Hilary Term
[2015] UKSC 7
On appeal from: [2013] EWCA Civ 276

JUDGMENT

R (on the application of Newhaven Port and Properties Limited) (Appellant) *v* East Sussex County Council and another (Respondents)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Sumption
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

25 February 2015

Heard on 3 and 4 November 2014

Appellant

Charles George QC
Philip Petchey
(Instructed by DMH Stallard LLP)

Respondent
(East Sussex County Council)
Stephen Sauvain QC
John Hunter
(Instructed by East Sussex County Council Legal)

Respondent
(Newhaven Town Council)
George Laurence QC
Edwin Simpson
(Instructed by Hedleys Solicitors LLP)

LORD NEUBERGER AND LORD HODGE: (with whom Lady Hale and Lord Sumption agree)

Introductory

1. The specific issue raised by this appeal is whether East Sussex County Council ("the County Council") was wrong in law to decide to register an area of just over 6 hectares (or 15 acres) known as West Beach at Newhaven ("the Beach") as a village green pursuant to the provisions of the Commons Act 2006. The points of principle raised by the appeal are, potentially at least, far more wide-ranging. Those points are (i) the nature of the public's rights over coastal beaches, (ii) whether byelaws can give rise to an implied consent to the public to use land, and (iii) the interrelationship of the statutory law relating to village greens and other duties imposed by statute.

The factual background

2. Newhaven is a port town on the mouth of the River Ouse in East Sussex, and its harbour ("the Harbour") has existed since the mid-sixteenth century, after a storm blocked the original mouth of the River Ouse, some three miles to the east. Since at least 1731, the operation of the Harbour has been subject to legislation. The Newhaven Harbour and Ouse Lower Navigation Act 1847 ("the 1847 Newhaven Act") repealed the earlier legislation, and established harbour trustees ("the trustees"), to whom it gave powers to maintain and support the harbour and associated works.

3. Section 49 of the 1847 Newhaven Act is in these terms:

> "[T]he Trustees shall maintain, and support the said harbour of Newhaven, and the piers, groynes, sluices, wharfs, mooring berths, and other works connected therewith, and also maintain and support the open navigation of the River Ouse between Newhaven Bridge and Lewes Bridge …"

4. The Newhaven Harbour and Ouse Lower Navigation Act 1863 ("the 1863 Newhaven Act") gave the trustees powers to construct and maintain and support the Harbour and associated works.

5. The Newhaven Harbour Improvement Act 1878 ("the 1878 Newhaven Act") established the Newhaven Harbour Company to which were transferred the rights, powers and duties of the trustees. Under section 57 of the 1878 Newhaven Act it is provided that:

> "the Company may hire or purchase and use any dredging machine for the purpose of deepening and cleansing the harbour …"

Section 2 of the 1878 Newhaven Act applied to the port section 33 of the Harbours, Docks and Piers Clauses Act 1847 ("the 1847 Clauses Act"), which provides that:

> "Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers."

6. By virtue of the Southern Railway Act 1926, the Harbour Company was vested in the Southern Railway Company. Pursuant to the Transport Act 1947, the Southern Railway Company was nationalised, and the Harbour was vested in the British Transport Commission. As a result of subsequent statutory and contractual arrangements, the Harbour subsequently vested in British Railways Board (1962), Sealink (UK) Limited (1979), Sea Containers Limited (1984), and, most recently, in 1991, Newhaven Port and Properties Limited ("NPP"), pursuant to the Sealink (Transfer of Newhaven Harbour) Harbour Revision Order 1991 (SI 1991/1257) ("the 1991 Newhaven Order").

7. Paras 10 and 11 of the 1991 Newhaven Order provide:

> "10 (1) The Company, subject to obtaining the necessary rights in or over land, may execute, place, maintain and operate in and over the transferred harbour such works and equipments as are required for or in connection with the exercise by it of any of its functions and may alter, renew or extend any works so constructed or placed. …
>
> 11 (1) The Company may deepen, widen, dredge, scour and improve the bed and foreshore of the transferred harbour and may blast any rock within the transferred harbour or in such approaches. …"

8. The Beach is part of the operational land of the Harbour, which is currently owned and operated by NPP, and is subject to statutory provisions and byelaws. The extent of the Harbour area includes (i) a substantial breakwater and lighthouse, seawall and the Beach which form the west of the entry into the port, (ii) a pier, a much longer (and naturally created) shingle beach which form the east of that entry, (iii) the mouth of the River Ouse and the next thousand metres or so of the river, and (iv) land running either side of the river, which includes (v) a car park, marina and fishing berth to the west, and (vi) two quays, a ferry dock, a cool store, a harbour railway station, and harbour offices to the east. NPP's current strategic plan for development of the port is contained in its Masterplan (2012).

9. The Beach owes its origin to the fact that, in 1883, pursuant to the powers granted by the 1863 Newhaven Act, the substantial breakwater was constructed to form the western boundary of the Harbour. The breakwater extends just over 700 metres out to sea. After the construction of the breakwater, accretion of sand occurred along the eastern side of the breakwater, and that accretion has resulted in the Beach. To the north, the Beach is bounded by a harbour wall. On top of the harbour wall is an area of hard standing and a car park, which is now owned and operated by NPP. There are physically two means of access to the Beach: first, by steps leading down from the top of the wall, and, secondly, by another set of steps leading down from the top of the breakwater.

10. The Beach is substantially covered by the sea for periods of time either side of high tide. Inevitably, as the tide ebbs and flows, the amount of the land uncovered varies, and the amount of the land uncovered at low tide and the period for which the whole of the Beach is covered with water varies between spring (high) and neap (low) tides. On average, the Beach is wholly covered by water for 42% of the time and for the remaining 58% of the time it is uncovered to some extent, but it is entirely uncovered by water only for a few minutes at a time.

11. The steps leading down to the Beach from the top of the harbour wall were accessible in practice by members of the public from shortly after the end of the Second World War (during which time it was closed) until it was fenced off by NPP in April 2006. Thereafter, access by the public was no longer possible, because access from the steps leading from the top of the breakwater had been closed off before 2006.

The making of byelaws relating to Newhaven Harbour

12. Section 58 of the 1878 Newhaven Act conferred on the Harbour Company the power to make byelaws which were to be approved and published in the

manner prescribed by the 1847 Clauses Act. Section 83 of the 1847 Clauses Act gives to the "undertakers" in whom a harbour is vested the power to make byelaws "as they shall think fit" for various purposes, including "[f]or regulating the use of the harbour, dock, or pier". Section 84 provides for criminal sanctions at the suit of the undertaker for breach of such byelaws. Section 85 of the 1847 Clauses Act states that the byelaws should not "come into operation until the same be confirmed" as required by that Act. Sections 86 and 87 of that Act are concerned with advertising and providing copies of the byelaws before confirmation.

13. Provisions relating to the publication and display of such byelaws were contained in sections 88 and 89 of the 1847 Clauses Act:

> "88. The said byelaws when confirmed shall be published in the prescribed manner, and when no manner of publication is prescribed they shall be printed; and the clerk to the undertakers shall deliver a printed copy thereof to every person applying for the same, without charge, and a copy thereof shall be painted or placed on boards, and put up in some conspicuous part of the office of the undertakers, and also on some conspicuous part of the harbour, dock, or pier, and such boards, with the byelaws thereon, shall be renewed from time to time, as occasion shall require, and shall be open to inspection without fee or reward …
>
> 89. All byelaws made and confirmed according to the provisions of this and the special Act, when so published and put up, shall be binding upon and be observed by all parties, and shall be sufficient to justify all persons acting under the same."

Section 89 was repealed by the Statute Law (Repeals) Act 1993. Section 90 of the 1847 Clauses Act provides that "[t]he Production of a written or printed Copy of the Bye laws" appropriately authenticated "shall be evidence of the Existence and due making of such Bye Laws", and "with respect to the Proof of the Publication of any such Bye Laws it shall be sufficient to prove that a Board containing a Copy thereof was put up and continued in manner by this Act directed …".

14. In February 1931, the Southern Railway Company made byelaws for the Regulation of Newhaven Harbour ("the Byelaws"), which were confirmed by the Minister of Transport the following month. The following Byelaws are germane to the present appeal:

> "51. No person shall enter or remain on the quays of the harbour unless he has lawful business thereon, or has received permission from the Harbour Master to do so; and every person entering or who shall have entered on such quays, shall, whenever required so to do by any duly authorised servant of the Company, truly inform him of the business in respect of which such person claims to be entitled to be thereon. Any person committing a breach of this byelaw may be forthwith removed from the quays and be excluded therefrom …
>
> 52. No person shall, without the consent of the Harbour Master, enter or remain within any part of the piers or quays which may, under a reasonable direction of the Harbour Master, be enclosed by chains, or by a barrier.
>
> 68. No person, without the permission of the Harbour Master, shall fish in the harbour; and no person shall bathe in that part of the harbour which lies between Horse Shoe Sluice and an imaginary line drawn from the East Pier Lighthouse and the Breakwater Lighthouse.
>
> 70. No person shall engage in or play any sport or game so as to obstruct or impede the use of the harbour, or any part thereof, or any person thereon; nor (except in case of necessity or emergency) shall any person, without the consent of the Harbour Master, wilfully do any act thereon, which may cause danger or risk of danger to any other person.
>
> 71. No person shall bring any dog within the harbour, or permit it to be within the harbour, unless it is securely fastened by a suitable chain or cord, or is otherwise under proper and sufficient control."

15. As regards publication and enforcement of the Byelaws, according to the Inspector who wrote the reports referred to in para 19 below, there were no byelaw signs in place during the relevant twenty year period that would have indicated to users of the Beach that their use was regulated by byelaws. She also concluded that there was no evidence of active enforcement of the Byelaws during that period; and that there was no other suggestion of any other overt act on the part of the landowner during that period to demonstrate that he was granting an implied permission for local inhabitants to use the Beach.

16. Town and village greens have been protected by statute since at least 1857. However, the currently applicable legislation is to be found in the Commons Act 2006, and in particular in section 15 of that Act, which replaced the preceding governing legislation, which was contained in the Commons Registration Act 1965.

17. Section 15(1) of the 2006 Act provides that

> "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."

Subsections (2), (3) and (4) each refer to cases 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."

Subsection (2) only applies where this use was continuing at the date of the application; subsection (3) only applies where the use had ceased after section 15 commenced, provided that the application was made within two years of such cesser; and subsection (4) only applies where the land ceased to be so used before section 15 commenced, provided (i) the application is made within five years of the cesser and (ii) an inconsistent planning permission has not been granted and implemented. It is, of course, subsection (4) which is relied on in this case. By section 61 of the 2006 Act, it is provided that "land" includes "land covered by water".

