in youth offending, obesity, diabetes, mental ill-health and the benefits include cross-generational interaction and support, happy healthy people, community cohesion, etc, etc? Could playing fields be transferred as a community asset to local community enterprises which would find innovative ways of raising the money for maintenance and service provision from feepaying activities (such as allotments round the edge, birthday parties, music festies, craft fairs) while still providing free access for many other regular activities and their participants, and the schools could become beneficiaries/partners – or they could set up a social enterprise and do it themselves?
>
> ***Response***: Yes – a really interesting idea we could look at in connection with the individual schools. Do you have any particular playing fields in mind and any particular uses we could explore?"

So far as I can tell, we do not have the minutes of the Cabinet meeting in the trial bundle, and therefore I do not know whether any of this was discussed at that meeting. Certainly nothing that I have reproduced here amounts to a decision by the City Council, and especially not in relation to Stoke Lodge playing fields.

The first application and report

152. As I have already said, Mr Mayer made the first application for registration in March 2011, and the inspector Mr Petchey was appointed to inquire and report. Again, as already stated, in his report dated 22 May 2013, the inspector recommended that the authority should register the land as a town or village green. For the reasons already set out earlier, however, no action was taken at the time. Eventually the inspector recommended that, because of recent important case law, it would be appropriate to hold a public inquiry, and this was done in 2016.

Use of the land by Cotham School and other authorised users

153. This is an appropriate point at which to assess the use actually made of the land by Cotham School from 2001 until it ceased using it at the end of 2014. The school's curriculum for physical education is the national curriculum. In its 2023 physical education subject report Ofsted indicated its view that less than 2 hours' physical education per week was not enough. Because of the distance of the playing fields from the school, pupils have to be taken there and brought back by school bus. Aerial photographs in the bundle show that there may have been up to eleven pitches laid out on the land, although of different sizes for different sports, together with an athletics track overlaid on the pitches on the eastern half. Of course, not all the pitches would be in use at once. There were also long jump pits from 2004 to 2012, and pitches for javelin and discus throwing.

154. Before I deal particularly with use of the land by the school, I will mention overall use by everyone, including the University, authorised under the transfer of control agreements which the school entered into. Peter Faulkner Hudson, grounds manager for the University, gave lengthy evidence about this to the inspector in 2016. He produced a print-out of more than 14,700 bookings of the land between 2000 and 2016. But he warned that this was just a guide, as sometimes bookings were cancelled, and sometimes more pitches were used than had been booked. He said that during weekdays in termtime and on those weekends when the land was being used by clubs, and taking into account the works being done to the land on a regular basis, it would have been difficult for the public to make use of the land except at the perimeter. I accept this evidence.

155. Some of the local inhabitants who gave evidence at the 2016 inquiry, and some of those who gave evidence before me, said that they were not impeded in their use of the land by the sports use, or that they had not seen much use by the school and the University and clubs. I see no reason to disbelieve what they actually said, but if they were working during the day they will have missed the most use being made, and anyone using the perimeter (*eg* as a short cut, or to walk a dog) would not have been impeded at any time. The schools and the University would not have used the land during the vacations, either. Some of the witnesses may also have been involved in use of the land via official bookings (*eg* for clubs). In any event, I consider that the evidence of a person whose job it was to look after the land is likely to be more comprehensive and accurate than the memories of those who used the land intermittently and for limited purposes in their spare time.

156. The school itself used the land on four mornings a week, and used about three pitches simultaneously for most of the morning. Between September and November, and February and May, the school also used the fields on two, or sometimes three, afternoons a week from about 3.30 pm to 5 pm. The games played included rugby, rounders, softball, soccer and hockey. The pupils arrived in school clothes and changed in the pavilion. There were also school sports days in June, held over two days so that junior and senior pupils competed separately. The evidence to the 2016 inquiry (both from school staff and local inhabitants) was that local inhabitants did not go on to the pitches during, or otherwise interfere with, school games. Dogs, however, were a different matter.

Dogs and the risk assessment

157. In 2012 the City Council installed dog waste bins on the land. I do not know if this was done with the consent of the claimant, by then the lessee of the land, and therefore *prima facie* the person entitled to give or refuse consent to this. By March 2013 an increase in dog fouling on the land had been noticed. In October 2013 incidents of dogs interfering in school activities were reported in these terms:

> "We had some major disruption today with dogs coming into the lesson. One dog came in and ran off with cones and chased students. Many of the students are anxious around dogs. The owner offered no apology but simply stated 'I suppose this is what you get when you have a dog walking area and a school using the park'. I asked the woman if she could put her dog on a leash. Another 2 dogs came running into the lesson, again the owners seemed to have no control of their animals."

158. In November 2013 there was another incident:

> "Please find attached a video of 3 dogs that came into my year 9 rugby lesson today and towards the end of the clip you see one of the dogs doing a poo on our pitch."

This video clip was played before me at the trial. So far as I could see, none of the dogs concerned was on a leash. On 27 January 2014, the Governors Finance Property and General Purposes Committee resolved that the claimant should cease to use the land for its sports or recreational purposes, pending the carrying out of a risk assessment and possible signage re dogs. Instead, it used the facilities at Coombe Dingle Sports Centre, for which it had to pay.

159. On 27 January 2014 there was a meeting of the Stoke Bishop Neighbourhood Open Forum, at which the claimant was represented by two persons, including the then headteacher, who explained the claimant's concerns, particularly in relation to dogs. To judge from the minutes of the meeting, there was little sympathy expressed for the claimant at the meeting. Comments included one that the claimant "had never bothered to attend" meetings of the Stoke Lodge Preservation Working Group, another that "facilities for walking dogs are just as important as for playing games", a third that the claimant "objected to the TVG so there could hardly be a partnership now", a fourth that the lease had "123 years left, and they do not pay anything for it", and a fifth that the claimant

"should be prepared to work with the community". A sixth person said that the land was much cleaner than before, and a seventh that the claimant "was exaggerating the dog problem". David Mayer is recorded in the minutes as saying a number of things at that meeting. One was:

> "DM voiced his fears that, because of Cotham's views on health & safety they will want to exclude areas of Stoke Lodge by fencing."

160. However, following a meeting of the Stoke Lodge Preservation Working Group (of which David Mayer was then the chair) on 18 March 2014, the minutes gave an account of the Neighbourhood Forum meeting in January which was at odds with the minutes of the Forum meeting itself. For example, the minutes of the Working Group said that "there was a sympathetic response [at the Forum meeting] to the problems of fouling and dogs off lead". But the only recorded mention of these problems in the Forum minutes is in remarks attributed to the then headteacher (saying the problem was getting worse), and a remark from the floor (that the school was exaggerating it). On the other hand, "there was criticism from the floor about the tone of [the claimant's] written objections to the TVG application". It is clear both that the claimant's opposition to that application was known, and also that some feared that the claimant wanted to exclude the public from access of some parts of the land.

161. The claimant carried out its risk assessment over the next few weeks. On 21 March 2014 the assessment was complete. It concluded that there were risks which meant the claimant should not use the land for sport purposes. In particular, it stated that the signs on the land were insufficient to negate the risks identified by the report. (Contrary to the second defendant's submissions, I do not read this report as an admission that the signs were insufficient to prevent user "as of right". The report was not dealing with that legal question, but with the practical one of risk to the children, and how to mitigate it.) On 24 March 2014, the Governors' Finance Property and General Purposes Committee resolved that the claimant should not use the land before September, whilst the health and safety risks were considered and mitigated. (In November 2014 the Finance Property and General Purposes Committee noted that there was a need to revisit the risk assessment and the possibility of returning to the land. In fact, with the exception of two games played on the land on 14 January 2016, referred to below, where the hosting school had booked these pitches, the claimant did not return to use the land until March 2019.)

162. As for the problems about dogs, at the Neighbourhood Forum meeting on 23 April 2014, Mr Mayer is recorded in the minutes as saying that "Anxieties raised by [the claimant] about dog fouling and 'attacks' needed to be proved by them." And PCSO Claire Fisher is reported to have said that "no reports of any attacks had been reported over the last six years and [the claimant] had not accepted invitations to meet her." I do not doubt the good faith of neither Mr Mayer or PCSO Fisher, but I am satisfied on the evidence that the concerns of the school about dogs were both real and substantiated.

163. The video that I saw of the dog on the pitch in November 2013 is particularly eloquent in this respect. Another example took place on 14 January 2016, when teams from the claimant school were supposed to be playing "away" against

Bristol Free School ("BFS"). That school normally played at Coombe Dingle, but on that day they found that no suitable pitches were available, and so Coombe Dingle allocated them pitches at Stoke Lodge. During the games a big dog ran loose on the pitches, and there were a number of other dogs not on leads, as well as a lot of dog faeces present on the ground. To the extent that these concerns need to be for present purposes, they have been proved as real and substantiated concerns. On the other hand, what the consequences should be in terms of the claimant's future use of the land are not a matter for me. I note in passing that various options were thereafter considered by the claimant. But they do not affect the *legal* questions which I have to decide.

The children's playground

164. It appears that local developers had provided funds, pursuant to an agreement under section 106 of the Town and Country Planning Act 1990, amounting to £102,491.64, for the construction of children's play facilities at Stoke Lodge. This apparently took many years to progress, but was finally completed, and opened in August 2014. It occupies part of the south-west quadrant of the land (which is coloured blue in the lease plan). That area is the subject of the landlord's break clause in the lease. So far as I am aware, this clause has not been operated by the City Council.

Awareness of the claimant's position to unrestricted access

165. In May 2016, John Goulandris, a ward councillor for Stoke Bishop, wrote a letter to the local newspaper to complain about what he called the "melodramatic and one-sided tone" of an article published in the newspaper about the use of the land. He went on to say that:

> "Cotham School are seeking … to erect fencing for the school's exclusive use of the site. Rather selfishly in my view they wish to exclude members of the public and prevent them enjoying use of the parkland, which they have done for many decades … "

It is accordingly clear that Mr Goulandris was aware that the claimant opposed unrestricted use by the public, and anyone reading his letter who was not already so aware would be aware also. Whether this opposition was indeed "selfish", as Mr Goulandris said was his opinion, is not a matter which is for me to decide.

The second report, registration and the judicial review

166. After holding the public inquiry, the inspector issued his second report, dated 14 October 2016. This time he recommended that the application be rejected, on the basis that the Avon County Council signs meant that user was not "as of right" in the period 1991-96. He did not decide what the position was thereafter. That is something which I shall have to do in this judgment. As I have already pointed out, in the judicial review judgment the judge found that, in the weeks leading up to the PROWG committee's meeting in December 2016, Mr Mayer had been "engaged in a campaign to persuade the committee that it should not accept the Inspector's recommendation". In November 2016, the claimant applied for grant funding to construct a new pavilion and install fencing of the

playing field. A planning application for the fencing was made, though it was subsequently withdrawn after the City Council indicated that it would not be approved. (In February 2017 the Claimant submitted a further application to redevelop the pavilion *without* a boundary fence.)

167. As I have already said, on 12 December 2016, the PROWG committee resolved, by the casting vote of the chair after a tied 3-3 vote, to reject the inspector's recommendation, and to register the land as a town green. It appears that this decision was taken along party lines. The dominant party voted one way. The opposition voted another. Whether it is desirable that a quasi-judicial decision (as Barling J described it in *TW Logistics Ltd*, at [42]) as to whether particular land does or not meet the legal definition of town or village green should be taken by a committee of elected local politicians subject to political influence and lobbying, and untrained in law or legal procedure (including in giving reasons for their decisions), is, happily, not a matter for me. It is a decision that has already been taken, by Parliament, in enacting the legislation in the form which it has.

168. Following the committee's decision, and as already stated, the claimant on 9 March 2017 commenced judicial review proceedings. These were successful, and the decision was quashed by Sir Wyn Williams in the High Court. His judgment was delivered on 3 May 2018, though the formal order was not sealed until 4 June 2018. I do not know why it took so long to seal the order. (For the benefit of non-lawyers, I mention here that judgments and orders normally take effect from the day on which they are made, rather than the day on which the order is actually sealed: see CPR rule 40.7.)

Landowner statement request

169. On 8 May 2018, after the High Court's decision was published, the claimant wrote to the City Council asking that it, as freeholder of the land (owner of the fee simple estate), make a landowner statement under section 15A of the Commons Act 2006 (inserted by the Growth and Infrastructure Act 2013, section 15, as from 25 June 2013) for the purpose of preventing any further application for registration as a town or village green. Section 15A(1) of that Act provides:

> "Where the owner of any land … to which this Part applies deposits with the commons registration authority a statement in the prescribed form, the statement is to be regarded, for the purposes of section 15, as bringing to an end any period during which persons have indulged as of right in lawful sports and pastimes on the land to which the statement relates."

170. By section 61(3) of the 2006 Act (which in fact I set out earlier),

> "references to the ownership or the owner of any land are references to the ownership of a legal estate in fee simple in the land or to the person holding that estate".

The claimant did not have an estate in fee simple, as it was merely a leaseholder. Only the City Council had that estate, and therefore only the City Council could

provide the landowner statement under section 15A. However, the City Council declined to provide one. So far as I am aware, no reasons for this refusal have been provided.

Fencing and new signs

171. In the light of the judgment, on 25 May 2018, the claimant published on its website a further proposal to fence the playing field. This proposal was also discussed at a meeting on 21 May 2018 between (amongst others) Mr Allen and Sandra Fryer of the claimant, Mr Mayer and Mr Goulandris. On 22 May 2018, Save Stoke Lodge Parkland issued a Newsletter referring to the fencing proposal as having been confirmed at that meeting.

172. On 18 June 2018, the local Member of Parliament, Darren Jones, wrote a letter to local residents, referring to the claimant's proposal to fence off the playing fields as one "which has been received critically by many of my constituents in and around Stoke Bishop ('the Community')", and "has been rejected by the Community, which has led to attempts to block the erection of the Fence". He said he was unable to support the claimant's position

> "unless and until I am provided with such evidence that both confirms the risks to be higher than currently assumed and can be corroborated with Ofsted. Only in that instance can such a response as the proposed Fence be concluded to be reasonable and proportionate in the circumstances."

173. However, in light of the judgment, on 25 June 2018, the PROWG committee reconsidered the question whether to register the land as a town or village green, its previous decision having been quashed. The six-person committee again split 3-3, but this time, the chairman being from the opposite political group compared to 2016, his casting vote was in favour of accepting the inspector's recommendation and rejecting the application. So, the application was now refused, again on party lines.

174. There followed an argument between the claimant and the City Council as to whether planning permission was required for the erection of the fence. The claimant limited the height of the fence to 2m in order to take advantage of what it said were permitted development rights. But then an argument was raised against the claimant that the land formed part of the curtilage of a listed building (that is, the house), so that permitted development rights would not apply. The City Council's Director of Finance said in a letter to the headteacher dated 13 July 2018 that the land *was* within the curtilage of the house. It was not explained why the Director of Finance (rather than an appropriate officer from the Planning, or Legal Services, department, for example) was the relevant officer to express such a view.

175. This On 24 July 2018, the claimant erected two new signs to replace the old Avon County Council signs at entrances 2 and 3. These signs read as follows:

"COTHAM SCHOOL PLAYING FIELD

MEMBERS OF THE PUBLIC ARE WARNED NOT TO TRESPASS ON THIS PLAYING FIELD

In particular the exercising of dogs or horses, parking vehicles, flying model aircraft/drones, playing golf, the use of motorcycles and the carrying on of any activity which causes or permits nuisance or disturbance to the annoyance of persons lawfully using the playing field will render the offender liable to prosecution for an offence under section 547 of the Education Act (1996)

REQUESTS FOR AUTHORISED USE SHOULD BE DIRECTED TO COTHAM SCHOOL

Cotham School accepts no liability to users for any unauthorised use of the playing field."

(Section 547 of the Education Act 1996 had in the meantime replaced section 40 of the Local Government (Miscellaneous Provisions) Act 1982, though expressed in identical terms.) Within 24 hours of their erection, they had become known in the community, and a local MP made a statement about them. The evidence before me was that the City Council initiated enforcement proceedings against the claimant in relation to the signs. I do not know what happened to those proceedings. But the signs are still in place, although both have been vandalised.

