Neutral Citation Number: [2018] EWHC 2530 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Case No: CO/2651/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/10/2018

Before :

MR C.M.G. OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

Between :

LYNN FORBES	**Claimant**
- and -	
WOKINGHAM BOROUGH COUNCIL	**Defendant**
- and -	
MONOPRO LIMITED	**Interested Party**

Mr D Wolfe QC and Ashley Bowes (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mr N Westaway (instructed by **Select Business Services Legal Solutions**) for the **Defendant**
Mr D Edwards QC and Daisy Noble (instructed by **Mills and Reeve Solicitors**) for the **Interested Party**

Hearing date: 13 September 2018

Approved Judgment

Mr CMG Ockelton :

1. This is a renewed application for permission to apply for judicial review following refusal on the papers by Mr David Elvin QC sitting as a Deputy Judge of this Court. The decision under challenge is the defendant's decision dated 28 March 2018 rejecting the claimant's application to register land in Wokingham as a new town or village green pursuant to section 15(3) of the Commons Act 2006. The interested party is the owner of the land.

2. The process leading up to the decision in this case was as follows. The claimant's application to the defendant as Commons Registration Authority was made on 8 June 2015. The defendant consulted on the application and the interested party objected. The defendant instructed a barrister Inspector to conduct a non-statutory inquiry in accordance with the procedure approved in R (Whitmey) v Commons Commissioners [2005] QB 282. The appointed Inspector, Felicity Thomas, gave directions on 13 June, 8 August and 8 September 2016, the directions on the latter two occasions resulting from amendments of her application made by the claimant. The inquiry sat from 12-20 December 2016. The claimant and the interested party were represented by Counsel. The claimant called 19 oral witnesses and relied on witness statements of 15 witnesses and the result of 83 questionnaires, as well as photographic evidence.

3. The Inspector's Report, running to 302 paragraphs, is dated 18 September 2017. It recommends the defendant to reject the application. The reason was that the Inspector found that the claimant had failed to show that it was more likely than not that there had been lawful sports and pastimes on the land of the required quantity and quality for the relevant 20-year period.

4. Reaching the conclusion in the manner she did, the Inspector did not need to consider all the statutory criteria. Following representations from the parties, the defendant asked the Inspector to provide her views on those criteria. The Inspector made a supplementary report dated 18 October 2017 to that effect. On 22 November 2017 the claimant wrote to the defendant inviting it to reach the conclusion different from that reached by the Inspector. The Inspector provided a note on 9 December 2017 pointing out the parts of her report which appeared to her to deal with the matters raised in that letter.

5. The application was then reported to the Defendant's Commons Registration Committee. There was an officer's report and the claimant wrote to the members of the committee. On 28 March 2018 the defendant held a public meeting, at which representations were made both in support of and objection to the application. Issues were raised by members of the committee and answered. After the public meeting, the committee made its decision in private, and notified it in writing. It refused the application. The record of the decision indicates that the committee considered all the submissions, the Inspector's two reports and all the other documents referred to in the officer's report and made its decision on the basis that it would endorse the Inspector's conclusion.

6. The decision is dated, as I have said, 28 March 2018. The present proceedings were filed on 14 June 2017.

7. In this renewed application Mr Wolfe QC on behalf of the claimant raises four grounds of challenge. The first is that the defendant erred in not holding the whole of its decision-making process in public. The second is that in reaching her conclusion the Inspector failed to consider the activities she had identified cumulatively and in total in reaching her conclusion on whether a substantial number of inhabitants had indulged in them. The third ground is that the Inspector excluded from her consideration certain activities as lawful sports and pastimes when she should in law have included them. The fourth ground is that the decision does not give sufficient or intelligible reasons, particularly in relation to the claimant's suggestion that the defendant should not adopt or follow the Inspector's conclusion.

GROUND 1

8. The foundation of the claimant's claim under this ground is section 100A(1) of the Local Government Act 1972, which provides as follows:

> "(1) A meeting of a principal council shall be open to the public except to the extent that they are excluded (whether during the whole or part of the proceedings) under section (2) below or by resolution under subsection (4) below."