18. It was argued below on behalf of NPP that a tidal beach cannot be a "town or village green" within the meaning of the 2006 Act. A speaker of ordinary English might well think that there is very considerable force in that argument. However, substantially for the reasons given by Ouseley J in the High Court and by Richards LJ in the Court of Appeal, the argument must be rejected – see at [2012] EWHC 647 (Admin), [2014] QB 186, paras 11-39 and [2013] EWCA Civ 276, [2014] QB 186, paras 31-42. In summary, the argument is inconsistent with the reasoning of the majority of the House of Lords in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674, a case on the 1965 Act (as amended in 2000), which, for the purposes of the point at issue was identically worded to the 2006 Act

– see per Lord Hoffmann, Lord Rodger and Lord Walker respectively at paras 39, 115 and 128. It might have been appropriate for this Court to reconsider the *Oxfordshire* case were it not for the fact that it was decided while Parliament was considering the Bill which became the 2006 Act, and Lord Hoffmann, Lord Rodger and Lord Walker each expressly observed (in the paragraphs just mentioned) that, if Parliament was unhappy with the decision, the Bill could be amended appropriately, and it was not. Implied Parliamentary approval of a court's decision should not be lightly inferred, but in the present case, we thought it inappropriate to grant permission to appeal on this issue.

The application to register

19. On 18 December 2008 Newhaven Town Council ("the Town Council") applied to the County Council, as the statutory registration authority, to register the Beach as a town or village green. The application was supported by evidence that the Beach had been used by a significant number of local inhabitants as of right and for a period of at least 20 years down to April 2006. NPP objected to the proposal, and the County Council appointed an Inspector, Ruth Stockley, a barrister experienced in this area of the law, to hold a public inquiry. The inquiry was held between 6 and 8 July 2010, following which Ms Stockley produced a report dated 6 October 2010 and an addendum report dated 14 December 2010, recommending that the Beach be registered as a town or village green. Ms Stockley's two reports were very full and clear. Importantly, she concluded that members of the public, and, crucially residents of the locality, had used the Beach for well over 80 years as a place to play, sunbathe, swim from, picnic and the like (save during much of the First and Second World War periods, when the port area, including the Beach, were inaccessible).

20. On 22 December 2010, the two reports and recommendation were put before the County Council's Commons and Village Green Registration Panel ("the Panel"), together with an officer's recommendation that the County Council accept the application and register the land as a town or village green. The Panel resolved to accept the application to register the Beach, but the actual registration awaits the outcome of these proceedings.

21. NPP then applied to the High Court for judicial review of the decision to register the Beach as a town or village green. The application came before Ouseley J who, in a comprehensive and carefully considered judgment, rejected a number of arguments raised by NPP, but granted their application on one ground, namely that it was reasonably foreseeable that the registration of the Beach would conflict with the statutory functions for which the Beach

was held by NPP, namely as part of Newhaven Harbour – [2012] EWHC 647 (Admin) [2014] QB 186.

22. The County Council and the Town Council appealed that decision to the Court of Appeal, who, in the course of their impressive judgments, unanimously disagreed with the Judge's reason for granting the application - [2013] EWCA 276, [2014] QB 186. Accordingly, the majority of the Court of Appeal (Richards and McFarlane LJJ) allowed the appeal. Lewison LJ would have dismissed the appeal on the ground that the use of the Beach by members of the public, and therefore by inhabitants of the locality, up to 2006 had not been "as of right", but by implied licence, for two different reasons, namely (i) because members of the public had enjoyed an implied licence to use coastal beaches in the UK for recreational and associated purposes, and/or (ii) by virtue of the provisions of the byelaws governing the Harbour area.

The issues on this appeal

23. The provisions of section 15 of the 2006 Act only enable land to be registered as a town or village green if it has been used for recreational and similar purposes by inhabitants of the locality for more than twenty years "as of right". As was explained most recently by this Court in *R (Barkas) v North Yorkshire County Council* [2014] UKSC 31, [2014] 2 WLR 1360, paras 14-19 and 58-68, that expression, perhaps somewhat confusingly, is to be contrasted with "by right", and generally connotes user without any right, whether derived from custom and usage, statute, prescription or express or implied permission of the owner. Accordingly, where the inhabitants of the locality have indulged in sports and pastimes on the land in question with the licence of the owner for at least part of the relevant twenty year period, section 15 will not apply.

24. Three issues arise on this appeal. The first is whether the fact that the Beach is part of the foreshore defeats the contention that the user by local inhabitants for sports and pastimes can have been "as of right", on the ground that the public had an implied licence to use the foreshore for such purposes and the implied right was never revoked in the case of the Beach. The second issue is whether, if that is not right, the public none the less had an implied licence to use the Beach, as part of the Harbour, in the light of the Byelaws. The third issue is whether, in any event, section 15 of the 2006 Act cannot be interpreted so as to enable registration of land as a town or village green if such registration was incompatible with some other statutory function to which the land was to be put.

25. We will take these three issues in turn.

Public rights over the foreshore: the arguments

26. The foreshore around England and Wales, by which is meant the area between the high water and low water mark, is owned by the Crown, although it is open to the Crown to alienate it, either permanently by conveying or transferring it, or temporarily by granting leases over it – see eg *Halsbury's Laws* (4th ed 1998 reissue) vol 12(1), para 242. During the course of argument, we were informed that the Crown retained ownership and possession of more than half the foreshore around England and Wales. Most of the foreshore which the Crown no longer owns was at some point conveyed or transferred away. But to describe the Beach in this case as having been alienated in this way may be slightly misleading, as the Beach only came into existence as a beach in 1883 in the circumstances described in para 9 above.

27. However, that does not impinge on NPP's argument, which is that there is a rebuttable presumption that the public use of the foreshore is by permission of the owner of the Beach – that is, the Crown or its successors in title. This proposition was rejected by Ouseley J at first instance and by the majority of the Court of Appeal, Richards and McFarlane LJJ. However, it was accepted by Lewison LJ.

28. The state of the law relating to public rights over the foreshore of England and Wales is more controversial than one might have expected. It appears clear that there is, at least normally, "a public right of navigation and of fishing in the sea and rights ancillary to it" – *Halsbury op cit*, para 243. However, the question in this case is the existence and nature of any further or greater rights, and in particular the right to use the foreshore for the purpose of bathing and the sort of familiar activities which people indulge in on a beach – at least in good weather.

29. At least where there is no express permission from the owner of the foreshore, there are in principle at least three possible conclusions in relation to the issue of the public's right to use the foreshore for bathing, by which we mean using the foreshore as access to the sea at low tide, or bathing in the sea over the foreshore at high tide (or a combination of the two), plus associated recreational activities. The first is that members of the public have, as a matter of general law and irrespective of the wishes of the owner of the foreshore, the right to use the foreshore for the purpose of bathing, as a matter of general common law. The second possibility is that the owner of the foreshore is presumed to permit members of the public to use of the foreshore for the purpose of bathing, unless and until the owner communicates a revocation of its implied permission. The third possibility is that members of the public

have no right to use the foreshore for bathing, in which case they are trespassers.

30. NPP would succeed on the first issue on this appeal if the first or second of these possibilities is correct. If local inhabitants (a subset of members of the public) had been using the Beach because they were entitled to do so as a matter of common law (the first possibility), or because they had an implied permission to do so (the second possibility), then, in so far as they were inhabitants of the locality, they would not have been doing so "as of right", but "by right". On the other hand, if the third possibility is correct, NPP would fail because the user by local inhabitants would have been as trespassers, and therefore "as of right", at least subject to the other two issues on this appeal.

31. So far as the relevant cases on the issue are concerned, none is binding on this Court, but they tend to be against the first possibility and somewhat unclear as between the second and third possibilities. Presumably for that reason, Mr George QC, on behalf of NPP, does not argue for the first possibility and takes his stand on the second possibility.

Public rights over the foreshore: the authorities

32. The leading, and it may be said the only, reported case where the topic of the rights of members of the public to bathe on the foreshore has been considered in any detail is *Blundell v Catterall* (1821) 5 B & Ald 268. In that case, the defendant used the beach "between the high-water mark and the low-water mark of the River Mersey" at Great Crosby in Lancashire for the purpose of providing bathing facilities (including bathing machines and carriages for members of the public who wished to swim in the sea). The plaintiff, as Lord of the Manor of Great Crosby and owner of the beach in question, sought an injunction to restrain this use. The defendant argued that all members of the public had the right to use a beach for the purpose of gaining access to, and bathing in, the sea.

33. The Court of King's Bench, Best J dissenting, decided that, unless such a right could be established by usage and custom, there was no "common-law right for all the King's subjects to bathe in the sea and to pass over the seashore for that purpose". The leading judgment has long been regarded as that of Holroyd J who gave the extent of the rights of the public over the seashore impressively full and detailed consideration, although Abbott CJ and Bayley J also delivered full judgments, as did the dissenting Best J.

34. Best J in effect followed the view expressed in *Bracton's De Legibus et Consuetudinibus Angliae*, where it is written "*Naturali vero iure communia*

sunt omnium haec: aqua profluens, aer et mare et litora mare, quasi mari accessoria. Nemo igitur ad litus maris accedere prohibetur" (By natural law these are common to all: running water, air, the sea, and the shores of the sea, as though accessories of the sea. No one therefore is forbidden access to the seashore). However, Holroyd J considered that this represented the civilian law, but not the common law.

35. Essentially, as we see it, the reasoning of the majority can be justified by reference to the well-established common law proposition that rights over land can normally only be obtained by grant, custom and usage, or prescription. Custom and usage required a long period of use for the specified purpose, and prescription could (at any rate until 1832) normally only be invoked if it could be shown that the use had continued since "time immemorial" which, at least normally, meant 1189. Bathing in the sea, unlike fishing and navigation, was a comparatively recent popular activity, which seems to have started as such around the middle of the 18th century. Although Strutt in *Sports and Pastimes of the People of England* (1802) refers to "swimming" as "an exercise of great antiquity", the first recorded instance of people bathing in the sea for pleasure, according to NPP in this case, was in Scarborough in 1732 (*Crane, Coast: Our Island Story: A Journey of Discovery Around Britain's Coastline*, 2010, p 218). Accordingly, bathing could rarely be a right obtained by custom and usage or (at least until the Prescription Act 1832, which introduced the twenty-year and forty-year rules) by prescription.

36. The decision in *Blundell* was not concerned with the second possibility canvassed in para 29 above, namely whether there was, or could be taken to be, some sort of tacit licence on the part of the owner of the sea-shore permitting members of the public to use it for bathing, recreations and pastimes. The point could not have arisen in that case, because it would not have availed the defendant, as any such licence would have been revoked by the plaintiff's objection to the defendant's use of the beach.

37. None the less, there are observations in the judgments in *Blundell*, which appear to imply that the right to use the foreshore for bathing or for access to the sea for bathing could be acquired by prescription. For instance, at p 301, albeit in a passage whose clarity is not assisted by a double negative, Holroyd J said "nor, if [the present claim] were [supported by custom or usage], would it follow that it was such a common law right as might not, by prescription at least, be otherwise appropriated". It seems to us that that observation carries with it the implication that a member of the public would be trespassing on the foreshore if he used it for that purpose, as otherwise they could not raise a claim by prescription. However, it would not be safe to make much of what is little more than a throw-away obiter observation.