176. The defendants in the present proceedings do not accept that use of the land thereafter became contentious. However, the second defendant's application (which was the one accepted by the committee, and so has led to the present proceedings) was made under section 15(3) of the 2006 Act in respect of the 20-year period to 24 July 2018, which is just less than a year before the application date. As I have said, this avoids any argument about the effect of the signs erected on 24 July 2018, and enables the court to concentrate on the position in the twenty years immediately before that date.

177. Returning to the fencing proposal, the claimant engaged outside planning consultants, who wrote to the City Council's Head of Planning in August 2018 to respond to that decision. However, the Head of Planning's view, expressed in an internal City Council email to the Executive Director of Resources on 20 September 2018, was that the land was *not* within the curtilage, and that permitted development rights *would* apply, so that no planning permission was needed. (It appears that counsel's advice had been obtained by the City Council on this point.) By November 2018 that was the City Council's official position. Moreover, after some initial uncertainty, the City Council's officials also determined, and the executive Director of Resources wrote to the claimant on 21 November 2018 to say, that the fence would not be a "structure" requiring landlord's consent under the terms of the lease.

178. Accordingly, the claimant started the fence installation on 14 January 2019. Initially the work to the fences was impeded by community protests, which were reported in local media. But eventually it was completed and the claimant resumed use of the land for educational purposes in March 2019. This was the first time since it was acquired after the Second World War that access to the

greater part of the land had been controlled by a physical barrier. The plan below shows where the fence was installed (north is to the north-west corner of the plan). It will be seen that neither the children's play area nor the Arboretum was fenced, and that it was still possible, though much more restrictive, to walk on the land round the outside of the fence.

179. The fence was unfortunately vandalised on a number of occasions, and whole panels of the fencing were even removed. The evidence of the headteacher of the claimant school was that by November 2023 there were 17 gaps in the fence, produced by the removal by unknown persons of about 53 panels and 20 posts (although one gap had been caused by a falling tree). There is nothing to show who did this. After the decision of the PROWG committee in September 2023 to register the land as a town or village green, the claimant decided to, and did, leave the fencing unlocked, and also made the decision not to use the land for its sports activities. It has since rented playing fields elsewhere, pending the decision in the present proceedings.

Visibility of the signs

180. It is necessary for me to make findings as to how far the signs erected on the land before June 2018 were visible to and seen by members of the public using the land. I have already found that signs were erected by Avon County Council in six places, of which only three had signs by 2018 (not Avon signs, of course). Those three were (i) to the north-western side of the house, adjacent to the path to that side of the house (entrance 11 on the plan), (ii) adjacent to the gas converter in the eastern corner of the land, next to Parry's Lane (entrance 2 on the plan), and (iii) just south of the gap in the surrounding stone wall, at the junction of West Dene and Ebeneezer's Lane (entrance 3 on the plan). The three Avon signs erected in these spots were replaced by Bristol City Council signs in more or less the same place. The three signs that are no longer there at all were Avon County Council signs placed on either side of the main entrance in Shirehampton Road (entrance 1 on the plan), and the sign nailed to a beech tree in Ebeneezer's Lane. I have found that they disappeared after 2002.

181. Historically, entrances 1, 2 and 3 would have been the most important entrances to Stoke Lodge as a private estate. They were certainly deliberately created. Entrance 1 was the original main (vehicular) entrance to the house and grounds. Entrance 2 is close to an original north entrance (also vehicular) where it appears that there was an entrance lodge to the grounds. (The lodge may have become Stoke Cottage, in which, according to the evidence to the Inspector in 2016, a groundsman lived after the War, but nothing turns on this.) The current entrance 2 is pedestrian only. I do not know when it was created. Entrance 3 was a vehicular entrance to a car park and service buildings (now demolished). The vehicular entrance is still there, though the gates were locked when I visited.

182. Apart from the Avon County Council sign nailed to a beech tree in Ebeneezer's Lane, there is no suggestion that any of the entrances other than nos 1 to 3 ever had a sign at or adjacent to them. One reason for this may be that most, if not all, of the other entrances to the land (pedestrian only) were not deliberately created by the landowner, most being the result of breaches of the boundary by people over time. Entrance 9 however appears to have been created by accident, when the highway authority widened Parry's Lane and took a strip of the land inside the wall for the new pedestrian walkway, but failed to close the gap between the end of the wall and the beginning of the new fence.

183. The status of entrances 4 and 5 is unclear. As appears from the Ordnance Survey 1938 map extract (but not the earlier 1912 version), that corner of the land was noted as a (private) cricket pitch, and the evidence to the Inspector in 2016 was that Stoke Bishop Cricket Club used to play there. It may therefore be that the then owner or owners acquiesced in access to the cricket pitch being given either from the end of Cheyne Road or from Ebeneezer's Lane, or both, in order to avoid players and any local spectators traipsing over the rest of the land. If so, it would have been the case of a private owner tolerating access for a specific and limited purpose. But in any event there is no evidence that it was other than pedestrian access through either entrance.

184. The evidence before the Inspector in 2016 and before me at trial (including both the oral evidence and the user evidence forms lodged in support of both the second and third applications for registration) shows a wide range of variation, amongst those who used the land, as to how much notice those users took of the signs. Some say they never noticed them at all. Some say they did notice that there were signs, but did not read them. Some say they both noticed and read them. Some of those who noticed the signs say they noticed them only after they visited the land on earlier occasions without seeing them. Some of those who both noticed and read them say they read them only after they visited the land earlier without reading them.

185. In relation to the first category (that is, those who never noticed signs at all) I must make a qualification. The question asked in the user evidence form was in this form: "Did you ever see any notices/signs to prevent or discourage the use of the land by local people/the community?" Some of those who answered "No" to this question can be demonstrated from other evidence *in fact* to have seen the signs erected by Avon County Council or the City Council on the land, but to have formed the view that they did not "prevent or discourage the use of the land", and therefore did not fall within the scope of the question. These include

David Mayer (who made the first of the three applications for registration, and whose application refers to those signs), and his wife Susan Mayer (who gave evidence before me, and accepted that she had seen them). To judge from the responses to the user evidence forms, there are at least two others in the same position. My qualification is therefore that the number of "No" respondents to this question is unreliable, because it is impossible to know how many of the other "No" respondents so answered the question on the same basis.

186. Having made that qualification, I note the following evidence in particular. First, all the witnesses who gave oral evidence to me at the trial said that, whatever entrance they habitually used to access the land, they *had* seen the signs at some time during the 20-year period ending 24 July 2018. Secondly, the evidence of the user evidence forms lodged in support of both the second and the third applications for registration is striking. These forms included questions on whether the person compiling the form had seen a sign (the text of which question I have set out in the previous paragraph), and also on which entrance or entrances he or she used.

187. A majority of those supporting the second application, and a substantial minority of those supporting the third, said that they had seen a sign. But almost all of those who said they had *not* seen one also said they had used an entrance where in fact there *was* a sign. There was only one user evidence form that I found (from either the second or third application) where a respondent had answered "No" to seeing a sign but had not used any of the entrances with signs. That respondent said that he had used his own garden gate, which backed onto the land. It is also to be noted that the erection of the new signs (in the same places as two of the old) by the claimant in July 2018 immediately generated controversy amongst local people.

188. On the evidence, I find that all but an insignificant minority of those who actually used the land were aware of the signs. Moreover, a considerable number of those users said in the user form that they thought the effect of the signs *was* to prohibit trespassing on the land.

Safeguarding children

189. There can be no doubt that, in considering the question of statutory incompatibility between the education purposes for which land used for the purposes of the school is held and registrations the town or village green, it is relevant to consider the question of the safeguarding the schoolchildren. In the *Lancashire* case in the Supreme Court, to which detailed reference will shortly be made, the judgment of the majority of the judges specifically refers to it:

> "65. … so far as concerns the use of Area B as a school playing field, that use engages the statutory duties of [Lancashire County Council] in relation to safeguarding children on land used for education purposes. LCC has to ensure that children can play safely, protected from strangers and from risks to health from dog mess. The rights claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use of Area B takes place … "

190. It is therefore not surprising that Joanne Butler, the headteacher of Cotham School since 2015, gave evidence in at the trial about child safeguarding. She referred to regulations (the relevant text of which I set out earlier) imposing on the claimant duty to ensure that arrangements are made to safeguard and promote the welfare of pupils at the school, such arrangements having regard to any guidance issued by the Secretary of State (and she refers to that guidance). She explained that the school has a child protection and safeguarding policy, updated every year. In the light of security incidents nationally, beginning with the Dunblane school shootings in 1996, attitudes to school security have considerably changed. She gave evidence that the decision to cease using the land as the school playing fields in 2014 was based on a risk assessment carried out as a result of safeguarding concerns, including open access to the land, uncontrolled dogs, dog faeces, and potential risk of harm to pupils and staff from members of the public, as well as the risk of pupils absconding. A single teacher of 30 pupils could not deal with all these concerns on an open field.

191. Whereas all access to the main school site is gated, and lanyards have to be worn by visitors, access to the land, as the school playing fields, was completely open until 2019. Following the judgment given in June 2018 of the judicial review of the registration authority's decision on 12 December 2016 to register the land as a town or village green, and the subsequent decision of the authority on 25 June 2018 to reverse that decision, the claimant sought to, and did, install fencing on the land as part of its arrangements for the safeguarding of the schoolchildren. But, once the registration authority decided to register the land as a town or village green in September 2023, the claimant decided to unlock the gates pending the decision in these proceedings.

192. Ms Butler gave evidence that, if the land was confirmed to be a town or village green, then the claimant would be unable to use the land effectively as a playing field for various reasons which she set out in her witness statement. I make clear that, at least in considering whether the land was properly registered as a town or village green, I am not concerned with these reasons. They do not affect the legal registrability of the land. She accepted in cross-examination that the schools regulatory agency Ofsted did not require schools to take specific steps with regard to site security, and in particular did not require the perimeter of the playing field to be fenced. However, neither did Ofsted rule out fencing. She also accepted that other schools did not fence their playing fields. However, she said that in such cases (such as at Fairfield School) the playing field was closer to the school, which made support easier. She said that she and the governing body were responsible for safeguarding the children. Her and their view was that, in the circumstances of the present case, the claimant could not effectively use the land as a playing field for school purposes unless it was fenced.

193. The point was made in argument by counsel for the second defendant that no direction had been given in the present case for the admission of expert evidence, and that Ms Butler's evidence was opinion evidence, which could only be admissible if it was expert opinion evidence. In my judgment, almost all of the evidence given by Ms Butler was evidence of fact. She identified the regulations which caused her to think that safeguarding duties existed and what she understood that the terms of those duties were. She explained that, in order

to comply with the regulations, the claimant had a safeguarding policy, and went on to explain what the terms of that policy were. She explained the genesis of the risk assessment carried out on behalf of the claimant in 2014, and what the results of that assessment were. She explained the governors' decision not to use the land for the foreseeable future pending further consideration. She explained the security arrangements at the school main site, and why she considered that the land could not be used effectively by the school as a playing field at that time. She also explained the decision to fence the land in 2019, once that became possible.

194. I accept that Ms Butler's evidence that, if the land was confirmed to be a town or village green, then the claimant would be unable to use the land effectively as a playing field, was a matter of opinion rather than fact. But, on that particular point, Ms Butler is in a peculiarly advantageous position to give such an opinion. An expert witness is one qualified by learned knowledge, or practical experience, of doing a thing. She is both a trained and an experienced teacher, appointed (no doubt after a competition) as the head teacher, and charged with the responsibility of protecting the schoolchildren. I would accordingly regard her as someone capable of giving an admissible expert opinion on this point. But she is not a person "who has been instructed to give or prepare expert evidence for the purpose of proceedings" within CPR rule 35.2, and hence is not subject to the Part 35 regime: see *Rogers v Hoyle* [2015] 1 QB 265, [62]. As the Court of Appeal there made clear (at [64]), the civil courts regularly receive expert evidence outside the confines of CPR Part 35. This is just such an example. So, I do not think the objection to Ms Butler's evidence goes anywhere.

195. My view overall is that Ms Butler was giving precise, careful and above all truthful evidence, which I accept. There is no doubt that the claimant has an important duty to safeguard and protect the schoolchildren in its care, and that in the performance of that duty the claimant has produced a policy which is intended to protect against various perceived risks, of greater or lesser likelihood. Even a theoretical risk is still a risk, and the consequences of serious harm resulting from, say, a dog attack, or an infection from toxic dog faeces cannot simply be ignored. If a child died from such a cause, and a school accepted that it did not take the risk into account because it was just "theoretical", I am sure that the political, as well as legal, consequences would be significant. Opinion evidence of this kind is inherently a matter of assessment and evaluation. It is not a precise science. But, in my judgment, in the context of our society as it is now, Ms Butler's approach had ample justification.

THE CASELAW

General points

196. I have already set out some of the statutory law applicable to this matter. I now need to refer to the relevant caselaw which, in the main, glosses that statute law. A large number of authorities were cited to me by the parties. I hope I shall be forgiven for concentrating on those cases which I think will be of the most assistance to me. I begin with two general points, and then move on to consider the doctrine of statutory incompatibility, both because that is the subject of the

first ground of the claim, and also because this arises logically at the outset of the enquiry. If the land cannot be subject to the town and village green regime at all, all the other questions fall away. I then go on to deal with use as of right, and the justice of amending the register.

The creation of perpetual rights and burdens on registration

197. The first general point is that registration of the land as a town or village green creates the right (which previously had no existence) for local inhabitants to use the land for their lawful sports and pastimes: see *Oxford City Council v Oxfordshire County Council* [2006] 2 AC 674, [35](1), [69]. Hohfeldian analysis teaches us that registration must also impose the concomitant burden on the land, thus significantly reducing the rights of the landowner. Thus, in *Paddico (267) Ltd v Kirklees Metropolitan Council* [2014] AC 1072, [34], Lady Hale (with whom all the other judges agreed) referred to these landowner rights as having been "severely curtailed" on registration. Moreover, in practice these rights are created, and this burden is imposed, *in perpetuity*, subject only to the possibility of a claim to rectification of the register (to correct an erroneous registration), and of an exchange of land in certain circumstances under section 16 of the Commons Act 2006 (but that burdens the exchanged land in the same way). The public's right cannot, for example, be bought out, whatever the price: see *R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs* [2021] AC 194, [61].

The effect of registration on estates, interests and charges in or over the land

198. I have to deal now with an important point about English property law, which arises (I think) in this case for the first time in a town or village green context. This is that "land" as a physical thing is not the subject of property rights in English law. Instead, the subjects of property rights are the legal metaphysical concepts of *estates, interests and charges* (bundles of rights of different kinds) in or over the physical land. These concepts consist of rights of enjoyment or exploitation of the land for different purposes or lengths of time. This is the result of the feudal system in English history. Leaving on one side the special position of the Crown, it is still the case today that no one in English law owns "land". Instead, people own bundles of rights (estates, interests and charges) *in or over* land. So, the second general point to which I referred above deals with the effect of registration on these different estates, interests and charges in the land concerned.

199. Most of the cases involving registration of town or village greens involve a contest between the owner of the legal estate in fee simple (popularly called "the freehold") and the local inhabitants. In the present case, however, there is not only a freehold owner (the City Council), but there is also the holder (the claimant) of a long lease, which is a separate legal estate in the land. Here it is the leaseholder, rather than the freeholder, who objects. As I have already noted, section 15 concerns applications "to register land to which this Part [of the 2006 Act] applies." Both section 5 (dealing with "land to which this Part applies") and section 61(1) (providing that "'land' includes land covered by water") deal with land as a tangible, physical thing, and not as the metaphysical concept of a divisible bundle of rights. On the face of it, therefore, if "the land" as a physical

thing is bound, then all the individual estates, interests and charges in or over it must equally be bound.

200. It is true that section 5 of, and Schedule 1 to, the Interpretation Act 1978 relevantly provide:

> "5. In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule.
>
> […]
>
> Schedule 1
>
> […]
>
> 'Land' includes building and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land.
>
> […]"

But this applies only "unless the contrary intention appears". Since the definition of "land" in section 61(1) of the 2006 Act makes clear that land *includes* land covered with water, but *does not include* the other extensions contained in the 1978 Act, in my judgment it demonstrates a contrary intention for the purposes of section 5 of the 1978 Act. Hence that statutory definition does not apply for the purposes of the 2006 Act.

201. However, there is also section 61(3) of the 2006 Act to consider. I set it out earlier, but repeat it here for convenience:

> "In this Act –
>
> (a) references to the ownership or the owner of any land are references to the ownership of a legal estate in fee simple in the land or to the person holding that estate;
>
> (b) references to land registered in the register of title are references to land the fee simple of which is so registered."

