APPLICATIONS BY MS EMMA BURGESS AND MS KATHARINE WELHAM TO REGISTER LAND KNOWN AS STOKE LODGE PLAYING FIELD, SHIREHAMPTON ROAD, BRISTOL, AS A NEW TOWN OR VILLAGE GREEN

REPORT

Summary: An application made in 2011 to register Stoke Lodge Playing Field as a town or village based on 20 years' use in the period 1991 – 2011 was rejected in 2018 by the City Council as registration authority on the basis that notices erected by Avon County Council made the use contentious and not *as of right*. In 2018 and 2019, the City received two fresh applications to register the Playing Field, each based on 20 years' use between the periods 1998 – 2018. Avon County Council was abolished in 1996 but the Inspector takes the view, by reference to the notices, that the use continued to be contentious and not *as of right* after 1996 and into 1998 and beyond; in short, the notice did not cease to be effective when Avon County Council was abolished. The applicants for registration argue by reference to additional material that the original decision was wrong and that throughout the period 1998 – 2018 the use was not contentious. The Inspector considers the additional material does not make a difference. He also takes the view that, whatever the position before 2016, use thereafter was contentious, following the publicity surrounding the public inquiry into registration of the land at which it was clear that Cotham School and the City Council as landowner were objecting to the use of the land by local people. In certain circumstances, land held for statutory purposes is not registrable because registration is incompatible with carrying out those purposes. The original application was not rejected on this basis but since that decision the scope of "statutory incompatibility" has been further clarified by the Supreme Court and the School and City Council as landowner contend that it does apply. The Inspector disagrees. The upshot is that the Inspector recommends that the Playing Field is not registered as a town or village green because use of it was not *as of right* between 1998 and 2018.

Introduction

1. Bristol City Council is the statutory body charged by statute with maintaining the register of village greens. I am a barrister in private practice with expertise in the law of town and village greens. In this capacity, I have often advised registration authorities and have often acted on their behalf as an Inspector, holding a public inquiry into an application before reporting and making a recommendation. I have also often advised and acted for applicants who have sought to register land as a town or village green; and for objectors, who have argued that land should not be registered as a town or village green.

2. I have been appointed as an Inspector by Bristol City Council (acting as registration authority) to consider two applications under section 15 of the Commons Act 2006 which have been received by the Council to register land known as Stoke Lodge Playing Field or Fields[1] and to advise the Council whether that land should be registered as a town or village green. The two applications are:

   (i) dated 13 September 2018 by Ms Emma Burgess; and
   (ii) dated 22 July 2019 by Ms Katharine Welham.

3. The application of Ms Burgess was supported by evidence forms completed by 104 people. There were objections to it by Bristol City Council (as landowner) and Cotham School and by 88 members of the public.

[1] Hereafter I refer to it in the singular.

4. The application of Ms Welham was supported by evidence forms completed by 62 people. There were objections to it by Bristol City Council (as landowner) and Cotham School and by 27 members of the public.

5. I was asked as a preliminary matter to decide whether it was necessary that there should be a public inquiry before I advised the City Council. By a decision dated 2 March 2021[2], I decided that it was not. It is possible that matters might have arisen thereafter which did make it appropriate for there to be a public inquiry but in my view nothing has so arisen. The core facts of this matter are not controversial and there is not therefore a need for evidence to be subject to cross-examination. Accordingly, my advice is on the basis of the extensive written material that has been submitted to me.

6. For land to be registered as a town or village green, the requirements of section 15 of the Commons Act. This[3] provides as follows:

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

(2) This subsection applies where–

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

(b) they continue to do so at the time of the application.

(3) This subsection applies where–

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

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

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

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

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

(b) in the case of an application relating to land in Wales, the period of two years beginning with that cessation.

(4) This subsection applies (subject to subsection (5)) where–

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

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

(c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).

7. The application by Ms Burgess was made under section 15 (2) on 13 September 2018. Accordingly she had to show that

[2] See, further, paragraphs 24 and 26 below.

[3] I set out sub-sections (1) to (4).

- a significant number of the inhabitants of a locality, or neighbourhood within a locality
- had indulged in lawful sports and pastimes on the land
- for a period of at least 20 years down to 13 September 2018; and
- their use was *as of right.*

8. The application by Ms Welham was made under section 15 (3) on 22 July 2019. It was made on the basis that qualifying use had ceased on 24 July 2018[4]. Accordingly she had to show that

    - a significant number of the inhabitants of a locality, or neighbourhood within a locality
    - had indulged in lawful sports and pastimes on the land
    - for a period of at least 20 years down to 24 July 2018; and
    - their use was *as of right.*

Procedural history

9. The consideration of whether Stoke Lodge Playing Field should be registered as a town or village green has a long and somewhat chequered history.

10. On 7 March 2011, David Mayer on behalf of Save Stoke Lodge Parkland made an application to register the Field a town or village green. Objections to the application were received from Bristol City Council in its capacity as landowner, the University of Bristol, Rockleaze Rangers Football Club and Cotham School. Mr Mayer responded to those objections and subsequently there were further exchanges of representations. In its capacity as registration authority the City Council initially considered that it would be necessary for there to be a non-statutory public inquiry and, on this basis, invited me to hold such an inquiry[5]. In August 2012 I issued draft directions for such an inquiry. However, I did observe in those directions that the factual matters in dispute appeared to be limited. This prompted the City Council in its capacity as landowner to suggest that it might not be necessary for there to be a public inquiry or, at least, a full public inquiry and accordingly I explored whether this might indeed be possible.

11. On the basis of a number of concessions made by the objectors as to the issues arising, in particular relating to the effect of prohibitory notices[6], I advised the City Council as registration authority that it would not be necessary for there to be a public inquiry and that the matter could be determined on the basis of written representations. Further representations were made and on 22 May 2013 I issued a report to the City Council ("the 2013 report") recommending that the land be registered as a town or village green because I considered that the statutory criteria had been met. In particular, I considered that use of the land had been *as*

[4] This was because on 24 July 2018 the School had erected notices which arguably had made the use contentious (see paragraphs 142 - 143 below).

[5] Such inquiries are referred to as "non-statutory" because there is no express power in the town and village green legislation providing for them to be held. However such inquiries have long been considered as appropriate in appropriate cases where registration of land as a town or village green is in dispute: see *R v Suffolk County Council, ex parte Steed* (1995) 70 P & CR 487 at p500 (per Carnwath J (as he then was)) and *R (Whitmey) v Commons Commissioners* [2005] QB 282 (CA) (per Arden LJ at paragraphs 26, 28 - 30).

[6] In particular, the City Council at this stage did not seek to rely on notices that had been erected on the land; so that it was not necessary to explore more particularly the surrounding facts relating to the notices.

of right[7]; and that an objection based on statutory incompatibility of registration with the statutory purposes for which the land was held fell away in the light of the decision of the Court of Appeal in *R (Newhaven Port and Properties) Limited v East Sussex County Council*[8]. I suggested that that it would be appropriate to give the parties the opportunity to comment on my report before it was submitted to Committee, and all took the opportunity to do so.

12. Bristol City Council as landowner changed its position on notices and further suggested that there should be a public inquiry in order to hear evidence about that matter; for its part, Cotham School suggested that a public inquiry was needed in order to investigate the extent of the use by schools and by sports clubs. Further, once it became likely that there was going to be an appeal in the *Newhaven* case, the City Council as landowner further suggested that further consideration of the matter be deferred until the outcome of that appeal was known.

13. I decided that it would be appropriate for further consideration of the matter to be deferred. One possible outcome of the appeal in the *Newhaven* case would have been that it became clear that the application should fail. In these circumstances, of course, I would have advised the registration authority to reject the application and there would not have been a need for a public inquiry.

14. The Supreme Court gave its decision on 25 February 2015[9]. Following submissions from the parties, I decided that, on its proper interpretation, the decision did not require the application to be rejected. In all the circumstances, I decided that it was appropriate for there to be a public inquiry. This would enable evidence to be led on the statutory incompatibility point, as well as in respect of the use of the land and as to the notices. I had at an earlier stage reached the view that it would be appropriate to allow the City Council as landowner to alter its position as regards notices.

15. The public inquiry sat on 20 – 24 June 2016, 27 – 28 June 2016 and 13 July 2016.

16. Many issues were in contention at the public inquiry but, in end, it was my judgment that the matter turned upon whether the existence of three prohibitory signs on the land had the effect of making use of the land by local people contentious and not *as of right*. I took the view that they did have this effect; and that accordingly the land should not be registered as a town or village green. In doing so, I relied upon the decision of the Court of Appeal in *Winterburn v Bennett*[10].

17. On the issue of statutory incompatibility, the position was that there had been further relevant litigation in the High Court exploring the scope of Newhaven *Lancashire County Council v Secretary of State*[11] and *R (NHS Property Services) v Surrey County Council* [12]. The case of *Lancashire* was particularly pertinent since it involved land held for educational purposes. In the light of this further guidance, I took the view that the application did not fail because

[7] My report pre-dated the decision of the Court of Appeal in *Winterburn v Bennett* [2017] 1 WLR 646 (CA) which materially affected the application of the law relating to notices.

[8] [2014] QB 186 (CA).

[9] [2015] AC 1547 (SC).

[10] See footnote 7 above.

[11] [2016] EWHC 1238 (Admin).