38. Further, in what may be seen as a hint at the possibility of an implied licence at p 300, Holroyd J said this:

> "Where the soil remains the King's, and where no mischief or injury is likely to arise from the enjoyment or exercise of such a public right, it is not to be supposed that an unnecessary and injurious restraint upon the subjects would, in that respect, be enforced by the King, the parens patriae."

This provides some apparent assistance to NPP's argument that there is an implied licence from the owner of a beach to use it for purposes which do not interfere with the interests of the owner. However, it would be wrong to place much weight on it, as, once again, it was not really relevant to the issue which the court had to decide, and it is not clear quite what the legal characterisation of the owner's indulgence Holroyd J had in mind.

39. In *Mace v Philcox* (1864) 15 CB (NS) 600, Williams J appears to have treated *Blundell* as a decision limited to the presence or use of bathing machines. In the same case, Erle CJ was apparently unenthusiastic about the majority view in *Blundell*, saying "I am desirous of guarding my judgment so as not to restrict the valuable usage or right of Her Majesty's subjects to resort to the sea-shore for bathing purposes", although he followed the majority view. So did Cozens-Hardy J in *Llandudno Urban District Council v Woods* [1899] 2 Ch 705, albeit without any expressed lack of enthusiasm. However, it could be said that he demonstrated a degree of restraint by refusing an injunction to restrain the activity in question (preaching on the foreshore) although concluding, in accordance with the reasoning in *Blundell*, that it was a trespass.

40. In *Brinckman v Matley* [1904] 2 Ch 313, 317, Buckley J, after referring to the fact that it had been applied in two first instance decisions of *Mace* and *Llandudno*, followed the judgment of Holroyd J in *Blundell*, and proceeded on the basis that members of the public did not have the right to go on the foreshore for the purpose of bathing or getting access to the sea for bathing. In the Court of Appeal in *Brinckman*, Vaughan Williams LJ said at p 322 that the majority view in *Blundell*, even if technically obiter, "has been recognised ever since by the whole of the profession as an accurate and binding statement of the law". Accordingly, he concluded, "I do not think that we ought now, after the lapse of eighty years, to upset the law thus settled". Romer and Cozens-Hardy LJJ took the same view – see at pp 326 and 327.

41. Shortly after this, Buckley J in *Behrens v Richards* [1905] 2 Ch 614 refused an injunction sought by the owner of land leading to the foreshore against fishermen who used the land to gain access to the foreshore, although he held

that the fishermen had established no public right of way by long user. Buckley J said this at pp 619-620:

> "I cite again, as I did in *Brinckman v Matley*, Bowen LJ's words in *Blount v Layard* [1891] 2 Ch 681n, 691n, 'that 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,' and 'that, however continuous, however lengthy, the indulgence may have been, a jury ought to be warned against extracting out of it an inference unfavourable to the person who has granted the indulgence.' In permitting persons to stray along the cliff edge or wander down the cliff face or stroll along the foreshore the owner of the land was permitting that which was no injury to him and whose refusal would have been a churlish and unreasonable act on his part. From such a user nothing, I think, is to be inferred."

This observation may give some support for the notion of an implied licence, the second possibility identified in para 29 above, but it refers to the use of land as a public means of access to the foreshore, not to the use of the foreshore itself.

42. In *Alfred F Beckett Ltd v Lyons* [1967] Ch 449, the Court of Appeal declined to hold that gatherers of coal on the foreshore for personal use were trespassers. Coal-gathering by local inhabitants went back to 1895, and, if they had been trespassers, the coal-gathering would have been carried on "as of right" for more than 20 years. However, as it was held that there was no trespass, no prescriptive right could have been obtained. The judgments therefore provide support for the second possibility referred to in para 29 above, and in particular there are dicta which support the notion that the use of the seashore for purposes other than fishing and navigation would be pursuant to an implied licence from the owner of the foreshore. Thus, Harman LJ observed at p 469A that it was "notorious that in many and indeed most places the use of the foreshore by the public for purposes of recreation and bathing is tolerated", and at 472F that "The practice may be sufficiently explained by tolerance of the foreshore owner, who would have been churlish indeed if he had stopped a poor man climbing up the cliff with a bag of small coals picked up on the shore to nourish his evening fire". Accordingly, at p 474A, he held that there was no prescribed right to collect coal from the beach as "toleration is a sufficient explanation". Russell LJ, who said pithily at p 476A that "the only reasonable conclusion is mere tolerance of the

unimportant", and Winn LJ, who referred at p 485G to collecting coal as being "a practice which had been long permitted" took the same view.

43. In passing, it is worth noting that Harman and Winn LJJ considered that a fluctuating group of people (such as local inhabitants) could not claim the right to gather coal by prescription – see at pp 474B-D and 479C-D respectively. Harman LJ based his reasoning on the fact that the right would be a profit a prendre. However, Winn LJ quoted from a judgment of Farwell J in *Attorney General v Antrobus* [1905] 2 Ch 188, 198 which suggested that an easement could not be obtained for recreational purposes. However, that may not be right in the light of *In re Ellenborough Park* [1956] Ch 131. Having said that, it is questionable whether, under common law as opposed to statute, a right to use the foreshore for bathing could be claimed by a fluctuating group of people such as the inhabitants of a neighbourhood or locality, as opposed to each owner of an alleged dominant property establishing a prescriptive easement arising from more than 20 years of such use as of right by that owner and/or his predecessors.

44. While the reasoning in *Beckett* provides some support for the second possibility identified in para 29 above, it has a number of features which render it at least arguably of limited assistance. First, it was not concerned with the right to bathe. Secondly, as is clear from what was said at pp 465A-D and 469B-D, the right to gather coal was treated as acknowledged in two deeds of grant from the Crown. Thirdly, it appears to have been accepted that the public rights over the foreshore were limited as held in *Blundell*, but the point was left open at least by Winn LJ at p 486C. Fourthly, the Court in *Beckett* proceeded on the basis that *Jones v Bates* [1938] 2 All ER 237 was correct, ie that the subjective belief of the person claiming a prescriptive right was relevant, indeed often determinative, on the question whether he had been acting "as of right", which is wrong – see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 358H, per Lord Hoffmann.

45. Furthermore, in *Mills v Silver* [1991] Ch 271, 279G-280B, Dillon LJ pertinently observed in relation to the reasoning in *Beckett* that if "there is an established principle of law that no prescriptive right can be acquired if the user by the dominant owner of the servient tenement … has been tolerated without objection by the servient owner", it would be "fundamentally inconsistent with the whole notion of acquisition of rights by prescription". This passage was cited with approval in *Sunningwell* at p 358F, in *R (Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 AC 889, paras 5-6 and 79-82, and in *Barkas* at para 28.

46. The choice between the three possibilities identified in para 29 raises an issue which is both difficult and important. The importance of conclusively deciding the nature and extent of the public's rights over the foreshore of England and Wales is self-evident. The difficulty arises because each of the three possibilities gives rise to problems.

47. There is a great deal to be said for the third possibility, namely that the public have no rights to use the foreshore for bathing, on the basis that their rights are limited to access for navigation and fishing, given the reasoning in, and long-standing nature of, the majority judgments in in *Blundell*. The reasoning speaks for itself, and the judgments have generally been followed by judges and have been assumed to be correct. However, the decision is not binding on this Court, the dissenting judgment of Best J is not without force, and, as was reportedly stated on behalf of the unsuccessful appellant in *Brinckman* at p 320:

> "The decision in *Blundell v Catterall* has been disapproved by text-writers, eg, *Hall on the Seashore*, 2nd ed, pp 156 *et seq.* The same view is taken in *Phear's Rights of Water*, pp 44 *et seq*, *Stuart Moore on the Foreshore*, pp 833 et seq."

Quite apart from this, it can be said that the second (implied licence) possibility mentioned in para 29 above is somewhat artificial and was only developed because it was assumed that the majority view in *Blundell* represented the law. Further, the law of Scotland appears consistent, or at least more consistent, with Best J's dissenting view - see *Officers of State v Smith* (1846) 8 D 711, 719 per the Lord Justice Clerk. Having said that, it would be a strong thing to depart from the majority view in *Blundell*, given that it has been treated as being the law for nearly 200 years.

48. The second possibility, namely a rebuttable presumption of a licence, has some support in the cases (see paras 41-43 above), but it may well be based on somewhat shaky legal foundations (see paras 44-45 above). It would also be rather curious, as it would mean that the position with regard to the foreshore is the opposite of the position with regard to almost all other land: a permission for the public to use is to be assumed for the foreshore, but not for any other land. There are some possible reasons for treating the foreshore in a special way for present purposes, as Lewison LJ mentioned in para 128 of the Court of Appeal judgment, but, Mr Sauvain QC, for the County Council argues with some force that they do not seem to be overwhelmingly powerful. Further, if the rebuttable presumption of permission applied to the foreshore, it would either also apply to any part of a beach above high water

mark, or one would have what may be a rather odd dichotomy between the foreshore and the upper part of many beaches.

49. As to the first possibility, the notion that members of the public have the right to use the foreshore for bathing would, as mentioned, align the law of England and Wales with that of Scotland, and it may well accord with the views and expectations of many non-lawyers. However, it might risk upsetting the effect of decisions and actions based on the not unreasonable assumption that the majority view in *Blundell* represented the law. And it may give rise to other problems for owners of the foreshore. It would also give rise to the arguable dichotomy mentioned at the end of para 48 above.

50. In all these circumstances, it seems to us that, unless it is necessary to do so for the purpose of determining this appeal (and it is not for the reasons which appear later in this judgment), this court ought not to determine the first issue, that is which of the three possibilities set out in para 29 above is correct. The issue is one of wide-ranging importance, and we would be uncomfortable about determining it in circumstances where it was common ground that the first possibility could be ruled out. However, given that the point has been raised and argued, and as it may well arise in another case (whether under the 2006 Act or otherwise), we considered that it would be worthwhile identifying the issue as well as referring to the arguments and problems as they appear to us at this stage. Since writing this, we have had the opportunity of reading in draft the judgment of Lord Carnwath, which gives further food for thought on this interesting issue.

51. Accordingly, we proceed on the assumption that the majority of the Court of Appeal and Ouseley J were correct, and that, at least so far as the general common law is concerned, and subject to the other two more specific issues to which we now turn, members of the public, and therefore inhabitants of the locality, used the Beach for bathing "as of right" and not "by right".

The Byelaws: introductory

52. NPP's argument is that the effect of the Byelaws was to amount to a licence or permission to members of the public to use the Beach for leisure activities. If that argument is correct, then NPP's appeal must succeed, as the use of the Beach by inhabitants of the neighbourhood, as members of the public, would not have been "as of right".

53. NPP's argument on this issue raises two points. The first is whether the Byelaws, if they had been, or should be treated as having been, properly communicated, would have amounted to a licence or permission sufficient to

defeat the public use of the Beach as having been "as of right". The second point is whether the Byelaws were, or should be treated as having been, sufficiently communicated to members of the public during the twenty years preceding 2006 when the Beach was used for bathing by members of the public. NPP contends that the answer to both points is in the affirmative, the County Council contends that both points should be answered no, and the Town Council agrees with NPP on the first point and with the Council on the second. While the Court of Appeal were unanimously in agreement with NPP on the first point, only Lewison LJ agreed with them on the second point. We will consider each of the two points in turn.