202. At first sight, it might appear that the draughtsman was intending to equate "land" with the fee simple estate in the land (the "freehold"), one of the two legal estates in land which can exist in English law after 1925 (the other being the term of years absolute, or lease: Law of Property Act 1925, section 1). But closer examination of the text shows that this is not so. What paragraphs (a) and (b) instead do is to recognise that, as already stated, "land" as a physical thing is not the subject of property rights in English law. Instead, the subjects of property rights are the metaphysical concepts of *estates, interests and charges* in or over the physical land.

203. Notwithstanding this fundamental point, the Act has referred throughout to the "owner of the land" and the "ownership of the land". So, these persons must be

identified for the purposes of the Act. Yet, left on their own, these references would not make sense in English property law terms. Accordingly, in paragraph (a) the draughtsman has given them a special meaning which English property law can cope with. Similarly, the phrase "land registered in the register of title" is used throughout the Act. But it, too, is meaningless, because under the English land registration system it is not *land* that is registered, but once again *estates, interests and charges* in or over the land. So, by paragraph (b), the draughtsman has given a special meaning to that phrase, which enables the land concerned to be identified. In other words, neither of these paragraphs equates "land" with the fee simple estate, *except* for the very limited purposes of giving meaning to three particular composite phrases used in the Act.

204. So far, therefore, it appears that there is nothing to show that registration of the land as a town or village green does not bind *all* estates, interests and charges in or over the land. And, if there were nothing more, that would be that. But there are other provisions in the Act which complicate this simple position. These are contained in sections 15(8)-(10) and 16(9)-(10), both of which were set out earlier. Section 15(9) provides that the owner of the fee simple estate in land may apply for the registration of the land as a town or village green only with the consent of "of any relevant leaseholder of, and the proprietor of any relevant charge over, the land" Section 15(10) defines a "relevant leaseholder" as one with a lease granted for more than seven years, and a "relevant charge" as a registered charge in relation to registered land, and otherwise as a legal mortgage or a charge registered under the Land Charges Act 1972. Section 16(9) makes similar provision in relation to an application by the owner of the fee simple estate for land already registered as a town or village green to be released in exchange for other land.

205. So, certain applications for registration, or for the release of land already registered, depend on the consent of *some* estate or charge holders, *but not others*. Short leases, easements and profits, and unregistered charges which are not legal mortgages, for example, are all excluded. It might be inferred from the requirement of consent that the estates and charges of those who give it are to be bound by the registration or exchange of land. It is less clear what can be inferred in the case of those who are *not* required to give consent. And, of course, cases of registration *on the application of local inhabitants* are outside the requirement of consent altogether.

206. It may be that the legislative intention was to bind *all* estates, interests and charges in or over the land *except* those estate or charge holders that, in the case of some applications for registration, are entitled to withhold consent, and thus prevent the application being made at all. If that is the case, then it could have been made clearer. Fortunately, in the present case I do not need to decide this, as there is no issue between the parties. Here, they are agreed that, if the land is registered as a town or village green, the claimant's lease will be bound, even though it was granted before the application and registration were made. (Self-evidently, if it were granted out of the fee simple *after* registration, the rights and burdens would have already taken effect.) I note in passing that the parties were equally agreed before Sir Wyn Williams in the judicial review case, and that he did not need to decide the point either: see his judgment at [6].

Statutory incompatibility

207. I turn now to consider the doctrine of statutory incompatibility. As has been seen, the existence of this doctrine arose for the first time in cases which were making their way through the courts at the same time as the inspector was considering the position in relation to the land in this case. So, where an appellate decision in one such case differed from one of the court below, or it became known that a further appeal in a case was to take place, it became difficult for the inspector to decide whether to carry on regardless, or to wait until matters became clearer. That helps to explain why the status of this land has been disputed for so long (although it is not the only reason).

208. The first case to raise the question of statutory incompatibility was *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547, SC. In that case, the claimant private company ("NPP") owned land which it maintained and operated as a port under various statutory powers. Those powers enabled byelaws to be made regulation the use of the law. Such byelaws were indeed made. The land concerned included a part of the foreshore called "West Beach". NPP fenced off part of West Beach, preventing public access. The town council objected, and applied to the defendant registration authority for West Beach to be registered as a town or village green. An inspector was appointed to inquire, report and make recommendations. The recommendation was to register the land, and it was accepted. NPP brought proceedings for judicial review of the decision.

209. At first instance, Ouseley J quashed the decision on the sole ground that the land could not be registered as a town or village green under the 2006 Act because it was reasonably foreseeable that registration would conflict with the statutory functions for which the land was held. Both the town council and the registration authority appealed. The Court of Appeal allowed the appeal by a majority, on the basis that use of West Beach by local inhabitants for bathing and associated recreational activities was enjoyed "as of right", namely, without either express or implied permission, so that, accordingly, West Beach was capable of registration as a town or village green under the 2006 Act. NPP appealed to the Supreme Court, which allowed the appeal, and restored the decision of the judge.

210. Lord Neuberger and Lord Hodge (with whom Lady Hale and Lord Sumption agreed) said:

> "92. In this case if the statutory incompatibility rested only on the incapacity of the statutory body to grant an easement or dedicate land as a public right of way, the Court of Appeal would have been correct to reject the argument based upon incompatibility because the 2006 Act does not require a grant or dedication by the landowner. But in our view the matter does not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act.
>
> 93. The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive

prescription. The question is: 'does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?' In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (*generalia specialibus non derogant*), which is set out in section 88 of the code in *Bennion, 'Statutory Interpretation*' 6th ed (2013):

> 'Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed.'

While there is no question of repeal in the current context, the existence of a *lex specialis* is relevant to the interpretation of a generally worded statute such as the 2006 Act.

94. There is an incompatibility between the 2006 Act and the statutory regime which confers harbour powers on NPP to operate a working harbour, which is to be open to the public for the shipping of goods etc on payment of rates (section 33 of the 1847 Clauses Act). NPP is obliged to maintain and support the Harbour and its connected works (section 49 of the 1847 Newhaven Act), and it has powers to that end to carry out works on the Harbour including the dredging of the sea bed and the foreshore (section 57 of the 1878 Newhaven Act, and paras 10 and 11 of the 1991 Newhaven Order).

95. The registration of the Beach as a town or village green would make it a criminal offence to damage the green or interrupt its use and enjoyment as a place for exercise and recreation - section 12 of the Inclosure Act 1857 - or to encroach on or interfere with the green - section 29 of the Commons Act 1876. See the *Oxfordshire* case [2006] 2 AC 674, per Lord Hoffmann at para 56.

96. In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict

> NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence.
>
> […]
>
> 98. The County Council referred to several cases which supported the view that land held by public bodies could be registered as town or village greens. In our view they can readily be distinguished from this case. …
>
> […]
>
> 101. In our view, therefore, these cases do not assist the respondents. The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour.
>
> 102. In this context it is easy to infer that the harbour authority's passive response to the use by the public of the Beach was evidence of an implicit permission so long as such user did not disrupt its harbour activities. This is consistent with our view of the byelaws which we have discussed above. There has been no user as of right by the public of the Beach that has interfered with the harbour activities. If there had been such an assertion of right it would not avail the public, because the 2006 Act cannot operate in respect of the Beach by reason of statutory incompatibility.
>
> *Conclusion*
>
> 103. The poet Ovid spoke of time as 'the devourer of things' ('tempus edax rerum'. Metamorphoses 15.234). In the English law of prescription, user as of right can over time eat into a landowner's freedom to use land. So too can the 2006 Act. In this case, however, we conclude that, assuming that there is no general common law right for the public to use the foreshore for bathing and associated recreational activities, the user was by permission in the light of the Byelaws, and that in any event the 2006 Act cannot operate by reason of incompatibility with the statutory basis on which NPP's predecessors acquired the land, and the statutory purposes for which they held, and now NPP holds, that land."

211. Two further cases were taken to the Supreme Court more recently, and were heard together: *R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs*, and *R (NHS Property Services Ltd) v Surrey County Council* [2021] AC 194. In the *Lancashire* case, the facts were, with one significant difference, the same as in the present case. The land concerned amounted to some 13 hectares (about 31 acres), and was adjacent to a primary school. Both the land and the school were owned by the county council as local education authority, which also operated the school. The significant difference in the present case is the claimant's academy status, and

thus its independence from the local education authority, including its long lease of the land.

212. The land in the *Lancashire* case was divided into five areas, A to E. Area A was being used to construct an extension to the school. Area B was a mowed field, fenced off and described as a school playing field. Areas C and D border areas A and B, but are separated by hedges and overgrown with brambles. Area E was overgrown and difficult to access. A local resident applied for the land to be registered as a town or village green. An inspector was appointed to inquire, and recommended that Areas A to D be registered. The county council itself applied for judicial review of the decision. Ouseley J held that the application failed. The Court of Appeal dismissed an appeal to that court. The county council appealed to the Supreme Court, which by a majority allowed the appeal.

213. In the *Surrey* case, the land measured 2.9 hectares (about 7 acres), and adjoined an NHS hospital. The freehold title of the land was originally held by the Surrey Primary Care Trust under, and for the purposes of, the National Health Service Act 2006. In March 2013 a local resident applied for the land to be registered as a town or village green. Later that year the primary care trust was dissolved under the Health and Social Care Act 2012, and its functions devolved on a clinical commissioning group. Title to the land passed to NHS Property Services Ltd, a company wholly owned by the Secretary of State for Health, which also owned the hospital. It appears from the decision of Gilbart J at first instance ([2012] EWHC (Admin), [29]) that the company held the land for the clinical commissioning group which had replaced the primary care trust as the NHS body with the "function of arranging for the provision of services for the purposes of the health service in England" under the 2006 Act. The Secretary of State had power under the 2006 Act to form companies "to provide facilities or services to persons or bodies exercising functions, or otherwise providing services, under this Act".

214. The company objected to registration of the land. The inspector appointed to inquire rejected the company's argument based on statutory incompatibility, but nevertheless recommended refusal of registration, on the basis that the "locality" or "neighbourhood" criterion of section 15 was not satisfied. The registration authority nonetheless registered the land. The company applied for judicial review, which Gilbart J granted, quashing the decision to register on the basis that the authority had not properly considered the question of statutory incompatibility. The Court of Appeal (hearing the appeal together with that in the *Lancashire* case), allowed the appeal, and restored the decision of the authority registering the land. The company appealed to the Supreme Court which (again by a majority) allowed the appeal.

215. Lord Carnwath and Lord Sales (with whom Lady Black agreed) discussed the judgments in the *Newhaven* case in some detail. Amongst other things, they said:

> "43. In the judgment of the majority (given by Lord Neuberger PSC and Lord Hodge JSC) the decision not to confirm the registration was supported by two separate lines of reasoning: implied permission and statutory incompatibility. Although the latter was unnecessary for the

decision, it was clearly identified as a separate ground of decision (para 74). Lord Carnwath was alone in basing his decision on the implied permission issue alone (para 137), seeing 'considerable force' in the contrary reasoning on the latter issue of Richards LJ in the Court of Appeal ([2014] QB 186). No-one has argued that we should regard the majority's reasoning on this issue as other than binding. Accordingly our decision in the present case depends to a large extent on the correct analysis of that reasoning, and its application to the facts of the two cases before us.

[…]

47. In the part of their judgment directed to the statutory incompatibility issue, Lord Neuberger and Lord Hodge referred to case law on public rights of way, easements and servitudes by way of analogy, adopting a cautious approach (paras 76-90). Nonetheless, they found it did provide guidance. In English law, public rights of way are created by dedication by the owner of the land, and the legal capacity of the landowner to dedicate land for that purpose is a relevant consideration (para 78, referring in particular to *British Transport Commission v Westmorland County Council* [1958] AC 126; see also para 87). Similarly, in the English law of private easements, the capacity of the owner of the potential servient tenement to grant an easement is relevant to prescriptive acquisition, which is based on the fiction of a grant by that owner (para 79). … Their discussion of English law and Scots law in respect of dedication and prescription at paras 76-90 is significant for present purposes, because the reasoning in the cases in those areas regarding statutory incompatibility is general, and is not dependent on the narrower rule of statutory construction that a general provision does not derogate from a special one (*generalia specialibus non derogant*), to which they also later referred by way of analogy.

48. There follows the critical part of the majority judgment, under the heading 'Statutory incompatibility: statutory construction', the material parts of which we should quote in full, at paras 91-96:

[Paragraphs 92-96 have already been set out above.]

We discuss this reasoning in detail below.

49. Finally in this part of the majority judgment reference is made to cases in which registration of land held by public bodies had been approved by the court: *New Windsor*, the *Trap Grounds* case and *Lewis* [2010] 2 AC 70. The treatment of these cases by Lord Neuberger and Lord Hodge is also significant for present purposes. As regards *New Windsor*, they emphasised that the land was not 'acquired and held for a specific statutory purpose', so '[n]o question of statutory incompatibility arose' (para 98). They observed that in the *Trap Grounds* case, though the land was wanted for use as an access road and housing development 'there was no suggestion that [the city council] had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility' (para 99). With respect to *Lewis* they pointed out that '[it] was not asserted that the council had acquired and held the land for a specific statutory purpose which would

be likely to be impeded if the land were to be registered as a town or village green'; hence '[a]gain, there was no question of any statutory incompatibility' (para 100).

50. In relation to each of these cases, Lord Neuberger and Lord Hodge referred in entirely general terms to the statutory powers under which a local authority might hold land and were at pains to emphasise that the land in question was not in fact held in exercise of any such powers which gave rise to a statutory incompatibility. That was the basis on which they distinguished the cases. It is clearly implicit in this part of their analysis that they considered that land which was acquired and held by a local authority in exercise of general statutory powers which were incompatible with use of that land as a town or village green could not be registered as such.

51. Their discussion concludes, at para 101:

[Paragraph 101 has already been set out above.]

55. In our judgment, the appeals should be allowed in both cases. On a true reading of the majority judgment in *Newhaven* on the statutory incompatibility point, the circumstances in each of these cases are such that there is an incompatibility between the statutory purposes for which the land is held and use of that land as a town or village green. This has the result that the provisions of 2006 Act are, as a matter of the construction of that Act, not applicable in relation to it.

56. The principle stated in the key passage of the majority judgment at para 93 is expressed in general terms. The test as stated is not whether the land has been allocated by statute itself for particular statutory purposes, but whether it has been acquired for such purposes (compulsorily or by agreement) and is for the time-being so held. Although the passage refers to land 'acquired by a statutory undertaker', we agree with Mr Edwards that there is no reason in principle to limit it to statutory undertakers as such, nor has that been argued by the respondents. That view is supported also by the fact that the majority felt it necessary to find particular reasons to distinguish cases such as *New Windsor*, the *Trap Grounds* case and *Lewis*, all of which involved local authorities rather than statutory undertakers. Accordingly, the appellants argue with force that the test is directly applicable to the land acquired and held for their respective statutory functions.

57. The reference in para 93 to the manner in which a statutory undertaker acquired the land is significant. Acquisition of land by a statutory undertaker by voluntary agreement will typically be by the exercise of general powers conferred by statute on such an undertaker, where the land is thereafter held pursuant to such powers rather than under specific statutory provisions framed by reference to the land itself (as happened to be a feature of the provisions which were applicable in *Newhaven* itself). That is also true of land acquired by exercise of powers of compulsory purchase. In relation to the latter type of case, the majority said in terms that 'the 2006 Act does not enable the public to acquire by

user rights which are incompatible with the continuing use of the land for those statutory purposes' (para 93). On our reading of the majority judgment, it is clear that in relation to both types of case Lord Neuberger and Lord Hodge took the view that an incompatibility between general statutory powers under which land is held by a statutory undertaker (or, we would add, a public authority with powers defined by statute) and the use of such land as a town or village green excludes the operation of the 2006 Act.

58. This interpretation of the judgment is reinforced by the analysis it contains of the English and Scottish cases on dedication and prescription in relation to rights of way, easements and servitudes and the guidance derived from those cases (see paras 76 to 91): para 47 above. It is also reinforced by the way in which Lord Neuberger and Lord Hodge distinguished the *New Windsor*, *Trap Grounds* and *Lewis* cases: paras 49 and 50 above.