[12] [2016] 4 WLR 130.

registration was incompatible with the statutory purpose for which the land was held. However, at the time of my report, permission to appeal was being sought in the *Lancashire* case and had been granted in the *Surrey* case. Thus, there existed the possibility that the outcome of those appeals might affect my advice on this point.

18. The Public Rights of Way and Greens Committee of the City Council considered my report and recommendation at a meeting on 12 December 2016. It decided to reject my recommendation and to register the land as a town or village green. That decision was challenged by Cotham School by way of judicial review. As well as taking the point that, in the light of my report, the Committee should have decided to reject the application, the School also argued that the application should have been rejected on the basis of statutory incompatibility. By the time the case came on for hearing before Sir Wyn Williams (sitting as a Deputy Judge of the High Court) on 21 November 2017, the Court of Appeal had recently heard argument on the appeals in the *Lancashire* and *Surrey* cases (the two appeals were heard together) but had not delivered judgment. Sir Wyn postponed delivering his judgment until after the Court of Appeal had given its judgment (which happened on 12 April 2018). This enabled him to take into account written submissions on the question of statutory incompatibility which were submitted to him by the parties after the judgment of the Court of Appeal had been handed down.

19. In his judgment, delivered on 3 May 2018, Sir Wyn upheld the challenge. However, in the light of the Court of Appeal's judgment in *Lancashire/Surrey,* he rejected the argument that the application should be rejected on the basis of statutory incompatibility. He did however accept that the City Council had erred in law in its rejection of my recommendation that the application for registration should be rejected. Accordingly, its decision was quashed.

20. On 25 June 2018, in the light of the guidance of the High Court and my report and recommendations, the City Council resolved to reject the application.

21. On 14 September 2018, Emma Burgess made a fresh application to Bristol City Council as registration authority to register the playing field as a town or village green. The relevant 20 year period in respect of her application was 1998 to 2018 (i.e. the twenty years to the date of her application). She submitted the use of the land was *as of right* on the basis that Avon County Council had been abolished in 1996 and the signs that it had erected on the land had no legal effect after that date.

22. Bristol City Council and Cotham School objected to the application. Among the points that they took was that the School had erected new signs on the land on 24 July 2018 and that, whatever was the position before, after 24 July 2018 the use had been contentious and not *as of right.* Ms Burgess contested that the signs were effective but if they were, then, on the face of it, the objectors had a good point because (i) the application was made under section 15 (2) of the Commons Act 2006 and (ii) by virtue of section 15 (2) (b), in order to qualify for registration, qualifying use has to continue to the date of the application. There is however (also on the face of it) a ready response to this objection: an application can be made under section 15 (3) of the Commons Act 2006. By virtue of section 15 (3) (c) and (d) an application can be made for up to a year after qualifying use has ceased. Thus, if the notices did have effect, one might think that the application could be considered under section 15 (3) instead of 15 (2). However, Ms Burgess could not know that Bristol City Council as registration authority would treat her application in this way. In the light of this, on 22 July 2019, Katharine Welham made a further application to register the land as a town or village green relying on section 15 (3) (c) and (d) of the Commons Act 2006. This explains why Bristol City Council as registration authority have been asked to consider two applications rather than a single one.

23. In the meantime, the *Lancashire/Surrey* cases had gone to the Supreme Court. The Court delivered its decision on 11 December 2019[13]. It allowed the appeals taking the view that the Court of Appeal had taken too narrow a view of the scope of statutory incompatibility.

24. On 2 March 2021, I made a report to the City Council. I advised that it was not necessary that there should be a public inquiry and that the land should not be registered as a town or village green. This was on the basis that the notices that had operated to render use not as of right between 1991 and 2011 continued to be effective after 1996, so that use by local people in 1998 and thereafter was not *as of right*[14].

25. I had thought that in March 2021, I had all the material before me on which to make a recommendation. This proved not to be the case. In the light of my report Ms Burgess and Ms Welham adduced additional arguments and submitted additional material in support of them. The objectors also made further representations.

26. The detailed facts relating to the applications are set out in my report dated 14 October 2016 ("the 2016 report"). As noted, the core facts are not controversial. Some additional evidence has been submitted by the applicants and is set out and considered as appropriate below. I do not consider that this additional material requires there to be a public inquiry.

27. The 2013 and 2016 reports are appended to this report.

28. I now make this report to the City Council as registration authority in the light of all the material which the Applicants and Objectors wish to submit to me.

Matters of law

The burden of proof

29. It is for an applicant to demonstrate that land should be registered as a town or village green. The burden of proof is to the civil standard (the balance of probabilities). In *R (Beresford) v Sunderland City Council*[15], Lord Bingham said:

> *As Pill LJ rightly pointed out in* R v Suffolk County Council, ex p Steed (1996) 75 P & CR 102 ,111: *"it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green ..." It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision-makers must consider carefully whether the land in question has been used by the inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met*[16].

[13] See [2021] AC 194 (SC).

[14] I also advised that the publicity surrounding the 2016 inquiry was such as to make the use thereafter contentious.

[15] [2004] 1 AC 889 (HL).

[16] See paragraph 2 of his speech.

30. The effects of registration or non-registration in this case are clearly very important for both the City Council and School as landowners and also for the local community so Lord Bingham's point is well made. However, it is worth stressing that the intrinsic merits of whether the land can be fenced off or whether it should remain open for use by local people or whether there is some acceptable compromise which might allow both are not matters either for me or, in due course, for Bristol City Council as decision taking registration authority. I am solely concerned with an assessment of whether the legal requirements of section 15 are met.

As of right

31. It is necessary that the use by local people relied upon by the Applicants is as of right. This means that it must be *nec vi, nec clam, nec precario* i.e. not by force, nor stealth, nor the licence of the owner[17].

32. The primary meaning of access that is *vi* or by force is access by physical force e.g. by breaking down a wall or cutting through a fence. However, it is sufficient if use is contentious. In *Smith v Brudenell-Bruce*[18] Pumfrey J defined contentious use as follows:

It seems to me a user ceases to be 'as of right' if the circumstances are such as to indicate to the dominant owner, or to a reasonable man with a dominant owner's knowledge of the circumstances, that the servient owner actually objects and continues to object and will back his objection either with physical obstruction or by legal action.

33. It is obvious from this that a notice may make use contentious. This was explained at the highest level and by reference to its origin in Roman Law by Lord Rodger of Earlsferry in *R (Lewis) v Redcar*[19]. Although a notice may make use contentious what may be less clear is what is the position if a notice is ignored.

34. In analysing the position, it is helpful to begin by taking the example of an open site which is fenced off with a wire fence. Local people mistakenly consider that they have a right to go on the land, and make a hole in the fence with wire cutters. The first to go through will be taking access by force. It is surely the case that those who in succeeding days use the gap that is created will also be taking access by force. But if we imagine that local people continue to use the gap thereafter and no further challenge issues, it is not so easy to describe their continued use as by force or contentious. The obvious analysis is that a challenge was issued, accepted and the landowner has subsequently acquiesced in the continued use: which is intrinsically peaceable. Local people behave as if they have the right.

35. A similarly analysis may be made if, instead of surrounding the land with a wire fence, the landowner puts up lots of notices saying: *Keep out! It is forbidden to trespass on this land.* Initially access will be by force, but the landowner may be viewed as acquiescing if he takes no further action.

36. There are *dicta* of high authority which supports this analysis.

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[17] See *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335 per Lord Hoffmann at p350.

[18] [2002] 2 P & CR 4.

[19] [2010] 2 AC 70. See paragraphs 88 to 90 of his judgment.

37. In *R (Godmanchester Town Council) v Secretary of State for the Environment*[20], the House of Lords had to construe section 31 of the Highways Act 1980. This provides that land may become a highway if it has been used by the public for twenty years. The relevant use has to be *as of right*; moreover, the claim will fail if the landowner shows that there was *sufficient evidence that there was no intention … to dedicate it* ("the proviso"). In his speech, Lord Hoffmann emphasised the difference between use being as of right and a landowner being able to satisfy the proviso. He said:

… there may be a notice which says "No right of way. Trespassers will be prosecuted". Nevertheless, for upwards of 20 years members of the public may have ignored the notice and used the way, openly and apparently in the assertion of a right to do so. Their user will satisfy section 31(1) but the landowner, even on the most objective test, will have satisfied the proviso[21].

38. By saying that *[t]heir user will have satisfied section 31 (1),* Lord Hoffmann was saying that that use by the public which ignored the notice was *as of right.*

39. In *R (Beresford) v Sunderland City Council*, Lord Walker of Gestingthorpe said:

It has often been pointed out that "as of right" does not mean "of right". It has sometimes been suggested that its meaning is closer to "as if of right" (see for instance Lord Cowie in Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd *1992 SLT 1035, 1043, approving counsel's formulation). This leads at once to the paradox that a trespasser (so long as he acts peaceably and openly) is in a position to acquire rights by prescription, whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights. Conversely a landowner who puts up a notice stating "Private Land—Keep Out" is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: "The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time."*

40. This passage contemplates that a landowner may not be able to argue successfully that use by members of the public which ignores a prohibitory sign is not *as of right.*

41. It is these *dicta*, in particular, which led me in the 2013 report to advise the registration authority to conclude that, despite the existence of the Avon County Council signs, use by local people of the land had been *as of right.* As the applicants have pointed out, I recorded at paragraph 70 of that Report that *It seems to me that the present case is a classic one of acquiescence.* This however was before the decision of the Court of Appeal in *Winterburn,* which, it seems to me, changed the legal position as it had previously been understood.