The Byelaws: did they give rise to a licence as a matter of interpretation?

54. It appears to be common ground that a byelaw can, as a matter of principle permit an activity which would otherwise be unlawful, and we think that this is right. As suggested in *Halsbury's Laws* (5th ed, 2009) vol 69, para 553, the classic definition of a byelaw was given by Lord Russell of Killowen CJ in *Kruse v Johnson* [1898] 2 QB 91, 96:

> "A by-law, of the class we are here considering, I take to be an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which, but for the by-law, they would be free to do or not do as they pleased. Further, it involves this consequence — that, if validly made, it has the force of law within the sphere of its legitimate operation."

55. The reference to "ordering something to be done or not to be done" carries with it an ability permitting something to be done: if an entity has the power to forbid or require, it must also have the power to permit that which it can forbid. However, in agreement with Richards LJ at para 72 in the Court of Appeal, we would accept that mere silence or inaction on the part of the entity cannot amount to permitting. In the same way as silence and inactivity on the part of a private landowner cannot, without more, amount to consent (save, arguably, as discussed in cases such as those mentioned in paras 44-45 above), so would the absence of any express or implied prohibition in the byelaws, without more, not amount to an implied licence.

56. Of course, it may be that the statutory powers pursuant to which particular byelaws are made are expressed in terms which lead to the conclusion that

the byelaws made thereunder cannot or are not intended to extend to permitting activities or certain activities, in which event the byelaws would either have to be construed so that they did not have that effect or they would be ultra vires. However, there is no question of such an argument being applicable in this case, in the light of the wide words of section 83 of the 1847 Clauses Act (quoted in para 12 above). Indeed, it is worth bearing in mind that the 1847 Clauses Act stipulates that it is to be the relevant "undertaking" which makes the Byelaws, and the undertaking is the entity which owns the harbour. In other words, the Byelaws are made and enforced by the owner of the land concerned, which plainly supports the notion that they can properly involve the grant of rights over the land.

57. Accordingly, the question which arises is whether, on their true construction, the Byelaws permitted members of the public to use the Beach for leisure activities. NPP cannot point to a Byelaw which expressly permits such activities in terms and therefore one is in the realm of implied permission. It is not part of the County Council's case, as we understand it, that byelaws could not grant a licence by implication. This is unsurprising: once it is accepted that byelaws can grant a licence, it is hard to justify the argument that they can only grant a licence expressly. Of course, the usual principles apply to implications: they are only justified when they are necessary or obvious.

58. A prohibition can be expressed in such a way as to imply a permission. For instance, it is hard to argue against the proposition that a byelaw which states that dogs must be kept on a lead in a public park implies a permission to bring dogs into the park, provided that they are kept on a lead. It is at least as a matter of pure linguistic logic, possible to interpret the byelaw as solely meaning that, if (and only if) specific permission is obtained from the park authority by a person to bring a dog into the park, then the byelaw will apply. However, any reasonable reader of the byelaw would not consider that it had such a limited meaning. In other words, as with any question of interpretation, a strictly logical linguistic analysis of the words concerned cannot prevail over a contextual assessment of what they would naturally convey to an ordinary and reasonable speaker of English.

59. Thus, Byelaw 71, which forbids the bringing of a dog into the Harbour "unless it is securely fastened by a suitable chain or cord, or is otherwise under proper and sufficient control", would appear to a normal person speaking ordinary English to imply that dogs could be brought into the area of Newhaven Harbour, provided that they are appropriately "fastened" or under control, and are not precluded by any other Byelaw. We do not consider that this point is undermined if the Harbour Master had forbidden dogs to be brought into certain parts of the Harbour area, or even the Harbour generally. The fact that a property owner voluntarily gives a general permission to the

public (or to an individual or group of individuals) to do an act does not prevent him from subsequently revoking or cutting down that permission.

60. The central question for present purposes is whether the Byelaws, and in particular Byelaws 68 and 70, imply that members of the public have the right to use the Beach for recreational activities associated with beaches. The argument advanced by NPP, and accepted by the Court of Appeal, is that (i) the prohibition of bathing in the area identified in the second part of Byelaw 68 and (ii) the prohibition on sports and games which impede the use of the harbour in Byelaw 70, imply that bathing can take place elsewhere in the Harbour and that associated recreational activities can also take place provided that they do not impede the use of the Harbour.

61. In our view, particularly when one remembers that the Byelaws are made and enforced by and on behalf of the owner and operator of the Harbour, this argument is correct. A normal speaker of English reading the Byelaws would assume that he or she was permitted to bathe or play provided the activity did not fall foul of the restrictions in the two Byelaws (and in any other Byelaws). This conclusion is also supported by the reference to the consent of the Harbour Master in the first part of Byelaw 68 and the second half of Byelaw 70: if the activities referred to in the latter Byelaw (ie including an activity which endangers others) are permitted if the Harbour Master's consent is obtained, that reinforces the view that generally harmless activities such as bathing and playing are permitted, at least in principle. The conclusion is further reinforced by the fact that, at the time the Byelaws were made, members of the public had been and were using the Beach freely for the purpose of bathing and recreation.

62. As Lord Sumption pointed out in argument, this conclusion is also supported by Byelaws 51 and 52. Those Byelaws would serve to cut down the areas within the Harbour in which bathing and recreations could take place (without the Harbour Master's permission), as they exclude people who simply want to bathe or play from the quays or from the piers in so far as they are enclosed by chains - ie from the operational parts of the Harbour. In the first place, those two Byelaws suggest that any other person who does not have "lawful business" in the Harbour would be entitled to go onto other parts of the Harbour area unless precluded by another Byelaw (or any other law). Secondly, they undermine any argument which might otherwise be raised that the implied licence raised by NPP would go too far. In addition, they both contain reference to the Harbour Master's permission, which, as already mentioned, provides some further support for NPP's case.

63. In these circumstances, the only factor which can stand in the way of NPP's succeeding in its argument that the use of the Beach by members of the public

was "by right" as a result of the Byelaws, is the fact that the Byelaws were not brought to the attention of the public, the issue to which we now turn.

The Byelaws: did they have to be brought to the public's attention?

64. A preliminary point which is raised in this connection is the argument that the Byelaws were only valid or effective so long as "a copy thereof" was "painted or placed on boards, and put up in some conspicuous part of the office of the undertakers, and also on some conspicuous part of the harbour, dock, or pier", pursuant to section 88 of the 1847 Clauses Act. The Court of Appeal rightly rejected that contention. As Lewison LJ said in para 133 in the Court of Appeal, it seems highly improbable that Parliament can have intended that the byelaws for harbours enabled by the 1847 Clauses Act should not apply if, for instance, the boards displaying them had been destroyed or washed away by a storm, or even pulled down by vandals.

65. Section 85 of the 1847 Clauses Act also supports this conclusion as, although expressed in the negative, it indicates that the byelaws become effective once they are confirmed, and publication and display clearly are intended to follow confirmation, as is clear from the opening part of section 88. Further, section 89 of the 1847 Clauses Act, now repealed, at most only imposed the initial display of the byelaws as a precondition to their efficacy; if it had had that effect, then the strong implication was that the continuing display of the byelaws was not a prerequisite to their continuing efficacy. In fact, as Lady Hale pointed out in argument, section 89 very probably took matters no further, given the grounds given for its repeal by the Law Commission pursuant to whose recommendation it was repealed. The Commission described it as an "unnecessary [provision] confirming the binding effect of byelaws which reflected 19th century doubts as to the legal effect of subordinate legislation and would never be enacted in modern legislation" – see *Statute Law Revision – 14th Report* (1993), Law Com 211, p 175. As Mr Laurence QC, for the Town Council, puts it, "section 89 was repealed because it was and always had been unnecessary".

66. Nor is this conclusion called into question by section 90 of the 1847 Clauses Act. In so far as that section implies that it would be necessary to establish that the byelaws were exhibited on a board, it would only be for the purpose of justifying a prosecution for an infringement of the byelaws. The fact that it may be necessary to show that the byelaws were appropriately displayed before a prosecution for their infringement could proceed does not justify the contention that they are of no effect generally unless they are displayed. Accordingly, we conclude that the Byelaws were effective as byelaws in the sense of representing the local laws applicable to Newhaven Harbour, even though they were not displayed as required by section 88 of the 1847 Clauses

Act, although that may well have meant that breach of the Byelaws could not have led to a prosecution (at least of someone who had infringed them without having seen them).

67. So we turn to the question whether the failure of NPP (and its predecessor) to ensure that the Byelaws were displayed means that they did not operate as an effective licence rendering the use of the Beach by member of the public "by right", rather than "as of right".

68. The majority of the Court of Appeal, in agreement with Ouseley J, considered that it was essential that any licence be communicated to the inhabitants of the locality before it could be said that their usage of land was "by right". That is certainly the normal rule where one is concerned with a private land-owner (subject to the point discussed in paras 41-43 above, namely where it is possible or appropriate to infer a consent or licence from the surrounding circumstances, even though there is no communication of a consent, a point which may well require reconsideration in the light of the cases referred to in para 45 above). Support for such a proposition can be found in *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28, [2008] AC 221, paras 32, 56, 68, 74 and 81. The basis of this principle is explained in a number of cases including, *Sunningwell*, *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11, [2010] 2 AC 70, and, most recently, *Barkas*, where, at para 21, Lord Neuberger quoted from Lord Hoffmann's opinion in *Sunningwell* that "whether user was 'as of right' should be judged by 'how the matter would have appeared to the owner of the land'", adding that that question should be assessed objectively.

69. However, as the decision in *Barkas* demonstrates, it is not always necessary for the landowner to show that members of the public have to have had it drawn to their attention that their use of the land concerned was permitted in order for their use to be treated as being "by right" rather than "as of right". In *Barkas*, land had been acquired and in part developed by a local authority for housing purposes under a statute which permitted any undeveloped part of the land so acquired to be used as "recreation grounds" if appropriate ministerial consent was obtained, which it was. The undeveloped part of the land was then used for recreation by members of the public, to whom the statutory purpose was not communicated. Despite the absence of any communication of a licence, it was held that local inhabitants were using that undeveloped part of the land "by right", and not "as of right".

70. In *Barkas*, para 23, Lord Neuberger said that:

> "Where land is held [by a local authority] for [the statutory] purpose [of recreation], and members of the public then use the land for that purpose, the obvious and natural conclusion is that they enjoy a public right, or a publicly based licence, to do so. If that were not so, members of the public using for recreation land held by the local authority for the statutory purpose of public recreation would be trespassing on the land, which cannot be correct."