59. The respondents in these appeals submit that the reasoning of Lord Neuberger and Lord Hodge is more narrowly confined, and depends upon identifying a conflict between a particular regime governing an area of land specified in the statute itself and the general statutory regime in the 2006 Act. In support of this interpretation the respondents point to the highly specific nature of the statutory provisions governing the relevant land in *Newhaven* and to the reference in para 93 to the rule of statutory construction that a general provision does not derogate from a special one (*generalia specialibus non derogant*).

60. However, for the reasons we have set out above, this interpretation of the judgment does not stand up to detailed analysis. Lord Neuberger and Lord Hodge stated only that 'some assistance' could be obtained from consideration of that rule of construction, not that it provided a definitive answer on the issue of statutory incompatibility. In other words, they treated it as a helpful analogy for the purposes of seeking guidance to answer the question they posed in para 93, just as they treated the English and Scottish cases on prescriptive acquisition as helpful. The way in which they posed the relevant question in para 93 shows that their reasoning is not limited in the way contended for by the respondents, as does their discussion of the prescriptive acquisition cases and the local authority cases of *New Windsor*, *Trap Grounds* and *Lewis*.

61. We do not find the construction of the 2006 Act as identified by the wider reasoning of the majority in *Newhaven* surprising. It would be a strong thing to find that Parliament intended to allow use of land held by a public authority for good public purposes defined in statute to be stymied by the operation of a subsequent general statute such as the 2006 Act. There is no indication in that Act, or its predecessor, that it was intended to have such an effect.

[…]

64. In construing the 2006 Act it is also significant that it contains no provision pursuant to which a public authority can buy out rights of user of

a town or village green arising under that Act in relation to land which it itself owns. That is so however strong the public interest may now be that it should use the land for public purposes. Since in such a case the public authority already owns the land, it cannot use any power of compulsory purchase to eradicate inconsistent rights and give effect to the public interest, as would be possible if the land was owned by a third party. Although section 16 of the 2006 Act makes specific provision for 'deregistration' of a green on application to the 'appropriate national authority', in relation to land which is more than 200 square metres in area the application must include a proposal to provide suitable replacement land: subsections (2), (3) and (5). This procedure is available to any owner of registered land, public or private; it is not designed to give effect to the public interest reflected in specific statutory provisions under which the land is held. Often it will be impossible in practice for a public authority to make a proposal to provide replacement land as required to bring section 16 into operation. Again, it would be surprising if Parliament had intended to create the possibility that the 2006 Act should in this way be capable of frustrating important public interests expressed in the statutory powers under which land is held by a public authority, when nothing was said about that in the 2006 Act.

65. In our view, applying section 15 of the 2006 Act as interpreted in the majority judgment in *Newhaven*, LCC and NHS Property Services can show that there is statutory incompatibility in each of their respective cases. As regards the land held by LCC pursuant to statutory powers for use for education purposes, two points may be made. First, so far as concerns the use of Area B as a school playing field, that use engages the statutory duties of LCC in relation to safeguarding children on land used for education purposes. LCC has to ensure that children can play safely, protected from strangers and from risks to health from dog mess. The rights claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use of Area B takes place. Secondly, however, and more generally, such rights are incompatible with the use of any of Areas A, B, C or D for education purposes, including for example construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes, only that they are held for such statutory purposes (see *Newhaven*, para 96). The 2006 Act was not intended to foreclose future use of the land for education purposes to which it is already dedicated as a matter of law.

66. Similar points apply in the *Surrey* case. Although the non-statutory inspector found against the appellant on the statutory incompatibility issue, the registration authority failed to consider it. Gilbart J was satisfied that, within the statutory regime applicable in that case, there was no feasible use for health related purposes, and indeed none had been suggested. The Court of Appeal took a different view, but largely, as we understand it, on the basis that recreational use of the subject land would not inhibit the ability of NHS Property Services to carry out their functions on other land. We consider that Gilbart J was correct in his assessment on this point. The issue

> of incompatibility has to be decided by reference to the statutory regime which is applicable and the statutory purposes for which the land is held, not by reference to how the land happens to be being used at any particular point in time (again, see *Newhaven*, para 96).
>
> […]
>
> 68. In our view, although the case might have been decided on narrower grounds, Lord Neuberger and Lord Hodge deliberately posed the relevant question in para 93 in wide terms, specifically in order to state the issue as one of statutory incompatibility as a matter of principle, having regard to the proper interpretation of the relevant statute pursuant to which the land in question is held. That is why the heading for the relevant section of their judgment is 'Statutory incompatibility: statutory construction'. They say in terms in para 93, 'The question of incompatibility is one of statutory construction.' Nowhere do they say it is a matter of statutory construction *and* an evaluation of the facts regarding the use to which the land has been put. According to their judgment, the issue of incompatibility is to be determined as a matter of principle, by comparing the statutory purpose for which the land is held with the rights claimed pursuant to the 2006 Act, not by having regard to the actual use to which the authority had put the land thus far or is proposing to put it in future. We consider that this emerges from the critical para 93, and also from the paragraphs which follow in their judgment.
>
> […]
>
> 75. In view of our conclusion that the land in each appeal should not have been found to be capable of being registered under the Act, the issue of what uses might have been open to a statutory owner if it were so registered does not arise, and we prefer to say no more about it on this occasion."

216. These extracts encapsulate the reasoning of the majority of the court. Lady Arden would have allowed the appeal, but on narrower grounds than the majority. Lord Wilson dissented. Sitting here, I am plainly bound by the opinion of the majority, to the extent that it is relevant to the present case. The determination of the question whether there is statutory incompatibility is not a fact-specific exercise, but a matter of principle, described in argument as a "desktop and theoretical exercise".

217. Lastly, there is the decision of the Supreme Court in *TW Logistics Ltd v Essex County Council* [2021] AC 1050. I have already referred to the first instance decision in this case, albeit in a different (procedural) connection. Here, the land concerned, about 200 square metres in area, and covered with concrete, was part of a quayside forming part of a port. It had been registered as a town or village green, after an inspector had so recommended to the registration authority. The owner sought an order for rectification of the register. That claim failed at all three levels, from first instance to Supreme Court. So far as concerns the doctrine of statutory incompatibility, at first instance Barling J held (at [179]) that the claim

> "concerns a privately owned port whose proprietor does not hold it for any specific statutory purpose and is subject only to general obligations".

218. One of the owner's grounds of appeal to the Supreme Court built on these "general obligations". It was that

> "40. … Land should not be registered as a TVG if the effect of registration would be to criminalise the landowner's continuing use of that land for the same commercial purposes as took place throughout the 20-year qualifying period … "

219. In their joint judgment, Lord Sales and Lord Burrows (with whom the other judges agreed) held that

> "65. … Registration of land as a TVG has the effect that the public acquire the general right to use it as such, which means the right to use it for any lawful sport or pastime (whether or not corresponding to the particular recreational uses to which it was put in the 20-year qualifying period, evidence of which gave rise to the right to have it registered as a TVG). However, the exercise of that right is subject to the 'give and take' principle so that it is potentially misleading to think that there is a 'one size fits all' principle. This means that the public must use their recreational rights in a reasonable manner, having regard to the interests of the landowner (which may, or may not, be commercial) as recognised in the practical arrangements which developed to allow for coexisting use of the land in question during the qualifying period. The standard of reasonableness is determined by what was required of local inhabitants to allow the landowner to carry on its regular activities around which the local inhabitants were accustomed to mould their recreational activities during the qualifying period.
>
> 66 The application of this standard means that after registration the landowner has all the rights that derive from its legal title to the land, as limited by the statutory rights of the public. It has the legal right to continue to undertake activities of the same general quality and at the same general level as before, during the qualifying period … "

220. The judgment went on to consider whether by continuing its commercial activities over the land the owner would be committing any offence. It noted that the relevant criminal offences either contained exceptions for actions "warranted by law" or applied only to actions "without lawful authority". It held that the landowners' actions would be "warranted by law" or carried out "with lawful authority". It therefore concluded that the owner would not be committing any relevant offence merely by continuing with its ordinary commercial activities. The Supreme Court declined to express any view on the "criminalisation" ground of appeal set out above, both because it did not arise on the facts of the case, and also because in its view the issue was not straightforward.

221. It added this comment:

> "92. … But our silence on the point should not be treated as endorsement of the parts of the judgments below in which TWL's arguments on this issue were rejected."

This means that, despite *obiter dicta* in *Oxfordshire County Council v Oxford City Council*, it remains unsettled whether, if continuing use by the owner of the land for purposes for which it was used prior to registration *would* be criminalised by virtue of the registration, the land can be the subject of registration at all. That will have to await another case for resolution.

User "as of right"

General

222. I now turn to consider the question of user "as of right". In *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335, HL, an application was made to register certain glebe land as a town or village green. The inspector who held an inquiry recommended that the application be refused on the basis that the land had not been used by local inhabitants "as of right". The applicant for registration applied for judicial review of the decision. It was refused relief both at first instance and in the Court of Appeal. However, the House of Lords allowed a further appeal.

223. For present purposes, it is only necessary to note two points from this decision. The first is that Lord Hoffmann, with whom the rest of their lordships agreed, said (at 355H)

> "There is in my view an unbroken line of descent from the common law concept of *nec vi, nec clam, nec precario* to the term 'as of right' in the Acts of 1832, 1932 and 1965."

In other words, the phrase "as of right" in the town and village green legislation was to be understood in the same way as the common law concept of *nec vi, nec clam, nec precario*.

224. The second point is that Lord Hoffmann made clear (at 354G) that:

> "The decision in the case [*Attorney-General v Antrobus* [1905] 2 Ch 188] was that the reasons why people used the road were irrelevant. It was sufficient that they used it as of right. I rather doubt whether, in explaining this term parenthetically as involving a belief that they were exercising a public right, Tomlin J meant to say more than Lord Blackburn had said in *Mann v. Brodie* (1881) 10 App Cas 378, 386, namely that they must have used it in a way which would suggest to a reasonable landowner that they believed they were exercising a public right. To require an inquiry into the subjective state of mind of the users of the road would be contrary to the whole English theory of prescription, which, as I hope I have demonstrated, depends upon evidence of acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose, the actual state of mind of the road user is plainly irrelevant."

To this may be added the observation of Lewison LJ in *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2012] 1 P & CR 13, [60], that "[t]he subjective state of mind of the owner is equally irrelevant". (But I will have to return to this observation later.)

225. In *R (Lewis) v Redcar & Cleveland Borough Council (No 2)* [2010] 2 AC 70, SC, an application was made to register land belonging to the local authority but until 2002 forming part of a golf course. The inspector who held an inquiry recommended that the land be not registered, on the basis that the land had not been used by local inhabitants "as of right". He held both that signs on the land made the user contentious, and that the inhabitants had "overwhelmingly deferred" to the golfers. The local authority accepted the recommendation. On judicial review, Sullivan J held that the inspector's first reason was bad but the second was good, and refused relief. The Court of Appeal dismissed an appeal. However, the Supreme Court unanimously allowed a further appeal.

226. Unusually, perhaps, all five judges gave separate judgments, whilst stressing their agreement with each other. A number of points were dealt with. Here I mention two. Lord Walker dealt with the question of the owner's point of view when he said:

> "36. … the English theory of prescription is concerned with 'how the matter would have appeared to the owner of the land' (or if there was an absentee owner, to a reasonable owner who was on the spot)."

Lords Hope, Rodger and Kerr agreed expressly with Lord Walker. Lord Brown in his judgment did not dissent from the view of Lord Walker expressed above. The same point had been made earlier by Lord Hoffmann in *Sunningwell* ([2000] 1 AC 335, 352H-353A, and was made subsequently by Lord Neuberger in *R (Barkas) v North Yorkshire County Council* [2015] AC 195, [21] (referred to below).

227. Meanwhile, in the context of "peaceable" user, Lord Rodger (a noted Roman law scholar) said:

> "88. The opposite of 'peaceable' user is user which is, to use the Latin expression, vi. But it would be wrong to suppose that user is 'vi' only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant contexts vis was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it …
>
> 89. English law has interpreted the expression in much the same way … If the use continues despite the neighbour's protests and attempts to interrupt it, it is treated as being vi and so does not give rise to any right against him.
>
> 90. In short, as *Gale on Easements*, 18th ed (2008), para 4-84, suggests, user is only peaceable (nec vi) if it is neither violent nor contentious.
>
> […]

> 92. If, then, the inhabitants' use of land is to give rise to the possibility of an application being made for registration of a village green, it must have been peaceable and non-contentious."

228. In *R (Barkas) v North Yorkshire County Council* [2015] AC 195, land had been acquired under the Housing Act 1936 for the building of houses. A field within that land was laid out and maintained as a recreation ground for the benefit of the inhabitants of the houses, pursuant to a statutory power under the 1936 Act and its successor the Housing Act 1985. An application was made to register the field as a town or village green. The registration authority refused the application on the basis that the local inhabitants' use of the field during the relevant 20 year period had been "by right" and not "as of right", because there was a statutory right under the housing legislation to use the land for recreational purposes. The applicant sought judicial review of that decision, which was refused, and both the Court of Appeal and the Supreme Court dismissed further appeals.

229. In the Supreme Court, Lord Neuberger (with whom Lady Hale and Lords Reed and Hughes agreed) said:

> "20. In the present case, the Council's argument is that it acquired and has always held the Field pursuant to section 12(1) of the 1985 Act and its statutory predecessors, so the Field has been held for public recreational purposes; consequently, members of the public have always had the statutory right to use the Field for recreational purposes, and, accordingly, there can be no question of any 'inhabitants of the locality' having indulged in 'lawful sports and pastimes' 'as of right', as they have done so 'of right' or 'by right'. In other words, the argument is that members of the public have been using the Field for recreational purposes lawfully or *precario*, and the 20-year period referred to in section 15(2) of the 2006 Act has not even started to run – and indeed it could not do so unless and until the Council lawfully ceased to hold the Field under section 12(1) of the 1985 Act.
>
> 21. In my judgment, this argument is as compelling as it is simple. So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land 'by right' and not as trespassers, so that no question of user 'as of right' can arise. In *Sunningwell* at pp 352H-353A, Lord Hoffmann indicated that whether user was 'as of right' should be judged by 'how the matter would have appeared to the owner of the land', a question which must, I should add, be assessed objectively. In the present case, it is, I think, plain that a reasonable local authority in the position of the Council would have regarded the presence of members of the public on the Field, walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that the Field was being held and maintained by the Council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors.

> […]
>
> 27. It was suggested by Mr Edwards QC in his argument for Ms Barkas that, even if members of the public were not trespassers, they were nonetheless not licensees or otherwise lawfully present when they were on the Field. I have considerable difficulty with that submission. As against the owner (or more accurately, the person entitled to possession) of land, third parties on the land either have the right to be there and to do what they are doing, or they do not. If they have a right in some shape or form (whether in private or public law), then they are permitted to be there, and if they have no right to be there, then they are trespassers. I cannot see how someone could have the right to be on the land and yet be a trespasser (save, I suppose, where a person comes on the land for a lawful purpose and then carries out some unlawful use). In other words a 'tolerated trespasser' is still a trespasser.
>
> 28. Furthermore, the fact that the landowner knows that a trespasser is on the land and does nothing about it does not alter the legal status of the trespasser. As Fry J explained, acquiescence in the trespass, which in this area of law simply means passive toleration as is explained in *Gale* (or, in the language of land covenants, suffering), does not stop it being trespass … "

230. Lord Carnwath delivered a concurring judgment, with which Lady Hale and Lords Reed and Hughes also agreed.

Signs

231. The present is a case in which it is said that the landowner's and occupier's opposition to unrestricted public access was demonstrated by the use of signs on the land. In *Taylor v Betterment Properties (Weymouth) Ltd* [2012] 2 P & CR 3, grazing land crossed by two public footpaths had been registered as a town or village green in 2001. The landowner (who had acquired the land from the Curtis family after registration) in 2005 sought an order rectifying the register on the basis (inter alia) that user had not been "as of right" during part of the 20-year period relied on, because there had been signs on the land showing that use of the land by the public was contested. There was evidence that a minority of local people had removed signs and vandalised fences. Preliminary issues in the action were dealt with by Lightman J (see [2007] EWHC 365 (Ch), a judgment referred to earlier). His decision was upheld on appeal ([2008] EWCA Civ 22). The claim itself was tried by Morgan J, who found for the landowner, and rectified the register by removing the land from it (see [2010] EWHC 3045 (Ch)). The local inhabitants appealed to the Court of Appeal.