42. Thus, despite the dicta in *Godmanchester* and *Beresford*, the position now is that *Winterburn* is high recent authority which is directly in point and which establishes that use which ignores prohibitory notices is not *as of right.* In his judgment in *Winterburn,* David Richards LJ said:

40 … In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right". Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings.

[20] [2008] 1 AC 221.

[21] See paragraph 24.

41. The situation which has arisen in the present case is commonplace. Many millions of people in this country own property. Most people do not seek confrontation, whether orally or in writing, and in many cases they may be concerned or even frightened of doing so. Most people do not have the means to bring legal proceedings. There is a social cost to confrontation and, unless absolutely necessary, the law of property should not require confrontation in order for people to retain and defend what is theirs. The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others. I do not see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over the land.

43. I note that in *Winterburn* it might have been argued that use was contentious on the basis of protests by the landowner in addition to the signs. However, it is clear that the judgment is on the basis that the signs were sufficient by themselves. I also note that David Richards LJ did not refer to either the *Godmanchester* or *Sunderland* cases. However, although the position is that the Court of Appeal did not have had drawn to its attention relevant authority[22], that authority represents *obiter dicta* and not *ratio decidendi*. Thus, it seems to me that the basis does not exist for Bristol City Council, as registration authority, to do other than loyally follow the judgment of the Court of Appeal as to effect of signs, which is *ratio decidendi*. The applicants suggest that *Winterburn* does not establish any general principle. It seems to me that it does.

44. In *Lancashire/Surrey* in the Supreme Court, Lord Wilson dissented and would have held that land held for educational and health purposes was registrable as a town or village green. That is as may be. At the end of his judgment he observed:

149. It was with complete passivity that, for no less than 20 years, these two public authorities contemplated the recreational use of their land on the part of the public. Their simple erection at some stage during that period of signs permitting (or for that matter prohibiting) public use would have prevented such use of the land being as of right: Winterburn v Bennett *[2017] 1 WLR 646 . In such circumstances it is hardly surprising that they both failed to establish its practical incompatibility with their own proposed use of it.*

45. It seems to me that this *dicta* – articulating what I think is not truly controversial – is high authority for the application of *Winterburn* to cases concerning town or village greens.

46. In the legal challenge to the decision in 2016 of the City Council to register the playing field as a town or village green, Sir Wyn Williams said:

50. In my judgment there can be no doubt that Taylor[23] *and* Winterburn *constitute authority for the proposition that where an owner of land has made his position about its use clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right" – see the paragraphs from* Taylor *quoted at paragraph 40 above and paragraph 40 in* Winterburn *itself. That is so, in my judgment, whether the claim relates to registration of a town or village green or the acquisition of a private right.*

47. Thus, the position is that in principle in the present case the signs may render the use of the land by local people contentious and not *as of right*. I say in principle because the further question arises as to whether the Avon County Council signs were sufficient to render use of the land contentious. I considered the evidence about this in the 2016 report and concluded that they were[24]. There seems to

[22] It is clear from the report that neither *Godmanchester* nor *Sunderland* were referred to.

[23] This is a reference to *Taylor v Betterment Properties (Weymouth) Ltd* [2012] 2 P & CR 3.

[24] See paragraphs 387 – 389.

me no basis now for me to reach a different conclusion in respect of the sufficiency of the notices[25]. Obviously unless anything changed the notices will have gone on making use of the land contentious after that time until there was some material change (or for some other reason they were ineffective).

48. In *Beresford*, the House of Lords held that for a permission to be effective it had to be revocable[26]. This position was overruled by the Supreme Court in *R (Barkas) v North Yorkshire County Council*[27]. In *Barkas*, Lord Neuberger made it clear that if a person is not a trespasser by virtue of a communicated consent, his use is not *as of right*:

... *if the landowner has in some way actually communicated agreement to what would otherwise be a trespass, whether or not gratuitously, then he cannot claim it has been or is unlawful—at least until he lawfully withdraws his agreement to it. For the same reason, even if such an agreed arrangement had continued for 20 years, there can be no question of it giving rise to a prescriptive right because it would clearly have been* precario*, and therefore "by right"*[28].

49. Finally, I need to refer to *R (Mann) v Somerset County Council*[29]. In that case, on part of the land which was the subject of an application for it to be registered as a town or village green occasionally there had been a beer festival and a funfair to which admission had been charged. The Inspector implied from this a permission when access was freely available. The High Court upheld the Inspector's approach. The contrast is with *R (Lewis) v Redcar*, where land was used (on a full time basis) as a golf course. The Supreme Court held (contrary to the view of the Inspector) that this use could co-exist with use by local people and the land be registered as a town or village green. It is fair to say that it was not argued from the golf course use that use by local people was permissive[30] but it would be remarkable to hold that *Lewis* was decided *per incuriam.* I think the answer is to see *Mann* as decided on its own facts, the argument not extending as far as the situation of a golf course in *Lewis.*

Consideration

Introduction

50. It is clear that during the relevant periods Stoke Lodge Playing Field has been used by a significant number of the inhabitants of a neighbourhood within a locality for lawful sports and pastimes. This was the position in respect of the period 1991 – 2001 as set out in the 2016 report and there is no reason to think that the position as regards any periods between 1998 and 2018 would be any different. I note, of course, that each application is supported by a quite a large number of evidence forms. In respect of the period 1991 – 2011, in the 2016 report I advised that I considered that the use was not *as of right.* The objectors contend that this is also the position as regards the periods 1998 – 2018. Their principal argument continues to rely on the signs that were erected on the land. For their part the objectors contend that such reliance was misconceived and that, properly considered by reference to additional material now available, the position is that the use was in those periods never contentious (and thus was, as required for registration, *as of right*).

[25] It is argued by the applicants that the notices were ineffective for other reasons. I consider these arguments in due course.

[26] See per Lord Scott at paragraphs 49 – 50.

[27] See the speech of Lord Neuberger at paragraph 15.

[28] See paragraph 29.

[29] [2017] 4 WLR 170.

[30] *Mann* was not cited to the Supreme Court in *Lewis.*

51. There is a separate issue in respect of *as of right* relating to the effect of the public inquiry in 2016.

52. The objectors also contend that the Playing Field is not registrable as a town or village green by reference to statutory incompatibility as explained by the Supreme Court in the *Newhaven* and cases *Lancashire/Surrey*.

53. In my consideration below I first address the issue relating to statutory incompatibility before turning to the two further issues relating to *as of right.*

54. The arguments set out in detailed submissions to me cover a great deal of ground. In my consideration below I have identified and addressed what I consider to be the key points. In doing so I have sought to take into account all the material and submissions that have been made to me.

Issue 1: statutory incompatibility

55. Registration of land as a town or village green gives the land statutory protection from development and activity harmful to it as a town or village green. Accordingly it is easy to see that, if land is held for statutory purposes, registration would interfere with the purposes for which it is held. The legal implications of this conflict were first considered in *Newhaven* where the conflict was with the statutory duties of a port authority. The Supreme Court held that, in the circumstances, land held which was subject to those duties could not be registered as a town or village green. In that case the land in question had in fact been used by local people for recreation without any conflict having arisen; the point was that there was potential for conflict.

56. On the face of it, the position of a local authority which holds land for a specified statutory purpose is exactly the same as that as a port authority. Thus land held by an education authority for the purposes of education would not be registrable; and this is what the Supreme Court held in *Lancashire/Surrey* It did not matter that the land in question was open and unenclosed and that there were no immediate plans to use the land for educational purposes: what mattered is that the land might be used in future for those purposes, with which registration was incompatible.

57. For the Supreme Court so to hold produces this complication. Local authorities are statutory bodies and most of the land which is vested in them will be held for statutory purposes. There were three cases where the registration of land held by a local authority for statutory purposes had been upheld by the Court of Appeal or House of Lords/Supreme Court. The land that was registered as a town or village green in *New Windsor v Mellor*[31] might be an exception but that in *Oxfordshire County Council v Oxford City Council and Robinson*[32] was held for housing and that in *Lewis v Redcar* for development. Statutory incompatibility was argued in none of these cases, and they were distinguished in *Newhaven* and *Lancashire/Surrey*. It is important to note *Oxfordshire* and *Lewis* and their treatment by the Supreme Court because the Court was recognising that not all land owned by a local authority under statutory powers was registrable.

58. However this may be, one can see that, in the present case, had an application been made to register the land at Stoke Lodge before 2010, it would have been defeated by reference to statutory incompatibility: the land was held by Bristol City Council as education authority for the purposes of education.

59. In 2010, the arrangements changed. Parliament passed the Academies Act 2010. This empowered the Secretary of State for Education to enter into academy arrangements with any person. The arrangements were, in summary, that that person provided education without charge and that the Secretary of State provided funding for that provision. The Act provided that existing maintained

[31] [1975] Ch 380 (CA).