To much the same effect, at para 65, after referring to "the general proposition [that] if a right is to be obtained by prescription, the persons claiming that right must by their conduct bring home to the landowner that a right is being asserted against him", Lord Carnwath said:

> "It follows that, in cases of possible ambiguity, the conduct must bring home to the owner, not merely that 'a right' is being asserted, but that it is a village green right. Where the owner is a public authority, no adverse inference can sensibly be drawn from its failure to 'warn off' the users as trespassers, if it has validly and visibly committed the land for public recreation, under powers that have nothing to do with the acquisition of village green rights."

71. In our judgment, the position in the present case is indistinguishable from that in *Barkas* for the purpose of deciding whether the use of the land in question by members of the public was "as of right". In this case, as in *Barkas*, the legal position, binding on both landowner and users of the land, was that there was a public law right, derived from statute, for the public to go onto the land and to use it for recreational purposes, and therefore, in this case, as in *Barkas*, the recreational use of the land in question by inhabitants of the locality was "by right" and not "as of right". The fact that the right arose from an act of the landowner (in *Barkas*, acquiring the land and then electing to obtain ministerial consent to put it to recreational use; in this case, to make the Byelaws which implicitly permit recreational use) does not alter the fact that the ultimate right of the public is a public law right derived from statute (the Housing Act 1936 in *Barkas*; the 1847 Clauses Act and the 1878 Newhaven Act in this case). We agree with Lewison LJ, who reached the same conclusion in the Court of Appeal, and said at para 138 that given that the Inspector rightly found that Byelaw 68 was an effective prohibition on swimming in the part of the harbour there referred to, it would be inconsistent then to reject the contention that the Byelaw's implied permission for swimming elsewhere in the harbour did not operate as a valid licence.

72. By contrast, Richards and McFarlane LJJ considered that the Byelaws had to be communicated to the general public, or at least to the local inhabitants, using the Beach, before they could constitute an effective licence rendering the use "by right". They took this view at least partly because of the decision and reasoning of the House of Lords in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 – see paras 82-87 in the judgment of Richards LJ and para 100 in the judgment of McFarlane LJ. After the decision of the Court of Appeal in the present case, this court in *Barkas* disapproved the decision and much of the reasoning in *Beresford*. The disapproval extended to passages quoted by Richards LJ in paras 83 and 84 of his judgment from the opinions of Lord Bingham and Lord Walker.

73. Thus, Richards LJ said at para 86, that, if (as he had concluded) "on their proper construction the Byelaws impliedly permitted the public to access the harbour and engage in various sports and activities", it did not follow that "they had the effect of conferring any *right* on the public to do those things". He went on to explain that, on this basis the Byelaws "went no further than to give an implied revocable permission by the harbour authority, as landowner, for such access and activities", and if the authority "had fenced off some part of the harbour, thereby preventing access to it", he did "not think that a claim could have been maintained against the authority by a member of the public on the basis that the fencing off was in breach of rights conferred on him by the byelaws". However, that analysis cannot stand: once one concludes that there is "an implied revocable permission" for an activity, it follows that there is a licence, which renders the activity in question being carried on "by right" not "as of right". The fact that permission can be subsequently withdrawn by an action on the part of the authority, such as fencing off, merely means that, when and if that occurs, the permission is withdrawn, so that any subsequent continuation of the activity concerned becomes a trespass and would therefore normally be "as of right".

The Byelaws: conclusion

74. It follows therefore that we would allow NPP's appeal on the second issue, which renders it strictly unnecessary to consider its appeal on the third issue. However, as the third issue is an important issue which was fully argued, and we have reached a clear conclusion on it, we consider that it is appropriate to allow the appeal on that ground as well, for reasons to which we now turn.

Statutory incompatibility: introduction

75. NPP's argument is that section 15 of the 2006 Act should not be interpreted as extending to the Harbour because it was reasonably foreseeable that registration of the Beach as a town or village green would conflict with the

port authority's future exercise of its statutory powers. This argument, which Ouseley J upheld, was, as we have said, unanimously rejected by the Court of Appeal.

76. Section 15 is in Part 1 of the 2006 Act, which extends to all land in England and Wales, with the exception of the New Forest, Epping Forest and the Forest of Dean (section 5), and land includes "land covered by water" (section 61(1)). There is no express exclusion of land held by statutory undertakers for statutory purposes. Therefore any restriction on the scope of section 15 would have to be implicit. NPP argues that statutory incompatibility provides that restriction. In support of its assertion NPP relies on case law in relation to public rights of way and private easements in English law and public rights of way and servitudes in Scots law.

77. When considering some of that case law it is important to recall that, in the context of the legislation relating to town and village greens, reference to case law on public rights of way, easements and servitudes is only by way of analogy. In *Beresford*, Lord Scott stated at para 34:

> "It is a natural inclination to assume that these expressions, 'claiming right thereto' (the [Prescription Act 1832], 'as of right' (the [Rights of Way Act 1932] and the [Highways Act 1980] and 'as of right' in the [Commons Registration Act 1965], all of which import the three characteristics, *nec vi, nec clam, nec precario*, ought to be given the same meaning and effect. The inclination should not, however, be taken too far. There are important differences between private easements over land and public rights over land and between the ways in which a public right of way can come into existence and the ways in which a town or village green can come into existence. To apply principles applicable to one type of right to another type of right without taking account of their differences is dangerous."

Statutory incompatibility: the English law of dedication and prescription

78. The case law therefore needs to be examined with care. In English law public rights of way are created by dedication by the owner of the land, whether express, implied or deemed, and by acceptance by the public, usually in the form of user (*Sunningwell* at pp 351H-353B per Lord Hoffmann; *Megarry & Wade's The Law of Real Property* (8th ed (2012)) para 27-035). In such cases, the legal capacity of the landowner to dedicate land for that purpose is a relevant consideration; if the owner had no such power, there could be no dedication. Section 1 of the Rights of Way Act 1932 (now section 31(1) of

the Highways Act 1980) provided for deemed dedication resulting from 20 years of uninterrupted user unless there was sufficient evidence that the owner had no intention to dedicate. In this context where dedication is implied through user, the owner's ability to dedicate remains relevant. This was stated expressly (in section 1(7) of the 1932 Act and now section 31(8) of the 1980 Act):

> "Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes."

Thus, in *British Transport Commission v Westmorland County Council* [1958] AC 126, in which a county council sought to assert a public right of way on a footpath across a bridge over a railway line, the issue was whether the railway owners could be deemed to have dedicated the path. The House of Lords held that the question whether the power to dedicate was incompatible with the owner's statutory objects was a question of fact and was to be assessed by reference to what could reasonably be foreseen.

79. Similarly, in the English law of private easements (other than access of light) the capacity of the owner of the potential servient tenement to grant an easement is relevant to prescriptive acquisition. As prescription is based on the fiction of a grant, a landowner who could not have granted the claimed easement cannot suffer prescription (see *Sunningwell*, per Lord Hoffmann at pp 349G-351C in relation to the common law; *Housden v Conservators of Wimbledon and Putney Common* [2008] EWCA Civ 200, [2008] 1 WLR 1172, paras 43 and 76, per Mummery LJ, and Carnwath LJ respectively, in relation to the 1832 Act; *Megarry & Wade op cit* at para 28-065; *Gale on Easements* (19th ed (2012)), paras 4.88 – 4.91). The Law Commission in its 2011 Report, "Making Land Work: Easements, Covenants and Profits à Prendre" (Law Com No 327; HC 1067) while advocating the removal of the fiction of grant, recommended (at para 3.168) that the use of land cannot be qualifying use, for the purposes of prescription, at any time when the land is in the freehold ownership of a person or body who is not competent to grant an easement over it.

80. By contrast, the owner of land which others wish to register as a town or village green does not need to have capacity to create such a green. All that is required is that people from the relevant locality have used the land "as of right" for lawful sports and pastimes (*Barkas* at paras 14-19 per Lord Neuberger). Indeed, it was only on the enactment of the 2006 Act that an owner obtained power to register land as a town or village green (section

15(8)). Until then an owner could not do so (*Barkas* at para 68 per Lord Carnwath). The landowner could only create the equivalent of a village green by settlement on trust for local inhabitants or the public at large (*R v Doncaster Metropolitan Borough Council, Ex p Braim* (1986) 57 P & C R 1, 8, per McCullough J).

Statutory incompatibility: the Scots law of positive and negative prescription

81. Faced with this problem NPP turns to the law of Scotland for support for its proposition. Again, those authorities which deal with the creation of public rights of way and servitude rights of way have to be handled with care, not least because they come from a separate legal system whose property law is much more closely related to the civil law than the common law of England and Wales. None the less, in the field of acquisitive prescription there is a clear analogy with English law as, drawing on the rules of Roman law, the user or possession which grounds prescription must be *nec vi, nec clam, nec precario* (see *McGregor v Crieff Co-operative Society Ltd* 1915 SC (HL) 93, per Earl Loreburn LC at 98, and Lord Dunedin at 103-104). Before the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") created the modern rules for positive (including acquisitive) prescription and also negative prescription, such prescription was governed by early Scottish statutes of the 16th and 17th centuries, although the period for positive prescription was reduced in the 19th and early 20th centuries. At the heart of positive prescription was uninterrupted possession of property. But some of the institutional writers of Scots law advanced rationalisations of the law of acquisitive prescription. Thus Stair (Institutions II 7.1 and 2) and Erskine (Institutes II 9.3 and III 7.2) spoke of the acquisition of a servitude by prescription as giving rise to a presumption of the owner's grant of a title or consent. There are also judicial dicta which supported implied grant, presumed grant or presumed consent but, as we shall show, it has long been accepted that the basis of acquisitive prescription of a positive servitude or a public right of way is uninterrupted user as of right for the prescriptive period. We deal first with public rights of way and then private servitudes.

82. In Scots law a public right of way can be constituted without any actual or fictional dedication by the owner of the land. Before the period of positive prescription was reduced, user by the public as a matter of right, continuously and without interruption for 40 years was sufficient to create such a right of way (*Mann v Brodie* (1885) 10 App Cas 378, per Lord Blackburn 387-388 and Lord Watson 390-391; (1885) 12 R (HL) 52, 54-55 and 57). Lord Watson explained it thus (pp 390-391):

> "According to the law of Scotland, the constitution of such a right does not depend upon any legal fiction, but upon the fact

> of user by the public, as matter of right, continuously and without interruption, for the full period of the long prescription. … I am aware that there are dicta to be found, in which the prescriptive acquisition of a right of way by the public is attributed to implied grant, acquiescence by the owner of the soil, and so forth; but these appear to me to be mere speculations as to the origin of the rule, and their tendency is to obscure rather than to elucidate its due application to a case like the present."

Lord Watson's clarification led to the leading case in Scotland on statutory incompatibility, to which we turn.