232. Patten LJ (with whom Carnwath and Sullivan LJJ agreed on the "as of right" issue) said:

> "35. … the visibility or not of the signs in relation to what I shall refer to as lawful user also raises a more fundamental question of law as to whether and to what extent signs stating the landowner's opposition to the use of his

land must ultimately come to the knowledge and attention of all users if the landowner has in fact taken all reasonable steps to achieve this.

[…]

38. If the landowner displays his opposition to the use of his land by erecting a suitably-worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable. It is not necessary for Betterment to show that they used force or committed acts of damage to gain entry to the land. In the face of the signs it will be obvious that their acts of trespass are not acquiesced in. But in some cases (and this is one of them) the landowner's attempts to assert his opposition to the unauthorised use of his land may face the practical difficulty that a minority of users will not only defy his assertion of ownership but will also take active steps to remove or vandalise the signs which are put up. In these circumstances the failure of lawful users to see the signs may be attributable to their unlawful removal. But the appellant contends that in the absence of the signs, the use of the registered land by the majority of lawful users was peaceable.

[…]

41. … Assuming that the notice is in terms sufficiently clear to convey to the average reader that any use of the relevant land by members of the public will be treated as a trespass then it will be irrelevant that individual users either misunderstood the notice or did not bother to read it. The inhabitants who encounter the sign have to be treated as reasonable people for these purposes to whom an objective standard of conduct and comprehension is applied …

[…]

48. … If the landowner erects suitably worded signs and they are seen by would-be peaceable users of the land then it follows that their user will be contentious and not as of right. That is the easy case. The alternative is an objective test based on knowledge being attributed to a reasonable user of the land from what the landowner did in order to make his opposition known. If the steps taken to manifest that opposition are sufficient to bring it to the attention of any reasonable user of the land then it is irrelevant that particular users may not have been aware of it. The steps to be taken do not have to be fail safe in that regard. But they must be proportionate to the user which the landowner wishes to prevent.

49 All the relevant authorities in this area proceed on the assumption that the landowner must take reasonable steps to bring his opposition to the actual notice of those using his land. Disputes about whether the wording of the notices was sufficient to make it clear that any use of the land was not consented to and would be regarded as a trespass would be irrelevant if the landowner did not have to make his position known. They assume that some process of communication is necessary. If the landowner keeps his

opposition to himself and makes no outward attempt to prevent the unauthorised use of his land he may be taken to have acquiesced.

[…]

52. I agree with the judge that the landowner is not required to do the impossible. His response must be commensurate with the scale of the problem he is faced with. Evidence from some local inhabitants gaining access to the land via the footpaths that they did not see the signs is not therefore fatal to the landowner's case on whether the user was as of right. But it will in most cases be highly relevant evidence as to whether the landowner has done enough to comply with what amounts to the giving of reasonable notice in the particular circumstances of that case. If most peaceable users never see any signs the court has to ask whether that is because none was erected or because any that were erected were too badly positioned to give reasonable notice of the landowner's objection to the continued use of his land.

[…]

56. … the occasions on which a member of the Curtis family or one of their employees actually challenged someone using the land were too infrequent to be treated as sufficient in themselves to make the local inhabitants' user of the land contentious.

[…]

60. It seems to me that there is a world of difference between the case where the landowner simply fails to put up enough signs or puts them in the wrong place and a case such as this one where perfectly reasonable attempts to advertise his opposition to the use of his land is met with acts of criminal damage and theft. The judge has found that if left in place, the signs were sufficient in number and location; and were clearly enough worded; so as to bring to the actual knowledge of any reasonable user of the land that their use of it was contentious. In these circumstances is the landowner to be treated as having acquiesced in that user merely because a section of the community (I am prepared to assume the minority) were prepared to take direct action to remove the signs?

[…]

63. It would, in my view, be a direct infringement of the principle (referred to earlier in the judgment of Lord Rodger in *Redcar (No 2)*) that rights of property cannot be acquired by force or by unlawful means for the court to ignore the landowner's clear and repeated demonstration of his opposition to the use of the land simply because it was obliterated by the unlawful acts of local inhabitants. Mrs Taylor is not entitled in effect to rely upon this conduct by limiting her evidence to that of users whose ignorance of the signs was due only to their removal in this way. If the steps taken would otherwise have been sufficient to notify local inhabitants that they should

> not trespass on the land then the landowner has, I believe, done all that is required to make users of his land contentious.
>
> 64. It follows from this that the Curtis family were not required to take other steps such as advertising their opposition in order to rebut any presumption of acquiescence. In my view, the judge was correct to hold that there was not user as of right for the requisite 20 years."

233. (I note that, although the Court of Appeal held that the land should not have been registered, it went on by a majority to hold that justice did not require rectification of the register. There was a further appeal to the Supreme Court on this point alone, which succeeded, and it is discussed below.)

234. The reasoning and decision in *Betterment* on "as of right" was applied by the Court of Appeal in the subsequent decision in *Winterburn v Bennett* [2017] 1 WLR 646. That was not a town or village green case, but one about the acquisition of a prescriptive easement of parking. However, the court (at [31]) treated the same principles as applicable to the question of use "as of right". The tenant under a lease of a club with a car park adjacent to a fish and chip shop sought to resist the registration of an easement of parking in the car park in favour of the shop, on the basis that there were two notices on the land indicating that the car park was private and for club customers only. The First Tier Tribunal allowed the registration, but the Upper Tribunal reversed that decision. The shop owners appealed to the Court of Appeal, but the appeal was rejected. There was no prescriptive easement, because user was not as of right.

235. David Richards LJ (with whom Sharp LJ and Moylan J agreed) said:

> "36. In my judgment, the authorities do not support the proposition that a servient owner must be prepared to back his objection either by physical obstruction or by legal action or the proposition that the servient owner is required to do everything, proportionately to the user, to contest and to endeavour to interrupt the user. As it seems to me, the decision of this court in *Betterment* [2012] 2 P&CR 3 is inconsistent with these propositions. The court there accepted that the erection and re-erection of signs was all that the owner needed to do to bring to the attention of those using the land that they were not entitled to do so.
>
> […]
>
> 40. In my judgment, there is no warrant in the authorities or in principle for requiring an owner of land to take these steps [*ie* physical barrier, oral objections, letters of objection, or legal proceedings] in order to prevent the wrongdoers from acquiring a legal right. In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be 'as of right'. Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers

> known to him orally or in writing, still less to go to the expense and trouble of legal proceedings."

236. The second defendant cites a dictum of Lord Hoffmann in *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2008] 1 AC 221, HL, where he says:

> "24. … For example, there may be a notice which says 'No right of way. Trespassers will be prosecuted'. Nevertheless, for upwards of 20 years members of the public may have ignored the notice and used the way, openly and apparently in the assertion of a right to do so. Their user will satisfy section 31(1) but the landowner, even on the most objective test, will have satisfied the proviso."

237. That was a case under section 31 of the Highways Act 1980, which is concerned with the creation of public rights of way. The common law originally required that the landowner *dedicate* the way to the public. The statute, originally enacted in 1932, allowed dedication to the public of a way to be presumed in certain circumstances:

> "32(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it."

The words from "unless" to the end are usually referred to as the "proviso", even though the words "provided that" or their equivalent do not appear. This is what Lord Hoffmann was referring to in the extract above.

238. The issue in the case was whether the landowner's intention *not* to dedicate the way as a highway under the proviso to section 31(1) had to be established objectively by some overt act or acts of the landowner. But although section 31(1) refers to user "as of right", section 31(3) expressly provides that erection and maintenance on the land of a notice inconsistent with the dedication of a highway is sufficient evidence to negate the intention to dedicate. As a result, "as of right" in Highways Act cases has to mean something slightly different from what it does in right of way and town and village green cases.

239. In any event, what Lord Hoffmann said was no part of the ratio of the case, and no other judge taking part in the decision cited his example. Indeed, Lord Hope (at [53]) referred specifically to section 31(3). And Lord Scott (at [67]) said "'as of right' must be interpreted in the context of dedication not prescription". I respectfully agree. But the town and village green legislation is not based on any theory of assumed or implied dedication, and there is no equivalent in it to the proviso in section 31(1). I conclude that Lord Hoffmann's dictum is of no assistance to me in this context.

240. The second defendant also cites a dictum of Lord Walker in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, HL. That was a town or village green

case about whether use of land by the public had been by permission of the owner, and thus not "as of right". The public authorities which had owned the land had mown the grass and allowed public access. The House of Lords held that there was no sufficient evidence of any acts by the owners indicating the giving of consent to access, and hence the use was not permissive. Lord Walker said:

> "71. … This leads at once to the paradox that a trespasser (so long as he acts peaceably and openly) is in a position to acquire rights by prescription, whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights. Conversely a landowner who puts up a notice stating 'Private Land - Keep Out' is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: 'The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time'."

241. This case (and this dictum) is about what amounts to *permission*, rather than about what make use *contentious*, which is the matter with which I am concerned. Lord Walker was pointing out that, if the question is whether use was by permission, a sign saying so is positive evidence of permission, and puts the owner in a stronger position than a sign simply saying "Private – keep out". But it does not help me in considering whether a particular sign makes use contentious or not. In passing, I note that this authority was cited to the Court of Appeal in *Betterment*. Evidently the judges in that case saw no inconsistency between *Beresford* and their own case.

Other demonstrations of protest

242. There is a question as to whether the landowner's opposition to unrestricted public access can be demonstrated in other ways than by the use of signs or direct communication to members of the public. In *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2004] JPL 975, a piece of overgrown land was registered as a town or village green. The decision to register was challenged both by judicial review proceedings and a claim to rectify the register under section 14. One point that arose was whether the use by local inhabitants during the relevant period was "as of right". An earlier application to register had been withdrawn after letters challenging the application had been sent.

243. Sullivan J said:

> "64. The landowner does not have to meet force with force. He can achieve the same effect by making non-forcible objection or protests directed towards the users of his land. In *Newnham v Willison* (1988) 56 P & CR 8, there was a dispute as to the existence of a right of way. … Having analysed the Authorities, Kerr LJ said this at p.19:
>
> > 'In my view what these authorities show is that there may be 'vi' – a forceful exercise of the user-in contrast to a user as of right once there is knowledge on the part of the person seeking to establish prescription

> that his user is being objected to and that the use which he claims has become contentious'."
>
> […]
>
> 70. In this context, the reaction of the applicants for registration to the landowner's objection must be relevant. If they had refuted the objection and persisted with their application, then it might well have been reasonable to have expected the landowner to do more to resist the exercise of the claimed right, for example, by erecting fencing or putting up notices. However, the reaction of the applicants after initially disputing the points made in the claimant's solicitor's letters of objection, was to withdraw their application to register the land as a village green. From the claimant's perspective, therefore, it had 'seen off' the applicants' contention that its land was a village green. Why did it need to do any more to make it plain that it was not acquiescing in the acquisition of village green rights over its land?"

244. However, I also bear in mind the comments in *Betterment*, at [63], and in *Winterburn*, at [40], both quoted above. In the former Patten LJ said that

> "If the steps taken would otherwise have been sufficient to notify local inhabitants that they should not trespass on the land then the landowner has, I believe, done all that is required to make users of his land contentious."

In the latter David Richards LJ said:

> "Protest against unauthorised use may, of course, take many forms … "

245. In my judgment, therefore, the comments of Sullivan J in *Cheltenham Builders Ltd* should no longer be read as confined to the case where an application is withdrawn as a result of opposition by the landowner. Even if an application is not withdrawn as a result, the opposition of the landowner to the application may (but not must) be such as to amount to a sufficient protest to local inhabitants by the landowner rendering the use not as of right. It will depend on the circumstances.

Over the whole land

246. In *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2004] JPL 975, to which I have already referred, Sullivan J said:

> "29. When dealing with 'the issues' the report correctly stated that the onus was upon the applicants for registration to prove on the balance of probability that the site had become a village green. Thus the applicants had to demonstrate that the whole, and not merely a part or parts of the site had probably been used for lawful sports and pastimes for not less than 20 years. A common sense approach is required when considering whether the whole of a site was so used. A registration authority would not expect to see evidence of use of every square foot of a site, but it would have to be

> persuaded that for all practical purposes it could sensibly be said that the whole of the site had been so used for 20 years."

Justice

247. I turn to the caselaw on the question whether, if I should hold that the land did not meet the criteria for registration, and should not have been registered, it would be "just" to rectify the register. I was referred to the decision of Morgan J in *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2010] EWHC 3045 (Ch), where the judge said:

> "159. Taking stock at this stage, I have now held that the pre-conditions to the court having power to order rectification of the register have been established. In particular, I have held that the amendment to the register which was made in 2001, to include the land as a town or village green, should not have been made. The outcome of this application under section 14 therefore critically depends on whether the court deems it just to rectify the register. Mr Laurence says that rectification would be just and Mr Petchey says that rectification would be unjust.
>
> 160. I begin by considering the effect of registration of land as a town or village green. After a considerable period of uncertainty on that point, the law has been settled by the decision of the House of Lords in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 … Land which is registered as a town or village green can be used generally for sports and pastimes. This does not mean that the owner is altogether excluded from the land. The owner still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants. There has to be give and take on both sides …
>
> 161. Accordingly, if the land in this case remains registered as a town or village green, the landowner will be subject to burdens which ought not to have been imposed, as the land should not have been registered in 2001. In the same way, the inhabitants of Wyke Regis will be entitled to enjoy rights over the land which should not have been conferred upon them, as the land should not have been registered. There is obviously a powerful case therefore for rectifying the register to remove the land from the register of town or village green to restore the situation to that which should have existed in and after 2001, freeing the land from burdens and taking away from the inhabitants of Wyke Regis rights which they ought never to have had.
>
> 162. Mr Petchey contends that this prima facie conclusion is overidden by a number of considerations particular to this case … "

248. But the main case to which I was referred was the decision of the Supreme Court in *Paddico (267) Ltd v Kirklees Metropolitan Council* [2014] AC 1072, heard and decided at the same time as a further appeal (on this issue alone) in the *Betterment* case. This was a case in which the judges below held that the land should not have been registered because the words "any locality" in section 15 had not been satisfied. The question therefore was whether it was just to rectify

the register. The claim for such rectification had been made some 14 years after the registration. The Supreme Court nevertheless decided that it was indeed just to rectify the register.

249. Lady Hale (with whom all the other judges agreed) said:

> "33. … although the interests of the wider public are not irrelevant, the section is principally focussing on justice as between the applicant for rectification of a registration and the local inhabitants who are the beneficiaries of that registration.
>
> 34. Where the applicant is the owner of the land, the starting point, as it seems to me, is that the landowner's rights have been severely curtailed when they should not have been, and the inhabitants have acquired rights which they should not have had. It does not follow that the lapse of time is immaterial. None of the appellate judges thought that it was. Parliament has seen fit to deprive people of their right to bring proceedings to vindicate their rights after a certain period of time no matter how unjust this might seem to be … But Parliament has not seen fit to set a deadline for these applications, nor is there an obvious close analogy within the Limitation Acts. The better analogy would therefore appear to be with the equitable doctrine of laches, which generally requires (a) knowledge of the facts, and (b) acquiescence, or (c) detriment or prejudice.
>
> 35. As to (a), this is unlikely to be a problem in most of these cases: the original landowner will have been notified of and had an opportunity of objecting to the proposed registration and a subsequent purchaser such as Betterment or Paddico will have had the opportunity of consulting the register before deciding to buy …
>
> 36. As to (b), acquiescence may be especially relevant where an application for rectification is made by someone other than the landowner …
>
> 37. As to (c), detriment or prejudice, this, it seems to me, will usually be the crux of the matter. Because this is a public register and there are public as well as private interests involved I would not limit the potential prejudice caused by rectification to the prejudice to the local inhabitants who will no longer be entitled to use the land for lawful sports and pastimes … "

APPLICATION OF LAW TO FACTS

Ground 1: Statutory incompatibility

Arguments

250. In summary, the argument for the claimant is threefold. First, *the first defendant* held (and holds) its freehold estate, part in possession and part in reversion, for statutory education purposes. Those purposes would be frustrated by the registration of the land. So, Parliament could not have intended the land to be registrable. Second, the land having been acquired for or appropriated to statutory education purposes, and the lease to the claimant (which is financed

and regulated by the Secretary of State for Education) having been granted to further those purposes, *the Secretary of State* has statutory duties which could not be performed if the land were registered. So, again, Parliament could not have intended the land to be registrable. Third, the purposes for which *the claimant* holds the land are incompatible with its registration as a town or village green. Again, therefore, Parliament could not have intended the land to be so registrable.