[32] [2006] 2 AC 674 (HL).

schools could convert themselves into academies, and, if they did, the Secretary of State could make a scheme for the transfer of land of the maintained school from the local authority to the Academy. In the present case Cotham School, which before had been a maintained school, turned itself into an academy and the land on which it stood and its playing fields (which are the subject of the application for registration as a town or village green) were transferred to the Academy by way of a 125 year lease. The City Council hold the reversion of the lease. This was by virtue of a scheme made by the Secretary of State under section 8 of the 2010 Act.

60. A simple analysis of the new situation arising is that nothing has essentially changed: the School in effect stand in the shoes of the education authority and that statutory incompatibility continues to apply. On this analysis the relevant incompatibility is that between the powers and duties of the School and registration.

61. It seems to me that such an analysis would not reflect the new circumstances. The statutory provisions in Lancashire upon which County Council relied as showing incompatibility were:

(1) section 8 of the 1944 Education Act which imposed a duty on local education authorities "to secure that there shall be available for their area sufficient schools" for providing primary and secondary education, sufficient in number, character and equipment;

(2) sections 13 and 14 of the Education Act 1996 which require local authorities to contribute to the development of the community by securing efficient primary and secondary education;

(3) section 542 of the 1996 Act which requires school premises to conform to prescribed standards, including (under regulation 10 of the School Premises (England) Regulations (SI 2012/1943)) suitable outside space for physical education and outside play;

(4) section 175 of the Education Act 2002 which requires the education authority to "make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children".

62. In the new situation (1), (2) and (4) have no direct application.

63. I am of course aware that, as regards academies, by section 94 of the Education and Skills Act 2008, the Secretary of State may by regulations prescribe standards for independent educational institutions, of which academies (specific provision for which is contained in the Academies Act 2010) are one. By regulation 3 of the Education (Independent School Standards) Regulations 2014 (SI 2014 No 3283), the relevant standard is provided by paragraph 29 to Schedule 1 of the Regulations:

(1) The standard in this paragraph is met if the proprietor ensures that suitable outdoor space is provided in order to enable—

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

64. Thus if any person is to run an Academy accordingly to law, he or she or it **must** comply with this standard. However, a duty on a proprietor to ensure the availability of outdoor playing space if he

operates an independent school is rather different to the interference with a statutory functions of an education authority. It does not seem to me that the Courts would hold that the land of an independent (private[33]) school could not be registered as a town or village green[34].

65. In its submissions, Cotham School distinguish the position of the School from that of an independent school, established by a charity or private corporation. It points out that by section 10 of the Education Act 1996, the Secretary of State has a duty to promote the education of the people in England and Wales. Further

(1) The Secretary of State shall exercise his powers in respect of those bodies in receipt of public funds which—

...

(b) conduct schools, institutions within the further education sector or 16 to 19 Academies in England and Wales,

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

66. I am very ready to accept that one of the ways in which the Secretary of State carries out her functions to promote the education of people in England and Wales is through the provision of academy schools under the Academies Act 2010. What is less clear and whether and if so how this makes a difference: so that an academy can rely upon statutory incompatibility but a school that is not in receipt of public funds cannot.

67. The point that is made is that the situation is analogous with the Surrey case considered in *Lancashire/Surrey* (which concerned the land of a hospital).

68. In this case, at the time of the application, the land was owned by the Surrey Primary Care Trust which had a statutory duty under section 83 (1) of the National Health Service Act 2006 to provide primary health care in this part of Surrey. If this had remained the position, it is clear that statutory incompatibility would have applied in the same way that it was held to apply in *Lancashire*. What made the situation different is that by the time the registration authority came to consider the matter, the Primary Care Trust had been abolished. A wider duty to provide health care was now imposed upon the Surrey Downs Clinical Commissioning Group by section 3 (1) of the National Health Service Act 2006 (as amended). The land itself was vested in NHS Property Services which was a company established under section 223 (1) to provide facilities or services to persons or bodies exercising functions, or otherwise, providing services under this Act.

69. Gilbart J (whose reasoning was approved by the Supreme Court) said:

... Land could only be acquired or held if done so for the purposes defined in the relevant Acts. The defined statutory purposes do not include recreation, or indeed anything outside the purview of (in summary) the purposes of providing health facilities. Could the land be used for the defined statutory purposes while also being used as a town or village green? No one has suggested that the land in its current state would perform any function related to those purposes, and the erection of buildings or facilities to provide treatment, or for administration of those facilities, or for car parking to serve them, would plainly conflict with recreational use.

[33] Confusingly in this context, one notes that in England private schools are called public schools.

[34] Many such independent schools are charities. It might be argued that the land of a charity could not be registered as a town or village green on the basis of statutory incompatibility but, for a court so to hold, would seem to me to be extending the law as it was held to be in Newhaven and Lancashire.

135. Indeed, it is very hard indeed to think of a use for the land which is consistent with those powers, and which would not involve substantial conflict with use as a village green. A hospital car park, or a clinic, or an administrative building, or some other feature of a hospital or clinic would require buildings or hard standing in some form over a significant part of the area used.

70. It will be seen that registration of the land as a town or village green would not have inhibited NHS Property Services making it available to the Commissioning Group; by contrast, the Commissioning Group which had the duty to provide health care did not own the land. I find it hard to escape the view that it is the combination of the two related elements which together gave rise to statutory incompatibility. I note that Lord Carnwath and Lord Sales referred in the context of the *Surrey* case to the statutory regime under which the land was held.

71. I accept that there is an analogy between the NHS Property Services/Commissioning Group relationship and Secretary of State/Academy relationship but it is not exact and does not reflect that the School is not providing education by reference to a statutory function but by its constitution.

72. The School argue that even if it is right that the terms on which the land is vested in the Academy do not mean that statutory incompatibility arises, it still arises by virtue of the fact that the City Council hold the reversion of the lease for education purposes. One sees the point but if land is not to be registered on the basis not of its statutory incompatibility with the any functions which are potentially exercisable as of now in respect of the land but in the future (on the face of it more than a hundred years hence) when the reversion falls in, statutory incompatibility will, it seems to me, be extended significantly further than in *Newhaven* and *Lancashire.*

73. It may be helpful if I summarise my conclusion above. The School, which has immediate possession of the Field by reference to a 125 year lease of it, is not under a statutory duty to provide education in the same way that an education authority does; Bristol City Council, which holds the reversion of the land for the purposes of education, has no immediate entitlement to use the land for those purposes. Any incompatibility looks much less compelling than that arising in *Oxfordshire* or *Lewis.* In these circumstances, to apply statutory incompatibility to the circumstances arising seems to me an extension of the law. I remind myself that there is no provision in statute (particularly the Commons Act 2006) which operates to defeat registration in situations of suggested statutory incompatibility. I think that, asked to rule upon the matter, a Court might hold statutory incompatibility to be applicable in the current circumstances. However, it does not seem to me appropriate for a registration authority so to extend the law.

74. In these circumstances, I do not advise the registration authority to reject the applications on the basis of statutory incompatibility.

Issue 2: the signs

75. Before the Second World War, in Stoke Bishop there was a large house with extensive grounds called Stoke Lodge. After the war it was sold to Bristol City Council. The extensive grounds became school playing fields (with the pitches being used by local sports clubs out of school hours) and the house an adult education centre.

76. Until local government re-organisation in 1974, Bristol City Council was a unitary authority. In 1974 it was abolished and a “two tier” arrangement put in place with some functions being the responsibility of a newly constituted county council and some of a newly constituted district council. The newly constituted county authority was called Avon County Council and the new district council was (somewhat confusingly) called Bristol City Council.

77. Avon County Council succeeded to the education functions of the old Bristol City Council so that in 1974 the whole of the Stoke Lodge land became vested in the County Council. Local government changed again in 1996. Avon County Council was abolished and Bristol City Council became, once

again, a unitary authority. As such it had responsibility for education and the land at Stoke Lodge once again vested in it.

78. The extensive grounds of Stoke Lodge are particularly attractive having a gently rolling character and containing a number of fine trees. Although fenced, the grounds were never fenced off from the public and there was unrestricted access through gates which were not locked. Accordingly, it is not surprising that, following conversion into playing fields, the land was used by local people for informal recreation, including dog walking. This use has never been the subject of a formal permission and, in its inception and for a long time thereafter seems to have been a classic case of use which was acquiesced in. The significance of this is that use which is acquiesced in – tolerated and not the subject of a permission or consent - would have been *as of right*[35]. Such use would have supported an application for registration of a town or village green. (The contrast is with the situation where the use of land is permitted and users enjoy thereby a right to use the land. Such use is not as of right and would not support an application for registration of a town or village green).

79. However in, it would seem, 1985 or 1986[36], Avon County Council put up three notices which made it clear that the Council were contesting the use and no longer acquiescing in it[37]. Accordingly when an application was made to register the playing fields as a town or village green relying on the twenty year period 1991 – 2011, I took the view that the use had ceased to be *as of right* and that there was not qualifying use throughout at least part of the relevant twenty year period, namely the period between 1991 and 1996 during which Avon County Council existed[38]. As I have explained, the law is that sufficient steps have to be taken by a landowner to communicate to users that their use is contentious. In the circumstances I considered that it was. In addition to use being *as of right*, it also has to be significant. It seemed to me clear that it was – users would have been aware of the signs. It also has to be by the inhabitants of a locality or neighbourhood within a locality. I considered that both these requirements had been met. Accordingly the one objection to registration was that the use had not been *as of right*. I advised that this one objection was decisive and, as explained in detail above, in due course the City Council decided to reject the application.