83. In *Magistrates of Edinburgh v North British Railway Co* (1904) 6 F 620 the First Division of the Court of Session dealt with a claim that a railway company, which was a statutory undertaker, was obliged to maintain a railway bridge over which a public right of way was asserted. The Court held that there was insufficient evidence of public user for 40 years. But it also held that the public could not acquire a public right of way over the railway by user because it was incompatible with the statutory purposes of the railway company. Lord Kinnear, with whom the Lord President (Lord Kinross), Lord Adam and Lord McLaren concurred, gave the opinion of the court. He accepted Lord Watson's explanation of the basis of acquisitive prescription when he stated (at pp 636-637):

> "I am of opinion, in the first place, that no right of way can be acquired by user over the line of the defenders' railway, and especially at a point where the railway traffic is so great as on the main line close to Portobello station. It must always be presumed that if people having no statutory right of any kind have been allowed to cross the line, their passage is permitted only so long as it does not interfere with the purposes of the railway traffic. … I am of opinion that no such right can be maintained, and that on the same principle on which it has been repeatedly held that a railway company cannot voluntarily grant a right inconsistent with the performance of the purposes for which it acquired its land. I assent entirely to the doctrine laid down by Lord Watson that the reference to the prescriptive right of way to an implied grant is a juridical speculation to account for an established rule, and not itself a rule of law. But at the same time I do not think it possible that a right of way which it would be ultra vires to grant can be lawfully acquired by user."

84. In so holding, the First Division upheld the decision of the Lord Ordinary, Lord Kincairney, in that case, who in *Kinross County Council v Archibald* (1899) 7 SLT 308 had relied on Lord Watson's approach in *Mann v Brodie* to reject any idea of an implied grant as the legal basis of the assertion of a right of way through user.

85. Shortly before the First Division handed down their opinion in *Magistrates of Edinburgh* the same Division of the Inner House (comprising the same judges) reached a similar conclusion in relation to an assertion of a private servitude right of way by apparently different but not inconsistent reasoning. In *Ellice's Trustees v The Commissioners of the Caledonian Canal* 1904 6 F 325, the First Division considered an assertion by the owners of a landed estate through which the Caledonian Canal passed that they had obtained by user during the prescriptive period of 40 years a servitude right of way over the towpath of the canal. The commissioners, in the exercise of statutory powers to construct and maintain the canal, had constructed a weir, which intersected the towpath, to allow floodwater to escape. The owners sought declarations that they were entitled to use the towpath for access and that the commissioners were obliged to maintain that access road and construct a bridge or other passage over the weir. The court rejected their claim, holding that the slight use made of the towpath, which did not inconvenience the commissioners, was not sufficient to create a servitude right of way. The Lord President (with whom the other judges concurred) also held that the commissioners did not have the power to grant a right of way which was not compatible with the exercise of their statutory duties. He stated (p 335):

> "I think, however, that even if the character of the use of the towing path of the canal had been such as might otherwise have constituted a public or servitude right of passage, the admitted circumstances of the case are such as to exclude any such a result. The Commissioners of the canal, as already stated, hold, and always have held, the canal banks for the purposes of the canal, and they have not now, and never had, any right either to alienate them or to agree that they should be subjected to any uses which were or might become inconsistent with or adverse to the use of the banks for their proper purpose – *videlicet*, the containing and working of the canal."

He continued (p 336):

> "And if it would be *ultra vires* of them to make such an express grant, an effective grant could not be inferred from any such user by the pursuers and their authors as is alleged to have been permitted or tolerated in the present case."

86. In *Ellice's Trustees* the court followed a line of authority, which included *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623, (1883) 10 R (HL) 85, that a statutory body had no power to alienate lands which it had acquired for a statutory purpose or to grant any right over such land which was inconsistent with its use for statutory purposes. The court's reliance on that case might suggest that it considered that the acquisition of a servitude right of way by prescription was based on implied grant. But the reclaimers' counsel cited both *Mann v Brodie* and *Kinross County Council* in their submissions, and the Lord President stated (again at p 336):

> "I further agree with the Lord Ordinary in thinking that even if a limited and qualified right of user of the canal banks had been acquired by prescription, that right could not be allowed to come into competition with, or to prevail against, the rights possessed by the [commissioners] and the statutory duties which are imposed upon them."

The case is thus consistent with the approach the court went on to take in *Magistrates of Edinburgh* that statutory incompatibility could bar acquisitive prescription.

87. In *British Transport Commission* Lord Keith of Avonholm (at pp 164-165) commented on Lord Kinnear's opinion in *Magistrates of Edinburgh*, suggesting that it would be going too far to hold that the public could never acquire a right of way over railway property but acknowledging that incompatibility with the conduct of traffic on the railway could bar a public right of passage. He opined (p 166) that incompatibility was a question of fact and that it was for the statutory undertaker to prove incompatibility.

88. Since those cases, the Scots law of prescription has been reformed by statutory provision. The 1973 Act sets out the modern Scots law of positive prescription. Section 3(2) provides:

> "If a positive servitude over land has been possessed for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the servitude as so possessed shall be exempt from challenge."

Section 3(3) provides essentially the same basis for the creation of a public right of way by prescription. In contrast with the provisions for the short negative prescription of five years which in section 6(4)(b) excludes from the prescriptive period any period in which the original creditor is under a legal

disability, by reason of non-age or disability of mind, such disability on the part of a landowner does not prevent the operation of positive prescription against him. This approach to positive prescription by possession following on a recorded title was expressly stated in earlier statutes, including section 16 of the Conveyancing (Scotland) Act 1924 which provided that periods of legal disability were not to be deducted from the prescriptive period. It applies *ex silentio* to such prescription in sections 1, 2 and 3(1) of the 1973 Act and extends to prescription by possession without title under section 3(2) and (3). Thus in the Scottish statutory scheme, the lack of legal capacity to grant a public right of way or a servitude of way is of itself not relevant.

89. In this respect the Scottish statute differs from the English law of prescription as section 7 of the 1832 Act excludes from the computation of the period of, among others, the 20 year prescription under section 2 any time during which a person was incapable of resisting a claim because he was an infant or otherwise disabled as specified. But we note that neither the 1832 Act nor the Scottish 1973 Act addresses the issue of statutory incompatibility.

90. It is not necessary in this appeal, which concerns English law, to express any view on whether in Scots law the doctrine of statutory incompatibility has survived the enactment of the 1973 Act. It suffices to note that it is a matter of controversy. Professor David Johnston in his scholarly "Prescription and Limitation" 2nd ed (2012) questions the continued relevance of the Scottish case law to which we have referred (para 19.27) while Professor Cusine and Professor Paisley, "Servitudes and Rights of Way" (1998) support the case law on the ground of inconsistency with the statutory purpose for which the servient owner holds the land (para 4.02). Professor Gordon, "Scottish Land Law" 2nd ed (1999) (paras 24.54 and 24.130) also sees statutory incompatibility or incapacity to grant as a bar to acquisitive prescription. Professor Reid, "The Law of Property in Scotland" (1996) (at para 449) states: "When land has been acquired compulsorily for certain purposes, this precludes the creation of any servitude rights the exercise of which could be prejudicial to these purposes." But he does not repeat this assertion in his discussion of acquisition of such rights by prescription under the 1973 Act (paras 458-461).

Statutory incompatibility: statutory construction

91. As we have said, the rules of prescriptive acquisition apply only by analogy because Parliament in legislating for the registration of town and village greens has chosen similar wording (indulging "as of right" in lawful sports and pastimes) in the 1965 and 2006 Acts. It is, none the less, significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive

acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded on would be incompatible with those purposes. That approach is also consistent with the Irish case, *McEvoy v Great Northern Railway Co* [1900] 2 IR 325, (Palles CB at 334-336) which proceeded on the basis that the acquisition of an easement by prescription did not require a presumption of grant but that the incapacity of the owner of the servient tenement to grant excluded prescription.

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.

97. NPP has also suggested that vessels en route to and from other parts of the port might have to reduce speed in circumstances where such reduction would not be desirable to maintain the stability of the vessels. It also led evidence of proposals to unload materials for an offshore windfarm on the Beach. But we do not need to consider such matters in order to determine that there is a clear incompatibility between NPP's statutory functions in relation to the Harbour, which it continues to operate as a working harbour, and the registration of the Beach as a town or village green.

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. In *New Windsor Corporation v Mellor* [1975] Ch 380, the Court of Appeal was concerned

with the registration of Bachelors' Acre, a grassed area of land in New Windsor, as a customary town or village green under the 1965 Act. The appeal centred on whether the evidence had established a relevant customary right. While the land had long been in the ownership of the local council and its predecessors, it was not acquired and held for a specific statutory purpose. It had been used for archery in mediaeval times and had been leased for grazing subject to the recreational rights of the inhabitants. In recent times it had been used as a sports ground and more recently it was used as to half as a car park and half as a school playground. No question of statutory incompatibility arose.

99. The *Oxfordshire* case concerned the Trap Grounds, which were nine acres of undeveloped land in North Oxford comprising scrubland and reed beds. The land was, as Lord Hoffmann stated (in para 2) "not idyllic". More significantly, while the City Council owned the land and wanted to use a strip on the margin of it to create an access road to a new school and to use a significant part of the land for a housing development, there was no suggestion that it had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility.

100. Thirdly, the County Council referred to *Lewis v Redcar*, which concerned land at *Redcar* owned by a local authority which had formerly been leased to the Cleveland golf club as part of a links course but which local residents also used for informal recreation. The council proposed to redevelop the land in partnership with a house-building company as part of a coastal regeneration project involving a residential and leisure development. Again, there was no question of any statutory incompatibility. 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.

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.

104. We therefore would allow the appeal and set aside the order of the Court of Appeal dated 27 March 2013.

LORD CARNWATH:

105. As will become apparent, I agree that the appeal should be allowed under ground (ii) for the reasons given by Lord Neuberger and Lord Hodge. While I agree that we need not reach a conclusion on ground (i), I think it useful also to comment on some of the more general issues discussed in argument, which have not previously been considered at this level and which may become relevant in other cases.

Bathing rights on the foreshore

106. At least since *Brinckman v Matley* [1904] 2 Ch 313, the decision of the Court of King's Bench in *Blundell v Catterall* (1821) 5 B & Ald 268 has been taken as establishing at Court of Appeal level that under English law the public has no general right to go onto the foreshore for the purpose of bathing or other recreation. In the words of the 1904 headnote:

> "The public have no common law right to use the foreshore or to pass and repass thereon for the purpose of bathing in the sea, whether the foreshore is the property of the Crown or of a private owner."

Not even the strong dissenting judgment of Best J in the earlier case, the advocacy of a future Lord Chancellor (Buckmaster KC), nor the criticism of three textbook writers cited by him (p 320), were sufficient to persuade the court to revisit the issue, or even to call on opposing counsel. The members of the court were unanimous in their praise for the model judgment of Holroyd J, regarded it seems as "one of the finest examples" of how a judgment should be expressed (p 323). Only Cozens-Hardy LJ, while observing that the principles laid down in that case "have never since been questioned by any authority to which our attention has been called", was prepared to concede that the point might be open for reconsideration by the House of Lords (p 327).

107. No doubt because judicial fashions have changed, I confess that I do not find the enthusiasm of the Court of Appeal for the judgment of Holroyd J altogether easy to share. Its erudite analysis of extracts from Justinian, Bracton, and Hale, and of obscure exchanges between the court and counsel in some early English cases, makes rather heavy reading to modern eyes.