251. The arguments for the defendants, again in summary, mirror the claimant's arguments. First, the City Council has divested itself of the land by the lease and has no right to use it. In both *Lancashire* and *Newhaven* the land was in the authority's possession and in current use (in *Lancashire* as to part) for the statutory purposes. Second, the Secretary of State does not hold the land and has no statutory duties in respect of it, and the statutory incompatibility principle depends on the authority having such duties. Thirdly, the claimant does not hold the land for a statutory purpose and has no statutory duty to use it only for a specific purpose. Any safeguarding duties of the claimant are in the same position as the health and safety obligations of the landowner in *TW Logistics Ltd*: they do not attach to or arise out of the land. In any event, there would be no incompatibility, as local inhabitants would not be entitled to interfere with use by the claimant.

The test to be applied

252. The test to be applied is that stated by the majority of the Supreme Court in *Lancashire* at [55]. This is whether

> "the circumstances … are such that there is an incompatibility between the statutory purposes for which the land is held and use of that land as a town or village green".

It will be noted that the test is not whether any particular *duties* lie on, or any particular *powers* are attached to, the holder of the land. Instead, it is whether the land is held for statutory *purposes* incompatible with use of the land as a town or village green. There are three aspects to this. First, the question is whether the land is held for statutory purposes. Second, if so, what those purposes are. Third, if it is, and those purposes have been identified, whether those purposes are incompatible with registration as a town or village green.

253. It appears to be common ground between the parties that, because of the terms of section 13(b) of the 1965 Act, the question of any statutory incompatibility falls to be established as at the date of the registration. But, in the present case, nothing turned on that, and so is not the subject of full argument.

254. On the facts of this case, in the years after the Second World War the City Council either acquired the land for statutory education purposes or it was appropriated to such purposes after being acquired. As was said by the majority in *Lancashire*,

> "56. … The test as stated is not whether the land has been allocated by statute itself for particular statutory purposes, but whether it has been

> acquired for such purposes (compulsorily or by agreement) and is for the time-being so held."

Discussion: the doctrine in principle

255. The express purposes for which the land was acquired in the late 1940s, or to which it was appropriated, do not appear from any of the documents in the bundle. We do not, for example, have copies of the conveyances on sale to the then county borough of Bristol by Miss Emily Butlin, the then owner of Stoke Lodge. (Indeed, the earliest document in the bundle dates from as recently as 1982.) Some local authority land is not acquired or held for specific purposes. But it is clear that the purposes for which this land was acquired, or to which it was appropriated, were the purposes of education. The inspector's 2016 report said as much. The parties' skeleton arguments agree. The county borough, as local education authority, had a duty under section 8 of the Education Act 1944 to secure that there were "sufficient schools" for providing secondary education in its area, and there can be no doubt that this was land that was intended to be used for such purposes in future, whether as land on which to construct new schools, or otherwise.

256. In the present case, the whole of the land was held on education purposes at least until the grant of the lease in September 2011. And, so far as concerns the part of the land known as the Arboretum, the City Council today is still in possession, and nothing has happened to change the purposes for which it holds that part of the land. (This appears to be accepted by the City Council in its closing submissions, at [23].) In considering the status of the Arboretum, the lease to the claimant is irrelevant. Nor does it matter what the Arboretum is currently being used for. As the majority said in *Lancashire*,

> "65. … It is not necessary for LCC to show that they are currently being used for such purposes, only that they are held for such statutory purposes … "

The City Council points out that some of the trees in the Arboretum are protected by tree preservation orders, and that therefore the land could not be used for education purposes. I do not think that that follows at all. Protected trees can still form part of an educational landscape. The relevant regulations contain numerous exceptions, including for development in pursuance of planning permission. And such preservation orders can be varied or revoked in appropriate circumstances.

257. Just as in *Lancashire*, where land held by the local education authority for education purposes was held to be exempt from registration as a town or village green, so too the Arboretum would appear to be similarly exempt, and, on the face of it, should not have been registered. Continuing the quotation from *Lancashire*, [65], I find these words:

> "The 2006 Act was not intended to foreclose future use of the land for education purposes to which it is already dedicated as a matter of law."

That statement applies just as much to this case as it applied to that one. I will return later to a question about the incompatibility of the registration of the land as a town or village green with the statutory education purposes.

258. If the Arboretum should not have been registered, it might be thought to raise the question whether *any* of the land should have been registered. This is because, as Sullivan J said in *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2004] JPL 975,

> "29. … the onus was upon the applicants for registration to prove on the balance of probability that the site had become a village green. Thus the applicants had to demonstrate that the whole, and not merely a part or parts of the site had probably been used for lawful sports and pastimes for not less than 20 years."

But what the judge was saying in that case was in relation to the use made of the land over the 20-year period. It was not as to whether the legislation simply did not apply. In my judgment, if the Arboretum is exempt, but the remainder is not, the remainder can still be registered if the criteria are otherwise satisfied. So, I must consider the position in relation to the remainder of the land (that part leased to the claimant).

259. In relation to the land, the matter is more complicated, because possession since 2011 has been vested in the claimant. The "land" that has been registered as a town or village green is the *physical* land inside the green line on the plan reproduced above at [33], in which the registered fee simple estate of the first defendant subsists. This is clear from section 61(3) of the Commons Act 2006, set out earlier (at [41]). The land registered as a town or village green is not simply the legal fee simple estate in land that, immediately before the grant of the lease to the claimant in 2011, was held by the first defendant for education purposes. It is the whole of the physical land. In my judgment, in granting the lease to the claimant school the City Council was actually implementing the statutory purposes for which its fee simple estate in the land was held. This is because the lease contains covenants by the claimant restricting the use of the land to those statutory education purposes. These include a covenant as to use only for educational purposes (3.9.3), covenants against assigning, parting with possession of and charging the lease (3.12.3 ff), and a covenant requiring notice to be given of any attempted encroachment (3.13). Moreover, there is a forfeiture clause (6.1), a clause providing for termination if the claimant's funding agreement with the Secretary of State comes to an end (6.7.1), and a break clause in favour of the claimant (7). Any of these could operate to determine the lease prematurely, and the City Council's fee simple estate in the land would then fall back into possession.

260. All the rights reserved to the City Council under the lease are part of its fee simple estate in the land, as part of the landlord's reversion expectant on the determination of the lease. They are a bundle of property rights held by the City Council, being those remaining after the right to possession of the land itself has been granted away to the claimant. That bundle of rights is still held by the City Council for the same statutory education purposes for which the land was originally acquired or to which it was appropriated. In my judgment, if the

statutory purposes are incompatible with registration under the 2006 Act, then the (physical) land cannot be the subject of such registration, just as the land in *Lancashire* could not. The submission that "the City Council has divested itself of the land by the lease and has no right to use it" is simply wrong as to part and irrelevant for the remainder. What the City Council divested itself of (and that only subject to the terms of the lease) was the *possession* of the land, not its *estate in fee simple*. That the City Council has no current right itself to use the land does not matter.

261. So far as concerns the leasehold interest in the land, this was granted by the City Council under its powers in that behalf, and is held by the claimant. The claimant is obliged under each of the lease, the funding agreement and its own constitutive documents to use the leased land only for the educational purposes for which it was originally acquired or appropriated. Those statutory purposes continued to be carried out by means of the grant of academy status to Cotham School, and were being so carried out until the claimant ceased using the land in 2014. It is correct to say that there is no *statutory* duty on the *claimant* to use the land for such persons. But the test does not involve duties; it involves *purposes*. The statutory purposes for which the land was acquired or appropriated are being carried out by the claimant as the lessee of the City Council. I can discern no good policy reason why the doctrine of statutory incompatibility should apply if the City Council had continued to operate the school and the land itself, and yet should not do so if, in accordance with the relevant education law, the statutory purposes are carried out by means of a different legal structure in which it is the City Council's lessee that holds the land. The identity of the owner of the relevant estate in the land that makes it possible to achieve the statutory purposes does not matter, as the *Surrey* case ([2021] AC 194) shows. The land is still being held (by someone) for the carrying out of the statutory purposes.

262. My conclusion is that the doctrine of statutory incompatibility in principle applies to the whole of the land in this case. In these circumstances I do not think it is necessary to lengthen this judgment to consider in detail the position of the Secretary of State for Education, and I do not do so. But I will say that I accept the claimant's argument that the *Surrey* case shows that ownership of the land concerned by a company with no statutory duties, but over whose actions the Secretary of State has sufficient control, can suffice for the purposes of the doctrine of statutory incompatibility. It is not necessary that the Secretary of State own the land. And, on the facts of this case, I think that the Secretary of State for Education did have sufficient control of the land for these purposes.

Is the doctrine satisfied on the facts?

263. The next question is whether that doctrine is satisfied on the facts of this case. This involves consideration of the question whether registration of the land would be incompatible with the statutory purposes for which it is held. The second defendant says that it is not. She refers to the judgment of Sir Wyn Williams in his 2018 judicial review judgment quashing the City Council's decision to register the land as a town or village green. She says that Sir Wyn Williams "identified the Council's relevant statutory duties as being section 507A and 507B Education Act 1996". These sections impose specific statutory

duties on the City Council to provide recreational facilities for schools, and derive ultimately from section 53 of the Education Act 1944, to which I have already referred. She says that registration as a town or village green "would promote such statutory duties rather than stymy [sic] or conflict with them". She relies on a dictum of Gilbart J at first instance in the *Surrey* case, at [135], in which the judge said that it was "easy to think of functions within the purview of education, whereby land is set aside for recreation", and also referred specifically to section 507A of the 1996 Act.

264. The first point to make is that Sir Wyn Williams, in identifying duties under sections 507A and 507B Education Act 1996, was in fact simply referring to what he understood *the inspector* had considered to be "the relevant statutory powers and duties of the landowner, education authority and occupier of the land." (As he put it, "Let me begin with the approach of the Inspector.") The judge was not saying that these provisions governed the question of statutory incompatibility. Indeed, he then went on to say (at [96]), "There is no doubt that the land is and has been, at all material times, held by the landowner for educational purposes … "

265. The second point is that Gilbart J in the *Surrey* case was dealing with the situation where land was being held for the purposes of the provision of health services, which the learned judge held did not include recreational purposes of the kind that would be served by registration as a town or village green. He contrasted this with the position of education, which obviously also included physical recreation for those already in education. In my judgment, that does not demonstrate that *all* kinds of recreation, for *all* age groups and abilities, automatically qualify as a form of education within the statutory purposes of education for which this land was acquired (or to which was appropriated). The judge was simply not dealing with that.

266. But these are sideshows. The really important point is that the test is not about the *duties* which may lie on the holder of the land at all. Instead it is about the *purposes* for which it is held, and the incompatibility that arises from that. The majority judgment in *Lancashire*, in a passage already set out above, says:

> "65 … As regards the land held by LCC pursuant to statutory powers for use for education purposes, two points may be made. First, so far as concerns the use of Area B as a school playing field, that use engages the statutory duties of LCC in relation to safeguarding children on land used for education purposes. LCC has to ensure that children can play safely, protected from strangers and from risks to health from dog mess. The rights claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use of Area B takes place. Secondly, however, and more generally, such rights are incompatible with the use of any of Areas A, B, C or D for education purposes, including for example construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes, only that they are held for such statutory purposes … "

267. In the first part of the paragraph, the court is saying that the statutory purposes of education (for which the land is held) can be carried out for children *only* in compliance with the safeguarding legislation. But that compliance cannot be obtained if the land held for such a purpose is a town or village green. Therefore, the land cannot lawfully be used for educating children, and there is a statutory incompatibility between the purpose and the registration as a green. In the second part of the paragraph, the court is making a more general point about education purposes, including the construction of new schools or playing fields. Those purposes are still capable of achievement in the future, even if (because of the lease) they are not presently contemplated. But, according to the authorities, that is sufficient for the purpose of satisfying the statutory incompatibility doctrine. It is not necessary to show that the land is currently used, or even that it is available for the public authority to use immediately, whether for the statutory purposes or otherwise.

268. The second defendant submits that the claimant cannot rely on obligations under the general law to establish statutory incompatibility. I have already noted that, in *TW Logistics Ltd*, the Supreme Court held that land forming part of "a privately owned port whose proprietor does not hold it for any specific statutory purpose" was not subject to the doctrine of the statutory incompatibility by reason only of obligations under the general law (*eg* relating to health and safety rules applying to workplaces). *Lancashire* and this case are obviously different, because in each of these two cases the land *is* held for statutory (education) purposes. Accordingly, there is no need for the claimant to seek to rely on obligations under the general law to establish statutory incompatibility.

269. The second defendant also relies on *TW Logistics Ltd* for a different point. This is that the Supreme Court there made clear that after registration the landowner has the right to use the land for the same purposes as prior to registration, and "local inhabitants' use of the Land for lawful sports and pastimes cannot interfere with such a right". The second defendant says that, since the landowner has the same rights afterwards as before, there can be no statutory incompatibility. This argument proves too much. If it were correct, it would mean that the Supreme Court in the *Lancashire* case reached the wrong conclusion. In that case, the school had the right to go on using the land after registration as a town or village green as before. And yet the Supreme Court said

> "65. … The rights claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use of [the playing field] takes place. Secondly, however, and more generally, such rights are incompatible with the use of any of Areas A, B, C or D for education purposes, including for example construction of new school buildings or playing fields".

270. In the same way, in my judgment, the statutory education purposes for which the land is held in this case are incompatible with registration of the whole land as a town or village green. It prevents the physical education of the children in compliance with the law, and it prevents the use of the land for other education purposes, including the construction of new premises. So, it should not have been so registered. Strictly speaking, that is an end to the first issue in this claim.

But I do not doubt that, given the strength of feeling on both sides in this case, the dispute will go further. It is therefore sensible for me to consider the case on the footing that I may be held to have been wrong on this first point. I turn therefore to user as of right.

Ground 2: User as of right - signs

Arguments

271. In summary, under this ground the claimant submits that the signs on the land were sufficient to render use of the land contentious and therefore not "as of right". The meaning of the wording on the signs is a question of law. Here the original Avon County Council signs warned people not to trespass, warned that certain activities would also amount to a criminal offence, and explained how permission might be sought for access. Those signs continued to be effective after the transfer of ownership of the land to the City Council in 1996. The Bristol sign erected in 2009 can be read only as contesting use. That sign relates to the playing fields rather than to the house. It is not necessary for a landowner to "do everything within their means to contest the user". The failure of both Avon County Council and the City Council to make a direction under the legislation to require the governing bodies of the schools which use the land to restrict public access is irrelevant.

272. Again in very brief summary, the defendants say that the signs on the land were not clearly worded and were in any event inadequate in number and position for an area of land of approximately 22 acres with at least 12 formal or informal entrances and a number of private entrances. Properly construed, they are not consistent with a prohibition on entry onto and use of the land. The Avon County Council signs were out of date, as that Council had ceased to exist in 1996. In any event, from 1987 that council (and subsequently the City Council) had no power to regulate the use of the land except by issuing a direction to the governing body of the school concerned (which was not done). The 2009 sign erected by the City Council was intended to apply to the grounds of the house and not to the playing fields. They say that, in a case like this, where the landowner is present rather than absent, what matters is how things would have appeared to the actual owner, and it is necessary to look at the owner's *actual* knowledge and understanding.

Discussion

273. I preface my discussion with a statement of the obvious. No two pieces of land are identical. Each case must therefore turn on its own facts. What is sufficient in one case to make use contentious may not do so in another, and vice versa. In my judgment, you cannot read across from one case, where a particular result obtained, to another, and say that this case is the same as, or even stronger than, that case, and the result must be the same. You have to look at the evidence in relation to particular land as a whole, and on its own terms. The mere fact, for example, that the land has no physical barrier to incursion but is open to access by the public (and dogs) by itself tells you very little.