80. The current applications relate to the period 1998 – 2018. Avon County Council had ceased to exist in 1996. If the effect of the abolition was that the notices ceased to be effective in 1996, it would mean that absent some new objection to registration emerging, the land would be now be registrable as a town or village green. On the other hand, if this was not the case and the notices went on being effective into the relevant period, the land would not be registrable.

81. I think that it is helpful to begin with consideration of this issue.

82. By virtue of section 17 of the Local Government Act 1992 and article 5 of the Avon (Structural Change) Order 1995 (SI 1995 No 493) the County of Avon ceased to exist and Avon County Council was abolished on 1 April 1996. Article 5 provides as follows:

5 Existing local government areas

[35] See *Mills v Silver* [1991] Ch 271 (CA).

[36] See paragraph 233 of the 2016 report.

[37] In the 2016 report I rejected an argument that the signs, as a matter of construction, did not make use of the field contentious. In his judgment quashing the decision of the City Council to register the land as a town or village green, Sir Wyn Williams upheld my interpretation of the signs and advice that use in the period 1991 – 2011 had not been *as of right.*

[38] An applicant for registration has to show qualifying use throughout the relevant 20 year period. Accordingly it was not necessary to determine whether use after 1996 was or was not as of right. I did however express a view about this: see paragraph 86 below.

(1) ***The existing county of Avon*** *and the existing Avon districts of Bath, Wansdyke, Kingswood and Northavon* ***shall be abolished****.*

(2) ***The County Council****, Bath City Council, Kingswood Borough Council, Northavon District Council and Wansdyke District Council* ***shall be wound up and dissolved*** (emphasis supplied).

83. Accordingly, at the beginning of the relevant period, Avon County Council did not exist and had not existed for more than two years.

84. As explained above, the applicants submit as regards the Avon County Council signs that they are not relevant to their applications because at the beginning of the 20 year period that applies to the applications (1998), Avon County Council did not exist. They argue that by an operation of law (the abolition of the Council), a necessary fact to render the signs effective (the existence of the Council) had ceased to obtain. If one postulates the signs doing service for the landowner in person attending at the land and warning trespassers off, on the day before the abolition of the Council there was such a person present and warning trespassers off; on the day after, there was no such person but a new owner. That new owner, it may be argued, never contested the use but acquiesced in it.

85. This submission has the merit of simplicity. Further, it will be noted that it is either correct or incorrect; it involves no shades of grey. If it is correct, the existence of the signs and thereafter will be irrelevant and the argument which was decisive in leading to the rejection of the 2011 application will not obtain.

86. In considering the 2011 application, the continuing effect of the signs after 1996 (the abolition of the County Council) was not determinative; it was enough that they had the effect of making the use between 1991 and 1996 contentious. However, the use relied upon by did continue after 1996 and in my *Report* dated 14 September 2016, I did express a view about it. This was as follows:

First, I think that if someone comes across an old and decrepit sign saying "Trespassers Keep Out" he might from all the circumstances consider that it was of no continuing application. Second, although the fact that a sign says "Avon County Council" rather than "Bristol City Council" does not mean that, the day after Bristol City Council takes over from Avon County Council, the notice ceases to have any effect, someone might well wonder, say, ten years after Avon County Council ceased to exist whether any particular sign that it put up had continuing effect.

87. It will be seen that I did not accept that the signs ceased to be of any effect upon the abolition of Avon County Council. Bristol City Council as landowner and Cotham School argue that I was correct to take this view. The City Council add:

14. Avon County Council was abolished and its educational functions were transferred to Bristol City Council as part of a re-organisation of local government on 1 April 1996. There was no suggestion in the statutory provisions that this was anything other than an administrative alteration that was not intended to alter any of the arrangements or decisions made by Avon whilst in existence that related to its statutory functions. Any reasonable local resident would have known that Avon was being abolished and its functions and responsibilities transferred to Bristol. No reasonable person could have concluded that Avon's statement, policies and notices were to cease effect at midnight on 31 March 1996[39].

88. Revisiting this point, I have not changed my mind as to the continuing effect of the notices after 1996. In order to make use contentious by reference to signs, there is no requirement upon the landowner to identify himself. Moreover it is unrealistic to think that any person visiting the land on the first day of its ownership by Bristol City Council would have thought that his legal position had

[39] See p 20.

changed. This, of course, is looking at the matter subjectively. As a matter of objective fact, the position was that the powers and responsibilities had passed to Bristol City Council by operation of law. The effect of this is that Bristol City Council succeeded to the shoes of Avon County Council. I consider that this means that if Avon County Council objected to the use of the land by local people, Bristol City Council continued to do so as its successor. The supersession of the County Council by the City Council was not, of course, a secret matter and all the relevant documentation was in the public domain. A member of the public investigating the position would have appreciated that Bristol City Council had taken over from Avon County Council by operation of legal instrument and that there was no reason for considering that the attitude of the City Council was any different to that of the former County Council: it had not in as a matter of fact altered its position from objection to acquiescence.

89. If the analysis above is correct, then the position as regards the contentiousness of the use of the land by local people did not change in 1996.

90. Further, that analysis would suggest that the notices were still effective in 1998 when the relevant period began on which the applicants rely. Indeed, it seems to me that if, as a matter of law, the notices did not cease to be effective in 1996, there is no basis for suggesting that they would have ceased to be effective in 1998. Nothing changed in the intervening period to 1998 after the abolition of Avon County Council and, in particular, the notices had not become decrepit. If this is correct, on the face of it, this finding is fatal to both applications because neither Ms Burgess nor Ms Welham can have established use which for the relevant 20 years was *as of right;* the use at the beginning of each period relevant period was contentious by reference to the signs (whatever the position at the end of each period).

91. It is my view that that the notices are fatal to the current applications in respect of the period 1998 to 2018 in the same way as they were fatal to the application made by Mr Mayer in respect of the period 1991 to 2011. However, the argument that Ms Burgess and Ms Welham make goes wider than saying that in 1996 the notices ceased to be effective. They say that, in the light of information which has now become available, the position is that notices were not effective before 1996. They argue that the view I took of the matter in my first report was wrong (albeit that this was not a matter of criticism, since I had advised in ignorance of the additional information). I have carefully considered these additional matters but I have concluded, as I explain below, that they do not fundamentally affect the position.

92. The additional matters go back to 1982, a time when there were no signs and use by local people, being acquiesced in, would have been *as of right.* The basic proposition being advanced is in that in the light of all that happened thereafter, use never ceased to be acquiesced in and thus *as of right.* It is further submitted that, if it did cease to be *as of right* by virtue of the erection of signs, then, taking everything that happened thereafter into account, it once again was acquiesced in (and thus, *as of right*) at some point thereafter so that qualifying use continued for more than twenty years down 2018.

93. In 1982, section 40 of the Local Government (Miscellaneous Provisions) Act (1982) was enacted, after debate, to deal with what the Minister described as *relatively minor problems*. He identified the following: *In rural areas, the problem may be one of people exercising horses and dogs on school playing fields which results in the digging up of turf. In urban areas, trouble is more likely to be caused by groups of youths making a noise and disturbing evening classes.* Evidently he thought that control of this sort of activity might facilitate wider community use of school playing fields. The section created an offence in respect of school playing fields of causing or permitting nuisance to the annoyance of lawful users of the playing fields. The enactment of section 40 (which came into force on 13 September 1982) was reported to a meeting on 7 September 1982 of the Education Committee of Avon County Council by the Director of Administration and County Solicitor who observed that *the section will have the effect of widening the powers of the County Council quite significantly in cases of minor nuisance and disturbances on educational premises.*

94. Also September 1982, the Director of Education of Avon County Council prepared a Report for a meeting of an Ad Hoc Committee of the County Council held on 17 September. The Committee was concerned with the community use of County Council premises and comprised members of the Land and Buildings Committee, the Education Committee, the Community Leisure Committee, the Social Services Committee and the Personnel Committee.

95. The first section of the Report was entitled Introduction and Background. It said:

At the last meeting the Committee members asked for a report on the ways in which the community use of buildings could be extended. It was suggested that specific consideration should be given to an increase in the number of multi-let sessions without additional cost, and that consideration also be given to the use of hard play areas and playing fields. This report will outline the possible methods by which increased community use could be encouraged.

96. As one might expect, a lot of the report is taken up with how schemes might be developed with other stakeholders for the authorised use of buildings, hard play areas and playing fields. However, it also touched on wider matters:

4.2 Informal use
The majority of the Authority's larger playing fields are used informally by members of the public, although the extent of use varies from site to site according to local conditions. ***This informal use of playing fields has increased rapidly over the past few years to a point where public use is now customary and readily accepted by the local community and Governing Bodies.*** *Elsewhere the availability of playing fields and hard play areas varies from the total exclusion of the public to a completely open plan approach whereby all the playgrounds and playing fields are used by the community without question. It is evident that the availability of education facilities depends on the location of each establishment, the site conditions and the attitude of the Governing Body and Head Teacher. Some playing fields are now so well used at weekends that it is no longer possible or worthwhile to maintain security fencing ... (emphasis supplied)*

4.3 Vandalism/security problems
The Authority, in recognition of increased public demands for facilities, has for some time tacitly accepted that its playing fields in particular can be utilised by the local community. *However, this approach has to be tempered with the amount of vandalism and misuse of property which can occur; the problem is non-existent in some areas and very prevalent in others. The existing practice normally restricts public access to grassed areas only, as hard play areas are provided next to buildings and to allow hard play areas to be used has generally meant an increase in vandalism to the buildings ... The numbers of complaints received from schools and parents in relation to the fouling of fields by dogs has increased dramatically over the past years (emphasis supplied).*

97. Section 5 contained the following:

There is little doubt that the present "informal" use of fields will continue to increase and the point will be reached when difficulties will occur, unless there is a more positive and defined Authority Policy on the use of external facilities. Some fields are so well used and the community involvement has existed for many years. However, there are instances where public use has been actively discouraged and where, with a little imagination, reasonable access could be provided, if only on a trial basis.