108. It is also difficult to find the basis of the assertion by Vaughan Williams LJ that the majority judgments in the earlier case had been "recognised ever since by the whole of the profession as an accurate and binding assertion of the law" (p 322). In the intervening century, recreational use of the foreshore and the associated beaches had become an even more wide-spread and popular activity. As far as one knows, the public had continued to enjoy the pleasures of the beach without interference, and without anyone suggesting that they were mere trespassers. There is no record of anyone relying on the judgment in *Blundell v Catterall* to restrict such use. Nor were we referred to any evidence of support from legal commentators to set against the three sources relied on by the appellants (*Hall on the Seashore, Phear's Rights of Water,* and *Stuart Moore on the Foreshore*).

109. Furthermore, as Vaughan Williams LJ acknowledged (p 322) the actual issue in the earlier case had been narrower than that facing his court. It had been, not the general right of the public to bathe on the foreshore, but their right to bring on to the beach bathing machines for that purpose, and to do so in an area where it conflicted with private rights of fishing with stake nets. On the same page, Vaughan Williams LJ also cited the short statement by Abbott CJ of "what the decision of the court was": that is, "where one man endeavours to make his own special profit by conveying persons over the soil of another, and claims a public right to do so" he has no reason to complain if the owner of the soil "shall insist upon participating in the profit …". On that footing the case was about commercial exploitation of the beach, rather than the public's right to its recreational use.

110. As appears from the dissenting judgment of Best J in the earlier case (p 279), it had been found as a fact that there was a "custom for the public to cross the spot in question on foot for the purpose of bathing". That usage as such was not apparently in issue. The problem arose because of the associated need for bathing machines, use of which at that time was seen as "essential" to the practice of bathing ("Decency must prevent all females, and infirmity many men, from bathing, except from a machine"). Even the judgment of the majority was not seen by them as restricting the established right of access to bathing on foot:

> "The right is claimed on the pleadings, as founded not on usage or custom, but upon the supposed general law only; and the usage, as stated in the special case, is found to have been for the public to cross the sea-shore on foot only, for the purpose of bathing, no bathing machines having ever been used in Great Crosby, where the locus in quo is situate, before the establishment of the present hotel. My opinion, therefore, on this case, will not affect any right that has been or can be gained by prescription or custom, either by individuals or by either the permanent or temporary inhabitants of any village, parish, or district." (p 289, per Holroyd J)

It is unfortunate that neither in that case, nor in any of the later cases relying on it, was there any discussion of the legal basis of such a hypothetical right gained by prescription or custom.

111. This was a point touched on by the first of the textbook writers, Robert Hall, a barrister of Lincoln's Inn. In his 1830 treatise "An essay on the rights of the Crown and the privileges of the subject in the sea shore of the realms", he devoted some 40 pages of a supplemental chapter to a detailed criticism of the majority judgments. He was troubled (p 219) by the implications of Holroyd J's acceptance that there might be a "local usage or custom of bathing", and the difficulty of distinguishing such a custom from one available to the public generally. It would be "singular to denominate this a collection of local customs". He compared fishing on the seashore which, though likely to be practised by local inhabitants, was accepted as a general rather than a purely local right. It would be strange, he said, to treat the right to bathe any differently.

112. More generally, he noted that much of Holroyd J's discussion was devoted to criticisms of Bracton's exposition of the law relating to river-banks, rather than the passages directly concerned with the public right over the sea-shore. He commented:

> "The reasoning, therefore, seems to have been this, Bracton was wrong in his law that 'Riparum usus communis est &c' therefore 'littorum usus non est communis'. But this is certainly a 'non sequitur'; and although the court, from the authorities, proved Bracton wrong, to a certain extent in his law respecting particular uses made of banks of rivers (as for towage), yet no authorities were adduced shewing that 'communis usus' of the sea shore for bathing is not a good custom." (pp 191-192)

Best J, by contrast, had preferred to see Bracton's writings on this issue as derived not so much from the civil or common law, as from "the law of all civilised nations" (p 281).

113. As to judicial authorities, the only judgment cited to the court in which *Blundell v Catterall* had been followed without question was *Llandudno Urban Council v Woods* [1899] 2 Ch 705, but that was at first instance, and it was concerned, not with bathing or general recreation, but with the holding of religious services on the beach.

114. More significant in the present context is *Mace v Philcox* (1864) 15 CB(NS) 600, which was cited to the Court of Appeal but not mentioned in their judgments. As appeared from the case stated, it was accepted that the "sea-beach or foreshore throughout the whole length of the borough of Hastings, including the locus in quo" had been used "from time immemorial" by the public "as a place of public resort" (p 603), subject only to the corporation's statutory powers to regulate the use by byelaws. The issue was simply as to the right of the defendant to place bathing machines on a part of the foreshore in private ownership, it being accepted that such a right existed on adjoining land owned by the corporation. Although *Blundell v Catterall* was cited on that point, the court did not evidently read it as settling any wider issue; rather Erle CJ was "desirous of guarding (his) judgment so as not to restrict the valuable usage or right of her Majesty's subjects to resort to the sea-shore for bathing purposes" (p 614 per Erle CJ).

115. Against this background the unwillingness of the Court of Appeal in 1904 to reopen the issue seems both surprising and disappointing.

Scotland

116. The hearing in *Brinckman v Matley* took place on 13 July 1904. The judgments appear to have been given on the same day. By a curious coincidence, three days later a similar issue (relating to shooting wildfowl on

the foreshore) was considered by the Court of Session in Scotland (*Hope v Bennewith* (1904) 6 F 1004). Although *Brinckman v Matley* is noted in a footnote to the report (p 1008), it seems highly improbable that the detail of those judgments would have been available at the hearing. In any event, counsel was able to submit, apparently without contradiction, that *Blundell v Catterall* had been "much criticised and followed with reluctance" (p 1010). He relied (inter alia) on *Mace v Philcox* and various textbook writers, including those cited to the English Court of Appeal. The court did not comment on the authorities, but proceeded on the basis of an admitted "public right to use the foreshore" (p 1010) without considering its precise scope.

117. It seems that from the middle of the previous century, Scottish law had begun to recognise a public right to use the foreshore for recreation, without feeling inhibited by authorities from the other side of the border. In 2001, the Scottish Law Commission reviewed the cases, beginning with *Officers of State v Smith* (1846) 8 D 711), and concluded that such a right was "well supported by authority". The precise scope of the right was not clear:

> "It appears to include walking and running, having a picnic or barbecue, sunbathing and swimming. While it does not include the right to put up a hut on the shore, it does include the right to shoot wildfowl. The sale of refreshments on the beach is outwith the scope of the right." (Discussion Paper No 113 *Uses of the Foreshore* para 4(25))

118. By the time of the Commission's final report (report 190 (2003)) its recommendations had to some extent been overtaken by the enactment of the Land Reform (Scotland) Act 2003 which conferred general rights of access to land for recreational purposes, "land" for this purpose being defined as including the foreshore (section 32). None the less it was recommended that the common law rights, which were regarded as more extensive than the new access rights, should themselves be put on a separate statutory footing (para 3.1-17).

Comparative jurisprudence

119. At the end of the hearing in the present case, the court offered Mr George QC the opportunity to provide information about the practice in other common law jurisdictions. He did not take up that invitation, perhaps in the understandable fear of opening up a Pandora's box. Some comparative material can, however, be found in the appendix to the Scottish Law Commission's 2001 Discussion Paper. That has been supplemented since the hearing in this case by some further work by our own judicial assistants, particularly relating to the United States of America. This research is far from

exhaustive, and, since it is not material to our conclusion in the present case, it has not been thought necessary to invite comments from the parties. However, as it may be of relevance to future cases, it seems desirable to make a brief reference to some of the main points.

120. Appendix 2 to the Scottish Law Commission's Discussion Paper contained a short review of the law relating to the foreshore, including rights of recreation, in various jurisdictions. This shows little consistency of approach. In the European countries mentioned (France, Germany, Norway, Spain) recreation on the sea-shore seems generally to be regulated by statute. Of the common law countries referred to (Canada, England & Wales, New Zealand), the English position unsurprisingly is defined by reference to *Blundell v Catterall*; and the position in Canada is said to be unclear (para 31).

121. Of more interest is New Zealand, where reference (para 156) is made to a case from the 19th century, *Crawford v Lecren* [1868] NZLA 117. In that case the Court of Appeal held, in reliance on *Blundell v Catterall*, that there was no right for the public to load and unload goods on the foreshore. The court seems to have attached particular weight to the support for this proposition of Best J, as well as of the majority (pp 128-129). The Commission also notes (paras 159-162) that in New Zealand public access to the foreshore is preserved through the concept of the "Queen's Chain", a strip of land up to 20 metres wide, measured from the high water mark of spring tide. The concept, which has had varying acceptance, and is now implemented by statute, is said to find its origins in an instruction of Queen Victoria given in 1840.

United States

122. The Commission did not look at the position in the United States. It says something for the degree of interchange in the early 19th century between the legal communities on either side of the Atlantic, that Hall's criticisms of *Blundell v Catterall* case were being cited with approval in the following year in an academic article: 3 US Law Intelligencer & Review 114 1831. (The US Law Intelligencer and Review was a periodical edited by one Joseph K Angell, who was born in the United States but lived in England from 1819 to 1824. He founded the periodical in 1829, which ran monthly for three years.) The article quoted extensively from the treatise, and praised its author for his "zeal and ability" in combatting a judicial decision which would abridge the public's "undoubted right of indulging in the favourite and healthful practice of bathing in the sea".

123. Somewhat paradoxically, although the subsequent development of the law has varied between the states, it was to the English common law that the

judges in later cases looked for the foundation for recognition of public rights of recreation over the foreshore. Thus in Florida, in *White v Hughes* 139 Fla 54, 59, 190 So 446 (1939), Brown J observed:

> "There is probably no custom more universal, more natural or more ancient, on the sea-coasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. The lure of the ocean is universal; to battle with its refreshing breakers a delight …"

After quoting Byron on the primeval quality of the "wild waves' play" (*Childe Harold's Pilgrimage IV*, 182) he continued:

> "The constant enjoyment of this privilege of thus using the ocean and its fore-shore for ages without dispute should prove sufficient to establish it as an American common law right, similar to that of fishing in the sea, even if this right had not come down to us *as a part of the English common law, which it undoubtedly has*" (p 449 emphasis added).

124. A more sophisticated (if less poetic) discussion of the development of the law up to 1969 can be found in the Yale Law Journal (William Dayton *The Public Trust in Tidal Areas: a Sometime Submerged Traditional Doctrine* (1970) 79 YLJ 762). The author traced the history of the law from its Roman roots, through Magna Carta, to the more modern law in England and America. Of *Blundell v Catterall* he said: "This exclusion from common law protection of an ancient and customary right is a prime example of the needless exclusion of an activity". He noted that the State of Oregon in particular had "seized the customary usage opening and widened it" (citing inter alia *State ex rel Thornton v Hay* 89 Ore 887 (1969)) (p 784-785). He ended by suggesting that the common law of the foreshore seemed to be entering "a major period of reformulation", which he described as "a sharp acceleration of the process begun by Magna Carta". He looked forward to the day when "common law citizens will have as many rights in the foreshore as Roman citizens once did" (p 785-789).