9. Subsection (2) relates to matters which are confidential and prohibited from public access. Subsection (4) when read with s.100I and schedule 12A enables a relevant resolution to be passed if the discussion will include private or financial information or information in respect of which a claim to legal privilege could be maintained, amongst other things. There was no resolution in the present case.

10. In its summary grounds, the Council argues that s.100A does not require a decision of the sort challenged in the present claim to be made in public; but in any event a claim under this ground should be rejected for two reasons under s. 31(3C) and (3D) of the Senior Courts Act 1981, firstly because, if needed, a resolution would certainly have been passed, because of the defendant's need to take legal advice; and, secondly, because the decision would obviously have been the same whether it had been taken in private or public. In support of the first element of that defence, the defendant refers to its own constitution.

11. Part 8.8 of the Council's Constitution includes, at paragraph 8.8.8, the procedure for considering and determining applications made to register land as a new town or village green. The Constitution provides, amongst other things, that a meeting will take place, at which the Commons Registration Officer will present a report setting out matters of law and fact; those who have asked for an opportunity to speak on the matter will be allowed to do so; and that that meeting is to be in public. Paragraph 8.8.8(i) provides as follows:

> "(i) When all the speakers have finished, the Committee will make a decision as to whether all or part of the land identified in the application should be registered as a new town or village green. The discussions of the Committee will be in the public domain and the decision-making will be taken thereafter in private. The Committee shall state in full the reasons for their decision."

That procedure was followed in this case; and there is and could be no argument that the Council failed to follow the procedure it had set out as required.

12. It is of course clear, as Mr Wolfe points out, that the Council's own constitution could not override obligations imposed by statute. It follows that if the statute required what was done in private to be done in public, the Council would have erred in law by following its Constitution and doing it in private. The claimant's problem is that there does not appear to be any foundation for such an argument. The position is that there is no statutory procedure for the determination for an application of this sort. It follows that a Council is entitled to adopt any procedure which it thinks appropriate, subject only to any relevant requirements of legality and fairness. It is clear that the procedure adopted and published by the Council gives every proper opportunity for public input into a decision. It is for the Council to determine the extent to which the proceedings take place at a "meeting". Part 8.8 of the Constitution sets that out with clarity. If there is a meeting it is held in public: that follows from the provisions of paragraph 8.8.3. It follows also that, under the Council's procedure, the process of decision-making, which is specified as taking place in private, is not a "meeting". In the absence of any provisions casting any doubt of the lawfulness of those arrangements, that, as it seems to me, is the end of the claimant's case under this head. I do not need to reach any decision on the correctness of the remarks of Turner J in R v London Borough of Wandsworth ex parte Darker Enterprises Ltd (1999) LGLR 601, as the claimant invited me to do; and I do not need to consider whether the arguments raised by the defendant under s. 31(3C) and (3D) are to be disregarded as post-decision justification. It is not arguable that the statute required the decision to be taken in public.

GROUNDS 2 AND 3

13. Grounds 2 and 3 challenge the Inspector's conclusions, which were adopted by the defendant in its decision.

14. It is common ground that the claimant's application for registration could succeed only if she was able to establish each of the requirements of s. 15(3) of the Commons Act 2006, that is to say that (a) a significant number of the inhabitants (b) of any locality, or of any neighbourhood within a locality, (c) had indulged as of right (d) in lawful sports and pastimes on the land (e) for a period of at least twenty years up to a date not more than two years before the date of the application. The period in the present case is from September 1994 to September 2014. At the heart of this inquiry is the decision as to what it was that inhabitants were doing "as of right". That is likely to involve also a determination of what potential right the relevant persons are, or are to be understood as, seeking to exercise. The Inspector reminded herself of the analysis of Lightman J in Oxfordshire County Council v Oxford City Council and another [2004] EWHC 12 (Ch), ("Trap Grounds") at [102]-[103]. There, Lightman J pointed out the difficulty that there may sometimes be in determining whether people on land are exercising a potential right of way over the land or are seeking to use the land for a wider purpose of lawful sports and pastimes. But the acquisition of the right is essentially prescriptive and so depends to an extent on the landowner's actual or perceived tolerance. Thus the question is whether:

> "The use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position

> is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green).
>
> ... The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both... In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights."