98. Section 6 presented the Director's conclusions. The section began:

The Authority needs to recognise the amount of informal use which now exists in many areas by the creation of a more positive attitude to public use. Although great care has to be taken to avoid an upsurge in misuse and vandalism with its attendant cost implications, there does seem to be scope for a gradual phased programme of increased public access which would form part of a policy statement

on access to facilities. The Director recommended a number of practical ways in which access could be improved. These included the drawing up of a policy document for guidance of members and officers, governing bodies, heads of establishments, voluntary and statutory bodies which would express the Authority's long term objectives.

99. At the meeting itself on 17 September 1982, the Director said that:

... he estimated that up to half the County Council's playing fields were used by the public on an informal basis. In addition there were organised lettings for hockey, rugby, football, cricket. He said adult and youth organisations caused few problems but it was considered that the informal use should be more controlled ...

100. The Chairman said that

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

... if the public considered they had an official entitlement to use facilities, albeit on a casual level, they were more likely to protect those facilities themselves than if they were officially denied all rights of access.

101. The minutes of the Ad Hoc Committee report that the Committee supported the further practical steps identified by the Director in his Report.

102. I do not know if the Ad Hoc Committee met again; if it did, it did not again consider the issue of informal access[40].

103. On 6 April 1983, the Agriculture Working Group of the Land and Buildings Sub-Committee considered the position at Kensington Meadows Playing Fields in Bath. These were playing fields at a distance from the schools that they served.

104. It was reported that

In 1978 the playing fields had been substantially reconstructed to new levels etc at an approximate cost of £8,500 (the land having originally been purchased for use as a controlled tip) ...

During the whole of the time that the land had been in public ownership, various local residents had attempted to establish rights of way and of access but these had not been substantiated. Nevertheless, the fields had been the subject of severe and persistent trespass and vandalism and the cost of reinstatement and repair ran into thousands of pounds over a long period. Repairs to fencing and gates had recently cost £1,600 for example.

The form of public use varied but the principal problems were the unauthorised use of the playing pitches, car parking, people wanting to fish and the flying of model aircraft (to the annoyance of nearby residents).

Officers were taking all reasonable steps to protect the interests of the County Council and local residents, but there was a need to clarify whether the use of the playing fields should be encouraged

[40] If there were any subsequent meetings of the Ad Hoc Committee which considered relevant matters, I would have been supplied with copies of the minutes relating to them.

or controlled in some way because without some decision on the matter of public use it did appear that there was little prospect of an improvement in the present situation.

105. Members were reminded that

... similar situations existed on other playing fields within the County, such as at Stoke Lodge, Bristol, where the main problem was the exercising of dogs.

106. The Committee resolved:

That the Director of Estates Services at the playing field regarding their proper use, and following this the Director of Administration ***post appropriate regulations*** *and County Solicitor, on the recommendation of the Director of Estates Services, take any action necessary, including the institution of legal proceedings of any kind, to protect the County Council's property against unauthorised use* (emphasis supplied).

107. At a meeting of the Group on 21 September 1984, the Group again considered the position at the Kensington Meadows Playing Field. The Report states:

On 6 April 1983, the Working Group had approved a report on the problems arising from the unauthorised use of these playing fields. Since that time, the misuse had continued and considerable annoyance caused to adjoining residents, including damage to property. Whilst the Authority had no legal liability in respect of such damage, it was under some pressure to stop the trespass. However, the general view of local residents, other than those immediately affected, appeared to be that Kensington Meadows was a public open space to which access should be freely available at all times and for all purposes, including local festivals, model plane flying, motor cycling and the exercise of dogs.

To erect a fence to reduce the damage would require some 290 metres run at an estimated cost of £3,950 and there would be no guarantee as to how effective this would be or how long it would last. No specific financial resources were available.

108. It was resolved that no further action be taken. It may be assumed that no fencing was erected at Kensington Meadows at this time; none was erected at the Stoke Lodge Playing Field at this time.

109. These facts supply the background, insofar as it is known, to the erection of the Avon County Council signs at the Stoke Lodge Playing Field. The detailed background is not available, the relevant files having been destroyed[41].

110. In my first report, relying on the oral evidence of somebody who was concerned with their erection, I said that the signs at the Stoke Lodge Playing Field were erected in about 1985/86[42]. The Applicants suggest that it is likely to have been earlier i.e. following the resolution of the Agricultural Working Group on 6 April 1983. One sees the point: if signs were erected at Kensington Meadows it is perhaps likely that they were in the same form as those erected at Stoke Lodge[43]; and that if some signs in the same form were being erected at that time, it is likely that other signs (which we know were erected at some time) were erected at the same time. It seems to me, nonetheless, that the reasoning involves a number of assumptions which may not be correct. However, in the circumstances, I do not think that the precise date of the erection of the signs is significant.

[41] *Ibid* at paragraph 237.

[42] See paragraph 233 of the 2016 report.

[43] I have no information as to whether they were or not.

111. It seems to me that the argument I am presented with is as follows. We have details of what happened at Kensington Meadows. The County Council put up signs there which were in the same or similar form to those at the Stoke Lodge Playing Field. However, it subsequently resolved not to fence Kensington Meadows. In these circumstances, it was acquiescing in the use of Kensington Meadows. If it was acquiescing in the use of Kensington Meadows, it was also acquiescing in the use of the Stoke Lodge Playing Field.

112. As noted, the argument makes a number of assumptions which may not be justified but what is key is that I am not considering an application to register Kensington Meadows as a town or village green and whether use of that land has been *as of right.* I not persuaded that the use in that case was acquiesced in – but I am not called upon to determine that issue. I have to look at the facts as they relate to the Stoke Lodge Playing Field and I do not think that the position at Kensington Meadows assists me.

113. In the 2016 report, I construe the meaning of the signs. As the law requires[44], I did this on an objective basis. On such an objective approach, I took the view that they were forbidding trespass and that the specific activities identified were examples of that ("in particular"). I noted that the signs would not accurately have stated the effect of the act since the exercising of dogs was not *per se* an offence[45]. I have not changed my view as the objective meaning of signs. It is this that is relevant – how they would have been interpreted by a reasonable reader. It was possible that they subjectively put a different meaning upon them – considering perhaps that it was only dog walking to the annoyance of others that was forbidden – but that was an interpretation that what not warranted by the actual words used. In my first report as I have noted I placed emphasis on the words *In particular*; I might also have noted the words *Requests for authorised use should be made to the Director of Education*. The signs envisaged that e.g. requests for the flying of model aircraft would be made to the Director.

114. If I go back to the meeting of the Agriculture Working Group on 6 April 1983, it is possible that the Group did not intend to prevent activities such as dog walking but only activities which caused a nuisance. If so, and if the signs that were erected were the same as those erected at the Stoke Lodge Playing Field, then the signs may have gone further than was warranted by the Group's resolution and, conceivably, this affected the way in which the notices were to be construed. But if that was so (and there are two big "ifs" involved as well as a particular point of construction), it does not mean that the signs in respect of the Stoke Lodge Playing Field are not to be given their objective meaning. Given that objective meaning, I consider that they made use of the Playing Field contentious. Insofar as it is relevant, I think that the County Council must be taken to have intended to make it contentious. The Applicants have shown that in 1983 there was a lot of discussion within the County of dual use of playing fields and, in that context, of informal use by the public. Evidently the County Council wanted to facilitate community use of its playing fields. But the minutes nowhere show that it was deciding to tolerate it[46]; and they do show that it was very alive to the difficulties of informal access. Thus the evidential basis for suggesting (if relevant) that the signs at the Stoke Lodge Playing Field did not reflect what the County Council actually intended does not exist.

115. It is, of course, still necessary to consider what happened after 1985/6[47] to see if, for any reason, at some date thereafter use ceased to be *as of right.*

[44] See paragraph 21 of *Barkas* per Lord Neuberger.

[45] See paragraph 369.

[46] Subject to this: it made a decision not to fence Kensington Fields.

[47] Or 1983, if the signs were erected then.

116. From 1987, Government pursued a policy of giving greater control over school premises to the schools themselves. Thus section 42 of the Education (No 2) Act 1986 provided that school premises were to be under the control of the school's governing body subject to any direction being given by the local education authority. Neither Avon County Council nor (after 1996) Bristol City Council ever gave such a direction.