125. The decision of the Oregon Supreme Court in *Thornton*, which may have provided a stimulus for that article, concerned the public's right to recreational use of what was described as the "dry-sand area", that is the privately owned area of beach between the vegetation line, and the state-owed foreshore (or "wet-sand area") in which the "public's paramount right" was not in dispute. The court accepted that the dry-sand area had been enjoyed by the general public "as a recreational adjunct" of the foreshore area

since "the beginning of the state's political history", and before that by aboriginal inhabitants "using the foreshore for clam-digging and the dry-sand area for their cooking fires". The majority upheld the public right over that area, by reference to "the English doctrine of custom" (as enunciated in Blackstone's Commentaries), preferring that basis of decision to one based on prescription. The minority (Denecke J) arrived at the same result, relying simply on long usage by the public of such dry beaches, combined with long and universal belief by the public in their right to that use, and long and universal acquiescence in it by the owners. The narrower English law on customary rights was distinguished as appropriate for "a small island nation" at a time when most inhabitants lived and died within a day's walk from their birthplace, as compared to "the vast geography of this continent and the freshness of its civilisation".

126. New Jersey is perhaps of greater interest because of the development of the law by the courts relying on the so-called "public trust doctrine", using language not dissimilar to that of Best J in the English case. He had spoken of the "public trust" in such property:

> "From the general nature of this property, it could never be used for exclusive occupation. It was holden by the King, like the sea and the highways, for all his subjects. The soil could only be transferred, subject to this public trust; and general usage shews that the public right has been excepted out of the grant of the soil …" (p 287).

The Court of Appeal in *Brinckman v Matley* accepted that the Crown holds the foreshore on the terms that it must recognise "the jus publicum whatever it may be" but saw that as limited by authority to rights of navigation and fishing (p 325).

127. A recent review of the New Jersey authorities comes in the judgment of the New Jersey Supreme Court, in *Raleigh Avenue Beach Association v Atlantis Beach Club Inc* 879 A 2d 112 (2005). The court (p 119) traced the history of the public trust doctrine to their decision in *Arnold v Mundy* (1821) 6 NLJ 1. That case, decided as it happens in the same year as *Blundell v Catterall*, concerned a claim to rights in an oyster bed. The court had explained that following independence the English sovereign's rights to the tidal waters had become vested in "the people of New Jersey as the sovereign of the country", and that "the land on which water ebbs and flows", including the land between the high and low water, belonged to the State, "to be held, protected, and regulated for the common use and benefit".

128. More recently, in *Borough of Neptune City v Borough of Avon-by-the-Sea*, 61 NJ 296, 303, 294 A 2d 47 (1972), the same court had referred to the roots of that principle in Roman jurisprudence, which held that "by the law of nature ... the air, running water, the sea, and consequently the shores of the sea," were "common to mankind", and had extended the public rights in tidal lands to "recreational uses, including bathing, swimming and other shore activities". That extension had been approved in *Matthews v Bay Head Improvement Association* 95 NJ 306 (1984), in which the court had gone on to consider the extent of the public's interest in privately-owned dry sand beaches, in particular its right to cross such beaches in order to gain access to the foreshore (p 323). The court had also affirmed "the concept already implicit in our case law that reasonable access to the sea is integral to the public trust doctrine". There was reference to the dissenting judgment of Best J in *Blundell v Catterall* (without reference to the majority judgments) for the proposition that -

> "the particular circumstances must be considered and examined before arriving at a solution that will accommodate the public's right and the private interests involved" (p 324).

129. In *Raleigh* itself, following *Matthews*, the court applied the principle that "the public use of the upland sands is subject to an accommodation of the interests of the owner", to be determined by "case-to-case consideration" (pp 120-121). It repeated the following statement from *Matthews*:

> "Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be 'fixed or static', but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit' …
>
> Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand.
>
> Today, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While

> the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand." (*Matthews* p 326)

Comparative material – summary

130. This review of the comparative jurisprudence is of interest, on the one hand for the apparently universal recognition of the recreational use of the foreshore in practice, but on the other for the continuing uncertainty in many jurisdictions as to the legal basis for that use and the wide variety of legal methods (statutory or judicial) used to resolve it. This divergence seems surprising, given the universality of the practice, and the common roots of most of the systems of law considered, either in Roman law, or in the rights and obligations of the Crown under the English common law. In the common law jurisdictions this confusion seems in part to be the legacy of *Blundell v Catterall.* Although the authority of that decision has been acknowledged in some common law jurisdictions, there is little evidence of it being given practical application so as to restrict use on the ground. The development of the law in New Jersey is of particular interest as an illustration of how the law in this country might have developed (and might yet develop) if the view of Best J had prevailed over that of the majority.

Usage, custom or implied licence

131. It remains to consider what lessons can be drawn for the present case. In the absence of argument to the contrary we must proceed on the basis that *Blundell v Catterall* and *Brinckman v Matley* were rightly decided. It follows that public use of the West Beach during the relevant period cannot be attributed to a general public right to use the foreshore for recreational purposes. Leaving aside the arguments relating to the bye-laws under the second issue, there are three possibilities: (a) some form of prescriptive or customary right (b) implied licence (as found by Lewison LJ) (c) trespass tolerated or acquiesced in by the owners (as found by the majority of the Court of Appeal).

132. I mention (a), which is not supported by any of the parties, because it is a possibility left open by the majority in *Blundell v Catterall.* While it may not be appropriate to the relatively recent use found in this case, it might be relevant as an alternative explanation of long-standing recreational uses of beaches more generally. However, as I have said, the legal basis for such a right is unclear. A right gained by prescription, as generally understood,

would have had to be related to a particular property, which would not have explained the more general usage found in the case. The alternative, a custom claimed by the inhabitants of "any village, parish or district", would accord with the principle that a custom should be linked to a particular locality, rather than for the benefit of the public in general. That was a familiar feature of the law of village greens, which in due course was repeated in the definition of customary village greens in the Commons Registration Act 1965. However, quite apart from the criticisms made by Robert Hall in 1830, there seems to have been nothing in the actual findings before the court to support such a limitation.

133. Explanation (c) – that those who use public beaches for recreation without specific authorisation do so as mere trespassers - defies common sense. It flies in the face of public understanding, and the reality of their use of the beaches of this country for the last three hundred years or more.

134. Explanation (b) accords with the view of Lewison LJ in the present case. He said he thought that the foreshore should be treated as "a special case", for a number of reasons:

> "i) The nature of the land is such that it cannot readily be enclosed. It would be wholly impractical to attempt to enclose it on the seaward side; and even on the landward side any attempt would be fraught with difficulty.
>
> ii) Historically the foreshore has been Crown property (although there are private persons who derive title from the Crown) and the Crown would not, in practice, prevent citizens from resorting to the foreshore for recreational purposes. This has been the case since time immemorial, and in those circumstances it is not unreasonable to presume that the Crown has implicitly licensed such activities.
>
> iii) Even where the owner of the foreshore does attempt to enforce his strict legal rights, there are serious impediments in obtaining an injunction.
>
> iv) Although in theory it is possible to prescribe for rights over the foreshore or to establish a customary right, there is no case in the books where a recreational right over the foreshore has been established.

> "v) It would take very little, having regard to the nature of foreshore and the manner in which it is generally enjoyed, to draw the inference that use is permissive by virtue of an implied licence.
>
> 129. Even if this is not, on its own, an independent reason for concluding that the use of the foreshore in this case is precario, it does in my judgment provide the context in which the byelaws are to be interpreted."

135. I agree, but I would put the emphasis on the point (v). It is the character of the foreshore and the use which is traditionally made of it, without question or interference, which leads to the natural inference that it is permitted by the owners in accordance with that tradition. As I said in *Barkas* (para 61 referring to comments of Lord Scott in *Beresford* [2004] 1 AC 889, para 34):

> "Lord Scott's analysis shows that the tripartite test cannot be applied in the abstract. It needs to be seen in the statutory and factual context of the particular case. It is not a distinct test, but rather a means to arrive at the appropriate inference to be drawn from the circumstances of the case as a whole."

Applying that approach to public use of beaches generally, I see no difficulty in drawing the obvious inference, in the absence of evidence to the contrary, that their use, if not in exercise of a public right, is at least impliedly permitted by the owners, rather than a tolerated trespass.

136. That general approach cannot necessarily be applied without question to the present case. This is not an historic beach, but one created artificially in relatively recent times, as a consequence of the statutory harbour works. Nor was public use accepted without question. As appears from the application for registration, the public were barred for some time after the end of the First World War, and their use only resumed in response to a public protest. There might well be a case for treating what followed as tolerated trespass, or use "as of right", had not the whole area been brought under formal regulation by the making of the byelaws. For the reasons given by Lord Neuberger, I agree that thereafter the only possible inference is that the use was permitted by the harbour authorities and was therefore "by right".

Ground (iii) - statutory incompatibility

137. In view of our unanimous conclusion on ground (ii), I would have preferred not to have to reach a decision on ground (iii), which I find much more difficult. I see considerable force, with respect, in the detailed reasoning of Richards LJ in the Court of Appeal, and in particular his reasons for not finding assistance in the Scottish cases ([2014] QB 186 paras 10-28).

138. I see a further problem which may have been touched on before Ouseley J (see his judgment at paras 133, 141-142), but has not been raised by the parties or explored in any depth before us. This concerns the consequences of registration under the 2006 Act. Lord Neuberger and Lord Hodge (para 95), citing Lord Hoffmann in the *Oxfordshire* case, proceed on the basis that registration of the Beach as a town or village green would make it subject to the restrictions (subject to criminal sanctions) imposed by the 19th century village green statutes. It is easy to see why such restrictions are likely to be incompatible with future use for harbour purposes, even if that has not proved a problem hitherto.

139. However, it is to be noted that the supposed incompatibility does not arise from anything in the 2006 Act itself, but rather from inferences drawn by the courts as to Parliament's intentions. In the relevant passage (para 56), Lord Hoffmann expressed agreement with the courts below on this issue, including by implication my own rather fuller reasoning in the Court of Appeal ([2006] Ch 43 paras 82-90). However, he did not see this issue as impinging directly on the question whether the land should be registered. Having noted and disposed of some of the arguments on the effect of the 19th century statutes, he added:

> "Nor do I follow how the fact that, upon registration, the land would become subject to the 1857 and 1876 Acts can be relevant to the question of whether there has been the requisite user by local inhabitants for upwards of 20 years before the date of the application"(para 57).

It was not necessary in that case to consider the issue which arises here: that is, the potential conflict between the general village green statutes and a more specific statutory regime, such as under the Harbours Acts. It is at least arguable in my view that registration should be confirmed if the necessary use is established, but with the consequence that the 19th century restrictions are imported subject only to the more specific statutory powers governing the operation of the harbour.

140. In conclusion, for the reasons already given, I agree that the appeal should be allowed.