15. The Inspector noted, in her analysis of the evidence, the existence of worn tracks over the application land, and analysed the use which the witnesses said they had made of the land. Many of the witnesses gave evidence of the use of the tracks only or almost only. Some gave evidence of use of the tracks with occasional divergences and return to the tracks. The Inspector's conclusion was that, with the exception of one person, the evidence of use of the tracks was evidence referable to the assertion of a public right of way and therefore did not demonstrate assertion of a right of recreation. That is at paragraph 291 of her Report.

16. Her conclusion that the user was referable to the assertion of a public right of way is challenged by Ground 3 as a matter of law. The claimant points out that walking may itself amount to "lawful sports or pastimes" (R (Lewis) v Redcar & Cleveland BC (no. 2) [2010] 2 AC 70 at [85]). Further, the claimant refers to the following remarks of Sir Nicholas Browne-Wilkinson VC in Dyfed County Council v Secretary of State for Wales (1990) 59 P & CR 275 at [279]:

> "If the inspector's finding that I have read is to be interpreted as a finding that the circular route was only used as an incident of the fishing, swimming, sunbathing, picnicking, etc., then his decision, in my judgment, may well be right of law. The use for sunbathing and matters of that kind is not capable of giving rise to a presumption of dedication as a highway. But that is on the basis that the use of a path around the perimeter of the lake was a mere incident to those things such as sunbathing, fishing and picnicking. So to hold requires a rejection by the inspector of the evidence that was before him that the circular path had been used by local inhabitants for pure walking. There is no finding rejecting that evidence. Indeed, the decision letter records some of that evidence. If the inspector had found as a fact that there had been use by the public of a footpath for pure walking (*i.e.* not merely ancillary to the recreational activities such as sunbathing, fishing and swimming), in my judgment such evidence was capable of founding a case of deemed dedication of the footpath whether or not such walking was itself purely recreational as opposed to walking for business purposes. There is no rule that use of a highway for mere recreational purposes is incapable of creating a public right of way. Such use for purely

> recreational walking would be a use of the path as a footway and give rise to the possibility of deemed dedication in the absence of evidence that the owner of the land had no intention to dedicate."

17. In her report, the Inspector recognised uses such as blackberry picking and bike riding and concluded that they were incidental to the use of a putative public right of way. Mr Wolfe's argument was that she was not entitled to do so, because such uses could not help to establish a public right of way, as the Dyfed case shows. That is, in my judgment, a misunderstanding of the Dyfed case. In that case the issue was whether there was a right of way. There was no doubt that the lake to which reference was made in the extract which I have cited was used for recreational purposes. The question was whether the Inspector was entitled to conclude, as he did, that the use of the path around the lake as incidental to the recreational purposes was determinative against there also being a right of way. As the Vice Chancellor said, the use for recreational purposes would not of itself establish a right of way. The problem was, however, in the Dyfed case, that there was also evidence before the Inspector of use of the path for passage unconnected with the recreational use of the lake, which the Inspector appeared not to have taken properly into account.

18. On the one hand, the Dyfed case assists in demonstrating that an Inspector must take into account all the material available in order to determine what the user of the land is. But dicta emphasising that, if there was no evidence of the use of the track as a right of way, then it would not have become a right of way because of its use incident to the recreational purposes, do not assist at all in demonstrating a converse proposition that recreational purposes may not be incident to the use of the right of way. On the contrary, as a matter of common sense and common experience they clearly may be. The Inspector's task in the present case was not to determine whether there was a right of way, starting from the proposition that there were recreational uses; her task was to determine whether there were any uses as of right and if so what.