117. I do not think that this has any bearing upon whether the use of the playing fields was *as of right* between 1987 and 1996 (when the law was changed). I am not entirely sure whether the playing fields were part of the premises of Fairfield Grammar School (who had use of the playing fields at this time) but it has not been argued to the contrary and I am prepared to proceed on this basis. What seems to me to be significant is the fact that neither Fairfield School nor the education authority did anything to affect what might be called the "status" of the land, namely the fact that use of it had been rendered contentious by the erection on it of appropriate signs.

118. In 1990, local management of schools was introduced under the provisions of the Education Reform Act 1988. As I understand it, this was under the framework of the Education (No 2) Act 1986 but provided for schools to be responsible for their own budgets. Avon County Council positively resolved that as part of this process, governing bodies would be free to determine the use to be made of their premises. I do not think that this added to the powers of Fairfield School; the significance of it, such as it is, is that Avon County Council were saying that their policy, for the future, was not to determine the use to be made of school premises[48]. Once again I do not think that this has any bearing upon whether the use of the playing fields was as of right between 1987 and 1996. What seems to me to be significant is the fact that Fairfield School did nothing to affect the "status" of the land, namely the fact that use of it had been rendered contentious by the erection on it of appropriate signs.

119. In 1996, section 149 of the Education Act 1996 came into force, replacing section 42 of the Education Act 1986. It was in similar terms to section 42 although it contained the additional provision that in exercising control of the use of the school premises outside school hours, the governing body should have regard to the desirability of the premises being made available for community use. Similarly, in 1999, section 149 of the Education Act 1996 was replaced by section 40 and Schedule 13 of the School Standards and Framework Act 1998, which was in the same or similar terms. I do not see how these changes affected the status of the land for the same reason that I do not think that the changes to the law in 1987 and 1990 affected it.

120. In 2000, the playing field became the designated playing field for Cotham Grammar School (from 2001, Cotham (Comprehensive) School)). In 2004, the School entered an agreement with the University of Bristol which provided for the University to maintain the playing field. A schedule to the agreement set out the Services and Service Levels that were to be provided and under the heading *Athletics* it was stated

pits etc will be kept as clean as possible, considering the site is open, at present, to the public and dogs[49].

This represents a recognition by the School to a third party that access to the public was occurring and makes practical provision for it. I do not consider that the recording of the facts as to the use of the land can be taken as affecting the quality of whatever on going use there was of the site. If, as I consider, it was contentious by virtue of the Avon County Council signs, it did not cease to be contentious because the fact that it was occurring was recorded in this agreement

[48] The County Council could, of course, thereafter have changed its mind and, at some date in the future, adopted a policy which potentially did impinge upon the powers of governing bodies.

[49] Subsequent agreements were in the same terms.

121. In 2009, Bristol City Council replaced one of the Avon County Council signs[50]. The background evidence about this is set out in my first report:

H4 [an employee of Bristol City Council from about 1985 until 2014] cannot recall the exact dates but it would have been around late 2008/early 2009 that he was given the responsibility of commissioning new signs to be displayed at the entrance to the site. He knew that there were other signs around the site, but he specifically recalls arranging for a new sign to be displayed in the grounds of the adult learning centre. This was a decision of his line manager. This was because this was considered to be the main entrance to the site accessed by members of the public. Its intended purpose was to advise members of the public that they would need to get permission from the Council if they wanted to use it: he said "It is therefore true to say that this sign was put up because the Council did not want members of the public to use the site". He recalled that trespassing was becoming a real concern to CYPS [Children and Young People's Services] *and "the main reason for the new signage was to safeguard the children who were using the site with permission due to a number of issues such as people walking their dogs on the site and failing to clear up after them, acts of vandalism, graffiti and general trespassing". The office had been inundated with calls about dog muck in the grounds and similar. The land was an important educational facility that was regularly used by children, including a school and a football club. It was also considered that as Avon County Council had been abolished in 1996, the existing signs were out of date and needed to be replaced. This was following advice received from a barrister following the "Packers" TVG case. Attached to an e mail dated 26 March 2009 would have been details of the proposal for the Bristol City Council sign and the sign would have been produced after that time. The wording was word for word what had been suggested by the barrister. H4 asked the sign company to replace all the signs on the site; they replaced only one. The reason why all the signs were not replaced was because the sign company did not do what he asked them to do. He saw the old sign before it was replaced and the new sign afterwards; his instruction was to put the new sign on the old posts to save costs and he thought that this is what had happened.*

122. At the public inquiry there had been discussion as to whether this new sign related to the playing fields or to the grounds of Stoke Lodge House. As to this, in the 2016 report I said

It seems to me that the sign is, to a degree, ambiguous. I accept, of course, that I have to construe it in a common sense way and in its context.[51]. It is indeed from the context that the ambiguity arises – placed as it is on the boundary between the grounds of Stoke Lodge House and the playing fields. Thus it seems to me that a reader may not be sure whether it relates to the grounds of the house or the playing fields. The possibility of confusion is enhanced if the sign being mounted on a single pole, it was possible for it to be rotated so that it will not always have been facing those leaving the grounds of Stoke Lodge House. However, on balance, I think that the reasonable landowner would consider that he had put up a sign that would be construed by local people as applying to the playing fields and not the grounds of Stoke Lodge. Thus someone considering the sign, even if it had been re-orientated, would consider that it was likely to apply to the playing fields. That, in its context (whatever its orientation may have been) it was taken as applying to the playing fields by at least one person emerges from the letter set out at paragraph 22 above: the lady must have been referring to the playing fields because she refers to the land on which she walks as being a pleasant and open space, which is not an apt phrase to describe the grounds of Stoke Lodge[52].

[50] Its wording was as follows:

[51] See *Betterment Properties (Weymouth) Ltd v Dorset County Council and Taylor* per Morgan J at paragraph 116.

[52] Following the reply to her letter … this lady's use will have been permissive; but that will not have been the general position [Footnote in the 2016 Report].

123. However the point that is now taken is that, in the light of the fact the playing field were now subject to the direct control of the School, an informed observer would have considered that the sign must relate to Stoke Lodge House rather than the playing fields; because (to spell it out) if the sign related to the playing fields it would have been put up by the School and not the Council. I do see the force of this; but the fact that the school now had a power to put up a sign did not mean that the Council did not have such a power. The possibility that the School would not have wanted the City to contest public access to the playing fields does not arise because it did not take any steps at this time to remove its own signs; it seems to me it should be taken in these circumstances to have adopted the City's sign. Accordingly I consider that, in essence, the position after the replacement of one of the Avon County Council signs by a Bristol City Council sign was the same as before: the use of the land continued to be contentious by reference to three signs.

124. On 22 April 2010 a Briefing Note was prepared for the Informal Cabinet of Bristol City Council about community access to school playing fields. The background was potential investment in improvements to two school playing fields, one of them the Stoke Lodge Playing Field. The report flagged the risk of registration of school playing fields as village green and advised

Landowners now need to proactively take steps to keep people [off] their land to prevent future registration.

125. It made it clear that the Stoke Lodge Playing Field was

... currently unfenced and allows unfettered community access.

126. The decision was taken to continue with the investment and approach Cotham School to see whether it might be willing to allow community access. As I understand the applicants' argument, it is that having had the risk and a remedy pointed out to it, if the City Council did nothing, it was acquiescing in the community access.

127. The reason why Informal Cabinet was briefed that there was a need proactively to take steps to keep people off the land to prevent future registration was in the light of *R (Lewis) v Redcar*, decided earlier in the year. Before that decision, the Council had taken the view, in the light of the advice of leading counsel, that registration of its playing fields would not have been possible by virtue of their dual use[53]. However *Redcar* had rejected that argument. Thus, all other things being equal, there was a risk of any and all of the playing fields of the City Council which were subject to dual use being registered as town or village greens on the basis that the City Council had acquiesced in their use. However the Briefing Note did not take into account the existence and effect of the Avon County Council signs at Stoke Lodge. It seems to me that, if the City Council **had** been acquiescing in use by local people, the Briefing Note could be taken as evidence of the City Council's continued acquiescence. However, if as I consider to be the case, the Avon County Council signs did make the use, the failure of the City Council to do anything following receipt of the Briefing Note in September 2010 is not evidence of continued acquiescence; it is simply a failure to do anything from which, in my judgment, nothing can properly be inferred. It did not affect whatever effect the Avon County Council signs had.

128. On 1 September 2011, Cotham School became an academy and was granted by the City Council a 125 year lease of the playing fields[54]. The terms of the lease provided that it was

[53] See paragraph 4 of Appendix D to the Briefing Note. The advice was that of Nigel Giffin QC dated 14 December 2009. I have not seen a copy of this advice; evidently Mr Giffin took the view that from the exclusion of local people from the playing fields during their use by schools, a permission was to be implied in respect of their use by local people during the rest of the time; so that their use would not have been *as of right.*

[54] See paragraph 58 above.

... subject ... to the existing rights and use of the property including use by the community[55].

129. The insertion of this provision suggests that the City Council thought that the community might have some sort of entitlement to use the land. One may note that the original application to register the land as a town or village green was made in March 2011[56]; it seems to me would have been prudent to recognise in any such lease the possibility of town or village green rights arising. The effect of the provision was that, if there were or are any such rights, the School could not have been able to complain to the City Council about their assertion. But the lease does not tell me anything about the quality of the use of the land by the community (i.e. whether it was or was not *as of right*). Even if, when it entered the lease, the City Council thought that there were or might be town or village green rights, this does not mean that there actually were any rights[57].