274. With that said, first of all, I do not agree that it is necessary to look at the owner's *actual* knowledge and understanding. The dicta of Lord Hoffmann in *Sunningwell* and Lord Walker in *Lewis*, properly understood, do not so require. Lord Hoffmann first referred to the speech of Lord Blackburn in *Mann v Brodie* (1881) 10 App Cas 378, 386 (a Scottish appeal), where the judge was discussing the relevant English law, saying that

> "He is concerning himself, as the English theory required, with how the matter would have appeared to the owner of the land."

275. That may suggest a subjective approach. However, he then went on to discuss the decision of Tomlin J in *Hue v Whiteley* [1929] 1 Ch 440, which referred to *Mann v Brodie*. Lord Hoffmann said that Tomlin J meant to say no more than Lord Blackburn in that case, that is, that user by the public had to be "in a way which would suggest *to a reasonable landowner* that they believed they were exercising a public right" (emphasis supplied). That is undoubtedly a reference to the passage at page 386 of *Mann v Brodie*, where Lord Blackburn refers to use by the public

> "in such a manner that the owner of the fee, *whoever he was, must have been aware* that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief" (emphasis supplied).

That is a reference to the understanding of the *reasonable* owner, and not to that of the *actual* owner.

276. In my judgment, Lord Walker's reference in *Lewis* to the statement of Lord Hoffmann in *Sunningwell* takes the matter no further. It simply adopts his view about the effect of Lord Blackburn's speech in *Mann v Brodie*. On the other hand, the dictum of Lewison LJ in *London Tara Hotel* ("The subjective state of mind of the owner is equally irrelevant … ") is perfectly clear. I accept that it is an easement case, and not a town or village green case. I accept also that in the town and village green context, case law on easements is useful only by analogy (*Newhaven*, at [77]). But, since I do not agree that the dicta of Lords Hoffmann and Walker were saying anything different, and my instinct is that I should be looking at the understanding of the reasonable owner, I consider that I should follow the dictum of Lewison LJ, if only by analogy.

277. Secondly, although the Avon County Council signs could have been better worded, they clearly contested unrestricted access to the land. To say (for example) that the words "MEMBERS OF THE PUBLIC ARE WARNED NOT TO TRESPASS ON THIS PLAYING FIELD" set out a *warning* not to trespass, but *did not prohibit it* is, I am afraid, just playing word games. English law concerns itself with *substance*, not with *form*. A warning not to trespass is a prohibition of trespass. It is not the same as the sign on the golf course in *Lewis*, warning that trespass was dangerous: see at [2008] EWHC 1813 (Admin), [22]. And, as I have already said, many of the user forms in the present case indicated that the users thought the signs did indeed seek to prohibit trespass. The Bristol City Council sign is clearer, and obviously contests unrestricted access. In my judgment, all the signs were prohibitory.

278. Thirdly, a notice or sign whose meaning in law is to prohibit or restrict access does not fail to do so merely because a person passing by it does not notice it, or notices it but does not read it, or reads it but does not understand it to impose a prohibition or restriction: see *Betterment*, [41], [48]. I say "merely" because, of course, it is necessary to look at the context in which the sign is placed, and indeed the whole of the factual matrix. I also make the point that whether a sign is visible from the land itself (*ie* to a trespasser already having entered) is not the point. What matters is the expression of the landowner's attitude towards those outside the land. Trespass does not cease to be trespass because you did not see a sign when you entered.

279. Fourthly, for the reasons already given, I do not accept that only the school could control access to the land, rather than the local authority. Until 2011, the local authority retained legal possession of the land, and statute did not take it away. By contrast, before 2011 the school had no separate personality, and the school staff were merely employees of the authority. The governors had such functions as statute or the authority allowed them, but these did not include having or controlling legal possession.

280. Fifthly, a prohibitory notice erected by one landowner on the land does not as a matter of law cease to be such a notice merely because the ownership of the land changes. Where A erects a prohibitory notice on his or her land, and subsequently dies, leaving the land on intestacy or by will to B, it is not necessary for B to take any steps to alter the owner's name on the old notice, or indeed to replace the notice, in order to continue to prohibit unrestricted access. This is, after all, the default position in English law. Put another way, the death of A does not grant an automatic licence to the public to enter upon and use the land now in the ownership of B. I entirely accept that, after A's death, B *might* indicate in some other way that the prohibition no longer applied, even without removing the notice. But, with one possible exception, there is nothing of that kind here. In particular, I do not think that telling a groundsman who has locked the gates to unlock them is at all equivalent to taking down the notices.

281. In the context of the transfer from Avon County Council to the City Council, there is also the effect of the Local Government Changes For England (Property Transfer and Transitional Payments) Regulations 1995, regulation 12(1), to consider. The text was set out earlier. But the crucial words are these:

> " … all notices in force which were given … by … a relevant authority in respect of any transferred matters shall be of full force and effect in favour of … the body to whom such matters are transferred."

I was not addressed on this provision at the hearing, and so I invited the parties to let me have any written submissions that they wished me to take into account. The claimant on the one hand and the two defendants together on the other did so, and I am grateful to them for those submissions.

282. Avon County Council was abolished by an order made under section 17 of the Local Government Act 1992. The claimant submits that the 1995 Regulations, being made under section 19 of that Act (powers to facilitate incidental, consequential, transitional, or supplementary provision for such abolition

orders), were relevant to understand the powers, duties and liabilities passing to the City Council on the abolition of Avon County Council. Regulation 12 refers to "transferred matters", defined by reg 12(3) to mean "any property, rights or liabilities transferred by virtue of these Regulations or any other relevant instrument". "Relevant instrument" is defined by reg 2(1) to mean "a statutory instrument made under the [Local Government Act 1992], or in connection with the Act or such an instrument under any other Act". It is clear that ownership of the land the subject of this litigation passed from Acon County Council to the City Council. The claimant submits that so too did the function of managing it. Accordingly, regulation 12 had the effect of making any notice in force at that time in respect of Avon County Council land operate thereafter in favour of the City Council.

283. The defendants submit, first, that the signs were not "notices" within regulation 12. They say that "notice" in this context refers to "a written document that conveys information or notifies parties of legal processes, rights or obligations", and "does not refer to signage located on or near land". They say that the word is used on other occasions in the regulations (at 5(4), 5(7), 6(7), 8(1) and 8(4)) when it clearly means "a written document notifying a party of something". They rely on the presumption that a word used in a statutory context should mean the same if used repetitively in that context: see *R (Good Law Project Ltd) v Electoral Commission* [2017] EWHC 2414 (Admin), [33]. I agree with the latter point, but it does not apply in this case. The specified provisions refer to notices "served" on another authority under specific provisions of the regulations themselves, *ie* as between the transferor and transferee authorities, as part of the abolition process. Regulation 12, by contrast, is dealing with a different matter, namely what happens when the abolished authority has given notice to a third party not connected with the abolition process. As the defendants themselves point out, a notice to quit given to an Avon County council tenant (an unconnected third party) would under regulation 12 continue to have effect even after the reversion on the tenancy had passed to the City Council. There is nothing in this point.

284. The defendants also refer to the Latin maxim of construction, *noscitur a sociis* (literally "known by the company it keeps"). They say that "the reference to 'notices' follows references to various documents ie contracts, deeds, bonds, agreements, licences", and therefore should be construed in the same way. It is literally true that the one follows the other, but the argument once more ignores the context. The relevant words are clear. First there are "All contracts, deeds, bonds, agreements, licences and other instruments subsisting in favour of, or against … a relevant authority". Then there are "all notices in force which were given, or have effect as if given, by or to, a relevant authority". There are in fact two separate provisions. The "contracts, deeds," and so on, are those *subsisting* in relation to an authority. The "notices" are those *given* in relation to an authority. The notice to quit a tenancy referred to by the defendants earlier would be one *given* by the authority. A notice on a sign not to trespass would be one *given* by the authority. Again, there is nothing in this point.

285. Thirdly, the defendants say that the use of the word "given" further "suggests that 'notice' in Reg 12(1) refers to documents that convey information relating

to, or notify parties of, legal processes, rights or obligations, rather than signage on or near land". They say that the draftsman would have used "erected" instead of given for signage. I disagree. What is *erected* is the physical signage. The notice that is *given* is the message on the sign.

286. The defendants make two other points in their written submissions on this issue. But these simply repeat points already made by the defendants elsewhere, namely (i) that the authority no longer had power to give directions at all, because of section 42 of the Education (No 2) Act 1986, and (ii) that the signs were too few to cover the whole of the land. If those points succeed elsewhere, repeating them here is irrelevant. If those points fail elsewhere, they fare no better here.

287. Fo the reasons given above, I prefer the arguments of the claimant. In my judgment, regulation 12 is an additional, statutory route to show that the Avon County Council signs erected on the land continued to have effect, though now in favour of the City Council after the transfer of the land.

288. I referred above to the possibility that the City Council might have indicated, in some other way than removing the notices, that the prohibition contained in the notices no longer applied. This relates to the City Council's proposal put forward in 2009 to fence off the land in order to facilitate a refurbishment of the land. That plan was dropped in 2010 after local protests. At a Neighbourhood Partnership and Committee meeting in September 2010 it was recorded

> "that the Executive Member had given an assurance that the proposal to fence Stoke Lodge had categorically been dropped and that the parkland would remain with open access for all as of right."

289. I was not addressed on the question how far the "Executive" of the City Council was authorised to bind the whole Council in giving undertakings or assurances, nor indeed on how far one member of the Executive could bind the whole of it. Assuming for this purpose in favour of the defendants (though without deciding) that a single member of the Executive could in effect give such an assurance on behalf of the whole Council, in my judgment that would amount to withdrawing the prohibitory effect of the various notices on the land as from September 2010. However, I doubt whether the phrase "open access for all as of right" can amount to more than a mere *permission* to the public to enter and use the land. This is because, if it went further than permission, it would amount to a rededication of land held by the City Council for education purposes to public recreation purposes. That would be an appropriation to new purposes, and I have no doubt that that would require greater formality than a mere oral assurance by one Executive member at a neighbourhood meeting.

290. If that is right, it would mean that user was thereafter *by permission* of the landowner, and (despite the language used) therefore not "as of right". Whether that is so or not, the fact remains that the various Avon County Council signs continued to have prohibitory effect at least until 2010 or (in some cases) until they disappeared earlier, but which was at some time after 2002. In either case, they ate into the 20-year qualifying user period, indeed by 2010 amounting to more than half of it.

291. There is a further point. Even if the signs ceased to have prohibitory effect in 2010, when the City Council was in possession of the land, a year later the Council granted the lease of the land to the claimant. It transferred its right to possession, and to sue for trespass, to the claimant. In principle, at least, no permission granted by the City Council to use the land before the lease was granted in 2011 could bind the claimant as lessee: *King v David Allen and Sons (Billposting) Ltd* [1916] 2 AC 54, HL. Thereafter it was a matter for the *claimant*, rather than the City Council, as to whether or not to give permission for others to use the land. By March 2011, even before the lease, David Mayer, in making the first application for registration, considered that "the school was seeking to fence the land off, thus "preventing unfettered public access as of right". Two years after the lease, in January 2014 the claimant ceased using the land for sports activities, because of concerns about dogs and dog walkers. Once again it sought to fence off the land, and John Goulandris wrote his letter to the local newspaper in May 2016 to complain about this proposed exclusion of the public from the site. Probably by March 2011, but certainly by 2016, any possible waiver of the signs' prohibitory effect had come to an end. Even if use had been permitted by the claimant in the interim, it no longer was thereafter.

292. All that said, I can see why local users of the land may have obtained the wrong impression of the legal situation. The Avon County Council signs could have been written more clearly, and certainly more simply. After all, they referred to legislation which eventually became out of date, without the signs' being amended. They also referred to a landowner who, in 1996, ceased to own the land. Lay people might not understand that, in considering whether unrestricted access is prohibited, these things are of little or no significance. Moreover, for many years, the prohibitions and restrictions imposed by the signs did not appear to be enforced, at least until fencing was installed. Until then, access to the land was not physically controlled. And the experience of users up to that point, that those prohibitions and restrictions, if they existed at all, were *not* enforced, was passed on to successive generations of local inhabitants.

293. Matters were not assisted by the fact the councillors and officials of the City Council, at different times and in different places, said sympathetic things to both local inhabitants and the school. If the City Council had taken a clearer stance, one way or the other (so having to disappoint *someone*), and stuck to it throughout, I doubt that this litigation would ever have arisen. It is unsurprising that local inhabitants thought they were in the right. In purely *political* terms, they may have had the better of the argument. But I do not know and anyway that is not for me to say. At the end of the day, and, as I have sought to make clear, this case is not about politics, but about law.

294. Criticism was made of the claimant for not doing more to make clear its opposition to unrestricted public access to the land. In my judgment, this criticism is misplaced. By the time that the claimant came into existence and had been granted its lease, it was too late. David Mayer had already launched his application for registration of the land as a town or village green. Thereafter the claimant, in particular, opposed it. Moreover, that opposition was successful before the inspector, who recommended rejection of the application on the very basis that user was not as of right.

295. In our system, property rights are deliberately "sticky", in part in order to provide stability to society. In the absence of express grant or transfer, they are hard to lose, and equally hard for others to acquire. This reflects the fact that it is not in the public interest to encourage owners of land suitable for public recreation to play Scrooge with local inhabitants. As Bowen LJ once said, in a different context (private fishing rights, in *Blount v Layard* [1891] 2 Ch 681n, 691),

> " … nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood."

296. Moving on, I do not agree with the defendants that Avon County Council and later the City Council had no power to regulate the use of the land except by issuing a direction to the governing body of the school concerned. Section 42 of the Education (No 2) Act 1986, later replaced by section 149(1) of the Education Act 1996, and later still by section 20 and Sch 13 para 1 of the School Standards and Framework Act 1998 does not so provide. All that these statutory provisions do is to permit the governing body of each school to determine how the school premises are to be used, but in every case reserving the right to the council to give a direction overriding the decision of the governing body. The words used are "the use of the school premises … to be under the control of the governing body", "the governing body in exercising control of the use of the school premises", and "the occupation and use of the premises at the school … shall be under the control of the governing body". None of these formulations is apt to transfer legal possession to the governing body of a school. And it is the council, as the person with legal possession of the land (until the 2011 lease), which has the right to prohibit access to it by third parties.

297. I have already found that, as a matter of fact, the Bristol City Council sign erected in 2009 was erected so that it faced the car park rather than the playing fields. Accordingly, it is one of the signs to be taken into account in considering whether unrestricted access to the land was contested by the owner. And, as I have already said, there were originally six Avon County Council signs, of which three disappeared after 2002. The *installation* of the Cotham school signs (though themselves irrelevant) produced an immediate reaction, showing that towards the end of the relevant 20-year period local people were acutely aware of the existing signs. On the material before me, I am satisfied that the various owners of the land in erecting the signs had done sufficient to make clear, during the relevant 20-year period, that unrestricted access to the land by the public was contested.

298. There were signs at the two vehicular entrances. I accept that there was not a sign by every pedestrian entrance, but there was a clear boundary to the land from the public highway (whether stone wall, fence or hedge), and many of the entrances were unofficial, having been made by members of the public breaching the boundary fence or hedge, or else by accident. The land was clearly not an extension of the public roads, as a market square might be. Even though the land measures some 22 acres in extent, the nature of its layout and the use

made of it by members of the public (in particular for walking dogs or as a shortcut) means that most people using the land, and certainly all habitual users of the land, sooner or later became aware of the signs. In my judgment, therefore, use of this land by members of the public was contested and therefore not "as of right" during the many years that the signs were on the land (with the possible exception of the period immediately after the assurance of access in September 2010, but if so that was by permission and equally not "as of right").

Ground 3: User as of right – other forms of protest

Arguments

299. As an alternative to the signs, the claimant relies on other forms of protest by the landowner against unrestricted use of the land. A number of matters are referred to. One is the article in the *Bristol Observer* on 8 July 2010 which reported that "technically the public have never been allowed access to the fields". Another is the recognition by *Save Stoke Lodge Parkland* (in the covering letter of Mr Mayer's application to register the land on 4 March 2011) that the school was seeking to fence the land off, thus "preventing unfettered public access as of right". A third is the letter from John Goulandris to the *Bristol Evening Post* of 11 May 2016, stating that the school wished "to exclude members of the public" from the land. A fourth is the non-statutory public inquiry held in June 2016 by Philip Petchey, in which both the claimant and the first defendant by counsel cross-examined witnesses in support of the application and argued that the land should not be registered because its use was contentious. A fifth is the "campaign" by Mr Mayer (found by Sir Wyn Williams to have taken place) to persuade the PROWG committee not to follow the inspector's recommendation. A sixth matter is the publication by the claimant of a statement on its website in May 2018 to the effect that it was seeking to control public access by way of a fence.