19. Her conclusions on the evidence are, provided that they are lawful, matters of judgment for her. I do not regard it as arguable that she was not entitled to come as she did to the conclusion that in many cases the user, of which there was evidence before her was attributable to an asserted right of way.

20. I turn then to Ground 2. The complaint here is that the Inspector looked at the various types of use in isolation treating each one of them separately and in relation to each separate use concluding that there was not use by a sufficiently substantial number of people to meet the requirements of s. 15(3). If the Inspector had done that, it would be an error. I do not regard it as arguable that she did do that.

21. What she did, instead, was to examine the evidence and see how much if any of it was referable to user other than that of a claim to a right of way. In a situation of ambiguity, and looking again through the eyes of the reasonable landowner, she was concerned to determine what interpretation should be placed on other observable activities. The uses referable to the assertion of a right of way, and uses incidental to that assertion, simply do not count towards the establishment of use for lawful sports and pastimes. That is why in paragraph 291 of her report, to which I have already referred, she noted that one of the witnesses who had given evidence to the use of the paths was to be disregarded in relation to non-right of way use only by 50%, because 50% of her use was not

referable to a claim of a right of way. But, as the Inspector pointed out, once the right of way use is discounted, the evidence pointed only to very limited recreational use. There were only five witnesses who gave evidence of regular use claimed to be that of recreation. There was evidence of a few infrequent or single activities. There was a small amount of evidence of activities which would indeed have been qualifying lawful sports or pastimes, but they were not sufficient to show the use of the whole of the land as a green during the whole of the relevant period. The one element of the evidence which did involve substantial numbers of people on the land in a manner not referable to the use of a right of way was seasonal use for "sledging, tobogganing, snowman building and snow play generally". But there was evidence that there were not very many days of snow. The Inspector reached the conclusion (which is unchallenged) that a reasonable landowner, observing that activity, would regard it as "a brief en masse trespass", rather than an assertion of use of the land for lawful sports and pastimes as of right. That conclusion is unchallenged and unchallengeable.

22. The Inspector's treatment of the evidence not referable to use as a public right of way is in a relatively short compass. She summarises the frequency and length of user described by the five remaining witnesses (para 292), she refers to the occasional activities (para 293) she deals with activities in the snow and reaches her conclusions on them in para 294, and in para 295 she concludes that blackberry picking is incidental to use of the putative public right of way. At paras 296 to 298 she deals with, and decides to discount, evidence purporting to show general widespread use of the land for recreation and attributes some of that claimed use to a claimed right of way as well. At para 299 she notes again that there may have been occasional recreational use but other activities to which she had been referred were also properly attributable to a claimed right of way. At para 300 is her conclusion as follows:

> "Therefore I find that the Applicant has failed to prove that it is more likely than not that there has been LSP in such quality and quantity for the 20 year period spanning 1994 to 2014."

23. In my judgment it is simply not conceivable that in writing that sentence she was not looking at the non-right-of-way use as a whole. Paragraph 300 is evidently the summary conclusion arising from her identification of each claimed user as either referable to the claim of the public right of way or minor, infrequent, occasional, or not covering the whole of the land.

24. I therefore reject Ground 3.

GROUND 4

25. Ground 4 claims that, because the decision letter does not specifically refer to the claimant's most recent letter to the defendant and email to committee members, in each case suggesting that they should not follow the decision of the Inspector, it is defective for failure to give proper reasons.

26. The decision specifically says that all submissions had been taken into account, and it specifically refers to the Inspector's reports. It seems to me that nothing else was necessary: the Council was invited to depart from the Inspector's conclusions and, as its decision shows, declined to do so, because having looked at all the material it endorsed the Inspector's conclusions. It is difficult to see what other reasons could

have been given. I am fortified in those observations by the following. First, the substantive matters advanced by the claimant in the letter and the email to which I have referred go no further than the issues that she had already raised and which had been dealt with in the Inspector's Report or the Supplementary Report (or both); secondly, the claimant does not appear to have indicated any point on which she is in doubt as a result of the decision that was made. In those circumstances it is difficult to see that it would be right to grant permission even if there were some theoretical possibility of uncertainty. I therefore reject Ground 4. Having rejected all the grounds advanced I refuse permission.

COSTS

27. There was also argument before me on the subject of costs. The claimant has sought protection against a full order for costs.

28. Sections 88 to 90 of the Criminal Justice and Courts Act 2015 apply to such an application. The principal relevant provisions are in s. 88:

> "88. Capping of costs
>
> (1) A costs capping order may not be made by the High Court or the Court of Appeal in connection with judicial review proceedings except in accordance with this section and sections 89 and 90.
>
> ...
>
> (3) the court may make a costs capping order only if leave to apply for judicial review has been granted."

29. These are judicial review proceedings and leave (or permission) has not been granted. The only relevant exception is that, under s. 90, regulations may be made providing that ss 88 and 99 do not apply to judicial review proceedings relating to environmental cases. There are such regulations. There are the Criminal Justice and Courts Act 2015 (disapplication of sections 88 and 89) Regulations 2017 (SI 100/2017). Read with Civil Procedure Rules, Part 5, Section VII, they have the effect that cost capping in accordance with the Aarhus Convention continues to apply to a judicial review which challenges the legality of a decision within the scope of article 9(3) of the Convention.

30. Article 9(3) so far as relevant provides that states shall ensure that members of the public have access to judicial procedures to challenge acts and omissions by public authorities which "contravene provisions of its national law relating to the environment". There is no definition of either the final word or the final phrase of that provision. In SSCLG v Venn [2014] EWCA Civ 1539, however, the Court of Appeal held that the interpretation of article 9(3) should be informed by the definition of "environmental information" found in article 2(3) as relating to:

> "(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

> (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of sub-paragraph (a) above, and cross-benefits and other economic analysis and assumptions used in environmental decision-making;
>
> (c) The state of human health and safety, conditions of human life, cultural sites and built structures, in as much as they are or may be affected by the state of the elements of the environment or through these elements, by the factors, activities or measures referred to in sub-paragraph (b) above."

31. The claimant claims that, because the recognition of land as a town or village green carries prohibitions on interference with its use or (to an extent) structures on it, the challenge to a refusal to register amounts to a challenge to a decision under national law relating to the environment. I do not accept that argument. The recognition or otherwise of a town or village green carries no implication for the state of the land or any modifications to the land or its use. Any such changes might be the subject of further processes of application or permission, but there is nothing in the law relating to commons which of itself impinges on any of the factors set out in article 2(3) of the Convention.

32. I am fortified in that view by a decision of Underhill LJ to which I was referred, refusing to treat a similar clam as an Aarhus claim. In R (NHS Property Services Ltd and Another) v Surrey County Council and Another, C1/2016/3267, he said that:

> "It does not in any event seem to me that the present proceedings fall within the terms of article 9 (3) of the Convention. It is doubtful whether section 15 of the 2006 Act constitutes "national law relating to the environment". Even if it does, it is hard to describe Mr Jones as "challenging" any "contravention" by NHS Property Services Ltd of the provisions of that Act when all that it was doing was contending that a decision taken under it was unlawful. I appreciate that a strictly literal construction may be inappropriate; but the present situation is a very long way from the language of article 9 (3)."

33. I would I think be wrong to treat that decision strictly as authoritative on the issue but it gives me no reason to depart from the view which I have reached.

34. As this is not an Aarhus claim, s. 88(3) prohibits the making of a cost capping order.

35. The order refusing permission on the papers gave the claimant an opportunity to object to the costs order made there. Other than the argument that costs should be capped, the claimant has raised no objection. The appropriate order would therefore appear to be that the claimant pay the costs of the defendant's acknowledgement of service summarily assessed at £3,722, and of the interested party's acknowledgement of service summarily assessed at £5,736.88.