300. In summary, the defendants say that this argument is based on dicta of Sullivan J in the *Cheltenham Builders Ltd* case which are wrong and should not be followed. But, further, none of the actions concerned took place on the land itself, most of them involved the school rather than the landowner, and in any event the matters relied upon were not sufficient to bring home their objection to more than "an insignificant number of users of the Land."

Discussion

301. For the reasons which I have already given, I do not consider that the dicta of Sullivan J referred to are wrong. In my judgment it is clear that acts of protest by the landowner may be other than simply speaking to people directly or erecting signs. The important thing is whether, objectively speaking, they demonstrate such protest and, in the context in which they are made or take place, they are sufficient to indicate that protest to relevant members of the public (without necessarily meaning that every member of the public is actually aware of the protest).

302. In my judgment, it is not necessary as a matter of law that the actions relied on should have occurred on the land itself, or even close to it. It all depends on the

circumstances. If A goes to B's house, some distance from A's land, and tells B not to trespass on A's land, it is plainly effective as a prohibitory act. I cannot see that it should make any difference if the prohibitory act concerned does not involve directly telling B, as long as it is otherwise sufficient for the purpose, but is done at B's house (and not on the land). Nor, in the present case, does it make any difference if the school, rather than the local authority, does the acts concerned. Before the school became an academy and the lease was granted, the local authority in law both possessed and used the land as a school, through the agency of its employees. Absent some direction from the landowner not to do so, those employees plainly had authority on behalf of the owner to tell trespassers to keep out. Once the lease was granted to the claimant, the claimant had legal possession and could do so in its own right. There is nothing in this point.

303. Lastly, there is the question of how many members of the public need to know about the objection. There is no rule that any particular proportion of the local population should become aware of the landowner's objection. Most of the local population will never visit the land. What matters is potential communication of the protest of the landowner to *those who are intending to come onto the land and make use of it*. That is a much smaller proportion of the local population. As I have already said, the evidence in relation to the signs in the present case satisfies me that all of those persons, except an insignificant number, *were* made aware of the protest of the landowner against unrestricted public access.

304. My decision in relation to signs means that it is academic whether any or all of these various acts did amount to a sufficient demonstration of the landowner's protest of unrestricted public access to the land. But the point has been raised and I will deal with it. I do not think that the article in the *Bristol Observer* is of much assistance. It is very short, and does not explain its very terse statement that members of the public do not have the right of access. The letter from Mr Goulandris published in the *Bristol Evening Post* in May 2016 is more explicit, in making clear that the claimant wished "to exclude members of the public" from the land, and, as a local councillor, Mr Goulandris would probably have attracted greater attention for his words. But, on the whole, I cannot think that this letter by itself would amount to a sufficient communication of the claimant's protest against unrestricted public access. The association *Save Stoke Lodge Parkland* was clearly aware in 2011 that the school was seeking to fence the land off, to prevent unrestricted public access. But it is unclear what act of the school caused that association to be so aware, apart from seeking to fence the land. The "campaign" by Mr Mayer referred to by Sir Wyn Williams falls rather into the same category.

305. In my opinion, however, the non-statutory public inquiry held in June 2016 is a different matter. That was a significant public event, with all the attendant publicity one might expect, lasting several days. It constituted an open public forum in which various parties, including both the claimant and the first defendant, were able to express their views on the desirability of unrestricted public access to the land. In my opinion, the position advanced by the claimant to the first defendant at that public inquiry constituted a sufficient form of protest against unrestricted public access to the land for the purpose of rendering

that access not "as of right". As for the publication by the claimant of a statement on its website in May 2018, in principle I consider that this too could constitute a sufficient form of protest, but, in the light of my findings on the signs and the positions adopted at the public inquiry, it really does not matter. I will however state my view that (contrary to the defendants' submissions) this statement was not merely making proposals for the future, but also making clear its present opposition to unrestricted public access.

Ground 4: Permission

Arguments

306. It will be recalled that clause 2.1 of the lease grants the term of years to the claimant "subject also to all existing rights and use of the Property including use by the community". In evidence on behalf of the second defendant it was suggested that this provision meant that the use by the community was protected under the lease, because "the school and the council had agreed between them that whatever was happening before could go on happening". As to this, in summary the claimant submits that clause 2.1 of the lease does not mean this, and does not give any rights to the community. However, it says that, if that is wrong, and the community had a right to go on doing what they had done before, then this would plainly be by permission, and could not be "as of right".

307. Both defendants accept that clause 2.1 (and, indeed, the lease as a whole) does not confer any permission or other rights on the local community. Hence, if use was "as of right" before 2011, it continued to be so afterwards.

Discussion

308. I agree with the claimant and both defendants that neither clause 2.1 nor the lease construed as a whole grants any permission or right to use the land to the local community. In my view clause 2.1 is nothing more than the product of cautious conveyancing, protecting the landlord in granting the lease from any possible liability at the instance of the claimant in respect of rights that the local community might have already acquired, such as a public right of way (which does not require registration to come into existence): see for example *Ashburn Anstalt v Arnold* [1989] Ch 1, 25-26, CA. If I were wrong about that, and the lease *did* grant such permission or other right, then I agree with the claimant that the use would be "of right" and not "as of right", and accordingly it could not be taken account of for the purposes of registration (see *Barkas*, [27]), despite the fact that the existence of clause 2.1 was not specifically communicated to members of the public (*Newhaven*, [69]).

Ground 5: Interruption to use

Arguments

309. In summary, the claimant submits that, when the playing fields were being used for organised sport, whether by the claimant, the University or sports clubs, members of the public were in effect displaced and their use of the land was interrupted. Any attempt to continue to use a part of the land being used for

organised sport would be unlawful under section 40 of the Local Government (Miscellaneous Provisions) Act 1982 and subsequently section 547 of the Education Act 1996. Hence, they could not show continuous, *lawful* use over 20 years, and statutory requirements were not satisfied.

310. The defendants say that this argument was put to Sir Wyn Williams in the judicial review, but he rejected it. In any event, they say that the argument fails because it is simply part of the "give and take" that occurs when members of the public seek to use the land at the same time as the landowner. Both sides accommodate each other, like the walkers and the golfers in the *Lewis* case, and the public and the port company in *TW Logistics Ltd*.

Discussion

311. I do not agree that this argument was put to Sir Wyn Williams in the judicial review, and he rejected it. The argument put to Sir Wyn Williams was different. It was that, because there were times when part of the land was being used for a beer festival and funfair, and the public then had no access to it, save on payment of an admission charge, their access on other occasions had to be regarded as by implied permission, and hence not "as of right". The claimant's complaint in the judicial review was that this argument had not been properly dealt with by the registration authority. The judge concluded that both the inspector and the registration authority *had* given sufficient reasons for not accepting the argument, and the complaint failed. So far as I can see, there was no argument in the judicial review to the effect that use of the land during organised sports matches sufficiently interrupted use by the public so that there could not be 20 years' continuous user.

312. As to the second point, and looking at the facts in the present case, I think that this cannot properly be regarded as just an aspect of "give and take". This is not like the walkers in *Lewis*, who pause for a minute to allow the golfers to play their shots and pass on. Nor is it like the forklift truck drivers in *TW Logistics Ltd*, who stop for a few seconds to allow the public to walk across the land concerned. No one taking a shortcut across the land in this case, or walking a dog on the land, pauses *for an hour or so* to allow the game to finish before continuing on his or her way across the pitch. There is a qualitative difference between the two cases. The public can properly be said to have been displaced by the games for the length of time that they took to play. If a gate had been locked to deny access to certain land to the public for that time, it could not be said that the public had access as of right during that time. The same is true if the landowner excludes the public by playing organised sports on the land.

313. It might be asked how long an exclusion is enough. Where are you to draw the line? The answer is that given by Lord Coleridge CJ in *Mayor of Southport v Morriss* [1893] 1 QB 359, 362:

> "The answer is that it is not necessary to draw it at any precise point. It is enough for us to say that the present case is on the right side of any reasonable line that could be drawn."

That is the position here. Whilst the amounts of time involved are not very great, the public *were* excluded during the games. Those games happened frequently, on several days a week during school term-time. In my judgment the public did not have continuous use of the land during the 20-year period. This is a further reason why the land should not have been registered as a town or village green.

Ground 6: Unlawful use

Arguments

314. I have already set out the claimant's argument on this ground above. If the public interfered with the playing of games by the school on the land, this would be unlawful under section 40 of the Local Government (Miscellaneous Provisions) Act 1982 and subsequently section 547 of the Education Act 1996.

315. The defendants say there is little or no evidence to establish that the local inhabitants' use of the land gave rise to the occurrence of nuisance and disturbance, apart from dogs straying onto pitches when in use. There is no evidence at all of any prosecution for an offence under either provision.

Discussion

316. The only relevance of this ground is to deal with the possibility that members of the public might not have given way to the playing of games by the school on the land, but instead walked through. In my judgment, if any such behaviour took place, it would be unlawful under these statutory provisions. It would therefore not count for the purposes of establishing the statutory criteria for a town or village green. It is clear that incidents involving dogs did take place, and did cause nuisance or disturbance to the school pupils and teachers. I accept that these were isolated instances, rather than regular problems. Nevertheless, as a matter of principle, I hold that no such intervention or interference with school games can be relied on in order to establish that the statutory criteria are met. It may be, but I do not think I have to decide it, that if the land was otherwise properly registered as a town or village green, that would provide "lawful authority" within section 547 to local inhabitants, so that the use of the land could no longer be unlawful.

Conclusion on the grounds

317. In my judgment, the claimant succeeds on all of its grounds except ground 4, though ground 6 is simply an aspect of ground 5. The land should not have been registered as a town or village green, because at the time it did not meet the statutory criteria. I must therefore go on, to consider the second question which arises. This is whether "the court deems it just to rectify the register".

Justice

Arguments

318. The claimant submits that, if it succeeds in showing that the land ought not to have been registered as a town or village green, then it has the "powerful case"

for rectification referred to by Morgan J in the *Betterment* trial decision. Although the second defendant puts forward arguments for showing that the register should not be rectified, the claimant resists these arguments.

319. The first defendant makes no particular submissions in relation to whether it is just to rectify the register if any of the grounds advanced is made out. The second defendant however does make such submissions. First, she points out that the owner of the fee simple estate (the City Council) resists the claimant's application. Accordingly, she says that "the landowner's rights are not a factor that supports the court exercising its jurisdiction to rectify the register". Second, she makes the point that, when the claimant took its lease in 2011, the first registration application (by Mr Mayer) had already been made. So the claimant was by then aware of the position and potential implications. Third, the second defendant says it would not be just to rectify the register if the statutory criteria were met in relation to a different period of time from that the subject of the present application. The second defendant says that those criteria were met in the period March 1991 to March 2011. Lastly, the second defendant says that, if the basis for holding that the statutory criteria were not met with that set out in ground 5, the court should simply direct an amendment to the entry in the register to exclude the parts of the land laid out to sports pitches.

Discussion

320. I agree with the claimant that, if (as here) the court holds that the statutory criteria were not met at the date of registration, then the case for rectification is powerful. For my part, I consider that it will not be difficult to show that it is "just" to rectify the register in a case where there is statutory incompatibility. If the statutory purposes for which the land is for the time being held are such that the town and village green legislation is simply inapplicable, then it is easy to see why effect should be given to that incompatibility. The land being already dedicated to one public purpose, such as education, highways or housing, it was not possible to rededicate it to a public recreational purpose under the 2006 Act, at least without a formal new "appropriation".

321. I accept that the decision may be harder in cases where the statutory criteria have for some reason not been met, in relation to land which is at least *capable* of being dedicated to public recreation. So, for example, questions of delay (as in *Paddico*, where the Supreme Court adopted the equitable doctrine of laches as the appropriate regulatory mechanism) or other action taken in reliance on the registration may, depending on the particular circumstances, mean that it is not just to rectify the register.

322. In the present case, I do not accept that the position of the City Council as owner of the freehold reversion can be determinative, or even of significant weight. In law, the right to possession for the next century or so belongs to the claimant. This is a considerable property right, and the claimant's position should weigh more in the balance than that of the City Council and its reversion, particularly considering the statutory purpose for which the land is held.

323. Second, in my judgment the fact that the claimant took the lease at a time when an application had already been made for registration takes the defendants

nowhere. The dispute between the school (and for that matter the City Council) on the one hand and the local inhabitants on the other had been running for some years by that stage. So, whether an application had actually been made by that date is irrelevant. And, in my judgment, mere knowledge of the dispute between the two sides does not without more prevent its being just to rectify the register if it turns out that the claimant's view was the correct one all along.

324. Third, it is not open to the defendants to resist the justness of a rectification on the basis that *another* 20-year period would have succeeded where the present one has failed. This would amount in substance to an attempt to make a fresh application for registration well out of time. In addition to that, the case pleaded here rests on the period 1998 to 2018. A trial under section 14 of the 1965 Act in relation to another period of 20 years would have been pleaded and conducted differently, and almost certainly tried on different documents. A further point is that the particular alternative period put forward (March 1991 to March 2011) would in any event fail because of statutory incompatibility. The local education authority during the whole of that time held the land *in possession* for the statutory purposes of education. The *Lancashire* case clearly covers this situation, and no sufficient distinction between that case and this was sought to be argued for this purpose. I certainly can see none.

325. The fourth point put forward by the second defendant is that it would be possible (if ground 5 were upheld) to amend the registration entry to exclude the actual sports pitches. The first answer to that is that grounds 1, 2 and 3 have also been upheld, and so the point does not arise. The second answer is that it would give rise to impossible enforcement problems. The school would be entitled to fence off the pitches, but nothing else. If it did that, the games could not safely be played on them. If it did not do that, there would be safeguarding and dog interference and defecation issues. On the facts of this case, I reject that possibility.

326. For completeness, I mention that the first defendant did not argue that the Arboretum should be treated differently from the leased land. But the second defendant did. She said that, even if the leased land should be deregistered, the Arboretum should not. The problem is that, as I have said, the Arboretum is held by the City Council for statutory purposes of education, and thus it is not available to be devoted to public recreation purposes. There was no sufficient argument based on laches, or other prejudice to the public, were it to be deregistered. The legal position is simply restored by deregistration to what it should have been before the wrongful registration. Accordingly, I deal with the Arboretum together with the leased land. Where the leased land goes, the Arboretum goes.

327. In the second defendant's skeleton argument for trial, but not in the second defendant's closing submissions, it is submitted that "the Claimant's conduct in this matter is a factor which weighs against rectification of the register". This submission is not in any way particularised in the skeleton argument. However, the cross examination of Ms Crossland and Ms Butler at trial suggests that the misconduct alleged is that the claimant "shut out" the second defendant from costs protection in the application which I heard and determined last year. I am not prepared to deal with matters in this way. It is not fair to the claimant to put

forward allegations of misconduct only in cross examination, and then to expect the court to find facts on such allegations and then to take any such facts into account in considering whether it is just to order rectification. To the extent to which the second defendant persists in these allegations, and having read the sequence of events set out at paragraphs 144-147 of the claimant's closing submissions, I reject them. In my judgment, it is indeed "just" to order rectification in the present case, by deleting the entry relating to the land.

CONCLUSION

328. For the reasons given above, I hold that:

(1) As a matter of law, the land should never have been registered as a town or village green. It did not meet the statutory criteria, but, in addition, registration as a town or village green would be incompatible with the statutory purposes for which it is held.

(2) In my judgment, it is "just" within section 14 of the 1965 Act to rectify the register to what it was before the wrongful registration took place.

Accordingly, I will order that the register of town or village greens be rectified by deleting the entry relating to the land, including the Arboretum.

329. The consequences of this legal decision, and in particular any political consequences, are a matter for others and not for me. I am under no illusion that the dispute between the parties will stop here. But, subject only to matters of costs and so forth, my involvement in the case does stop here. So, I want to express my thanks to all the parties and their legal teams for all their hard work in bringing this complex and detailed matter to trial, to the witnesses for giving evidence, and to the members of the public who took an interest in the hearing. All in their own ways have contributed to this judgment. I should be grateful to receive a minute of order giving effect to this judgment for consideration and approval.