130. I now need to note certain evidence as to what happened "on the ground".

131. Cllr Abraham, between 1983 and 2021 the member for the ward of Stoke Bishop on Bristol City Council recalls that at some point in the 1980s a new caretaker started to lock the gates to the playing fields. He says that this caused great concern to many people and the lock out was reversed. It is possible to date this occurrence to 1987 or 1988 by reference to the evidence of Hilary Corfield who also recalls the occasion when the gates were closed, and can date it because she is confident it was an occasion when her first son got rust on his hands from the mesh of the fence. This would also tie in with the known date of the appointment of a new caretaker in 1987.

132. There was another relevant occurrence in 1990.

133. There was evidence before the first inquiry that the employees of the council would block off Cheyne Road access. This action can be dated to after 1987. The principal concern seems to have been motorbikes getting on to the field, The evidence is not entirely clear[58] but it seems that a tree trunk which had fallen nearby was used to obstruct the gap; for a time it may be that this stopped the motorbikes but permitted access to pedestrians. There then came a time when the tree trunk was pushed against the opening. What happened next is described in an article in the Bristol Post for 8 January 1990 entitled '*Guerilla tactics' to clear footpath.*

134. As reported what had happened is that twenty Stoke Bishop people had taken a van to Cheyne Road and loaded the offending wood and debris into it; which was then taken to a tip:

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

'I have used it for 35 years since I played on the fields as a little girl and others say it has been in use much longer. There was a stile there.'

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[55] See clause 2.1.

[56] Although the date for considering whether the land was or was not a village green by reference to that application was thus March 2011, if the application had been made out, the land would not have become a town or village green (and, thus, subject to the rights of local people) until registration: see *Oxfordshire County Council v Oxford City Council and Robinson* (in particular, per Lord Hoffmann at paragraph 50 and Lord Rodger at paragraph 116).

[57] In his judgment, Sir Wyn Williams noted that *It is common ground that the creation of the lease was and is no bar to the registration of the land as a green* (see paragraph 6). It seems to me that this remains the position.

[58] The obstruction of the gap by a tree trunk or branch may have happened on more than one occasion and this account may be a conflation of a number of such occasions.

'We tried to clear it a few weeks ago but it nearly ended in a punch up then. We have seen a solicitor about this but it was taking so long to sort out.'

'Everyone felt so strongly that something had to be done. The police were very good and it was all very civilised.'

'Yesterday there were dozens of people out there walking to make sure it stays open.'

135. A picture is captioned

Victory ... now the protesters must make sure the way stays open.

136. As the report indicates, local people had seen a solicitor about the matter. The solicitor had evidently written to Avon County Council which had replied as follows on 4 January 1990:

Messrs Veale Wasbrough
...

Dear Sir

Access onto Stoke Lodge Playing Field

I refer to your letter dated 28 December 1989 concerning the above.

I am happy to report that the Ground Services Manager of the Property Services Department has advised me that he has placed an order to erect a fence with a gate for pedestrian access and that the work on this will be undertaken within the next four to six weeks.

I have already spoken to one of your clients, a Mr Clarke, advising him of the same when he telephoned this Section on a related matter and he will no doubt, inform his fellow residents.

...

137. The letter is signed on behalf of the Director of Education by an Administrative Assistant (Sites and Accommodation) in the Capital Planning Section.

138. The first thing to say about this letter is that potentially it could be referring simply to access to the field in order to cross it by way of a footpath. However it seems to me that this narrow interpretation would not be justified unless it had been spelled out.

139. The applicants observe:

It is important to note that any restriction of access was partial (one gate only, when many other access points were available) and unofficial and would not have been evident to users generally (only those seeking to enter the land from West Dene)

and

The incidents at the West Dene and Cheyne Road entrances were short-lived, unofficial and did not amount to any more than a minor impediment to access to the land as a whole, since multiple other entry points were available. Only individuals who attempted to use those entry points during the periods of time when they had been blocked would have been aware that anything out of the ordinary had happened, and clearly the matter was rectified shortly afterwards. Many people would have

140. The applicants submit that these matters demonstrate that by 1990 the use by local people was no longer contentious but acquiesced in. Whether or not this is correct seems to me to involve a consideration of the implications of *Winterburn.*

141. David Richards LJ makes it clear that the objecting landowner does not need to go further and prevent the activity to which he objects. Accordingly a landowner can post signs, make the use contentious and leave access to his land unimpeded. He or she does not need to keep gates locked. He or she will not be acquiescing in any use. It seems to me that if following the erection of signs, he or she leaves unlocked gates which were previously locked, he or she will not be acquiescing in the use. This might indeed be rational behaviour; a landowner might not subjectively be concerned whether his land is used or not as long as that use does not ripen into a legal right[59].

142. The position is somewhat different if, having posted the notices, the landowner in some way encourages continuing use. The argument is obvious: if the use is being encouraged, it is not contentious. The notices no longer have any effect.

143. The difficulty with this is that acquiescence is use which is tolerated not encouraged. Thus the combined effect of not locking the gates and facilitating access at Cheyne Road looks to be by way of permission; or, if not the combined effect, then simply the effect of facilitating access at Cheyne Road. As noted, it used to be a requirement that, to be effective as rendering use not as of right, a permission must be revocable (see *Beresford*) but this is no longer a requirement (see *Barkas).* On this basis, use since 1990 would be permitted and not trespass.

144. It does seem to me that so to hold attributes to the occurrences of 1987/8 and 1990 rather more significance than they will bear. By this I have in mind that they would not have been matters known to everybody and thus not of general significance. But if **this** is the correct analysis, the position will be that the signs go on regulating the use of the generality which will be contentious; while the use of others will be permitted. In the somewhat unusual circumstances of this case (and contrary to what I said in the 2016 report) use (albeit by different people) can be both permitted and contentious at the same time.

145. What I think is argued is that by expressly permitting a small category and thus making it clear that it was not objecting to anyone else using the Playing Field, the County Council was making it clear that it was no longer relying on the signs and therefore tolerating/acquiescing in the use of the Playing Field by the majority. It seems to me that this playing fast and loose with the requirement to view the matter objectively. The Council cannot have been **intending** simply to tolerate/acquiesce in the use of the majority; if anyone other than Veale Wasbrough's clients had written to the Administrative Assistant, he would have replied that they, too, could use the field. Viewed objectively, the small category were permitted and the use of the majority was contentious.

146. In 2012 the City installed dog waste bins and that in 2016 it installed a play park with access from the playing fields. I can see the force of the argument that says that the installation of dog waste bins – although a small thing by itself - might suggest to a user of the land that Bristol City Council as landowner was no pursuing a different approach to that of Avon Council (abolished more than 15 years earlier); and that he or she might consider from the availability of the land for use when the School and sports clubs were not using it that the City Council were permitting use[60]. From the

[59] It seems to me that *Winterburn* necessarily opens up the possibility of a discrepancy between what appears to be the case and what (in one sense) actually is the case. It seems to me that in accordance with first principles, it is how the matter appears that is decisive.

[60] It seems to me that while the signs were effective, the argument from *Mann* that permission could be implied from the fact of school use of the playing fields has no application. If one were to say that the signs are of no continuing application, the argument comes into play. I think that, against the background that use for lawful sports and pastimes can co-exist with another use of the land, the facts of the schools usage of the land was not as a matter of fact of a nature to indicate to local people that their use was being permitted.

Applicants' point of view to hold that the use was permissive after 2012 would be fatal to the application. For use to have been *as of right* it needs to be acquiesced in or tolerated. I find the idea of positive acquiescence not amounting to permission a difficult concept. Accordingly, I approach the question of the use after 2012 in this way. One can see an argument that nothing significant changed in 2012 and that the use continued to be contentious. One can also see an argument that the position did change in 2012 and the use was permissive. In either case, use would not be *as of right*. What I find it impossible to hold is that in some way the signs and the litter bins cancelled one another out so that the City Council were now no longer objecting or permitting but (as they were required to do if use was to be *as of right*) **acquiescing.** Accordingly, there was not qualifying use in the period 2012 to 2016. As to the period after 2016, see the discussion of Issue 3 below. Whatever the position down to 2016, it seems to me that use was contentious thereafter[61].

147. On 24 July 2018 the School erected two new signs on the playing field, replacing the old ones. They were as follows:

COTHAM SCHOOL
STOKE LODGE PLAYING FIELD

MEMBERS OF THE PUBLIC ARE WARNED NOT TO TRESPASS ON THIS PLAYING FIELD
In particular the exercising of dogs or horses, parking vehicles, flying model aircraft/drones, playing golf, the use of motorcycles and the carrying on of any activity which causes or permits nuisance or disturbance to the annoyance of persons lawfully using the playing field will render the offender liable to prosecution for an offence under section 547 of the Education Act (1996)[62]

REQUESTS FOR AUTHORISED USE SHOULD BE DIRECTED TO COTHAM SCHOOL
Cotham School accepts no liability to users for any unauthorised use of the playing field.

148. In the light of these signs, it seems to me that after 24 July 2018 the use of the playing field by local people was contentious. I do not think that the terms of the lease by the City Council to the School dated 1 September 2011 prevented the School from erecting this signs or affected what would otherwise be their effect in making the use of the land contentious.

Issue 3: the public inquiry in 2016

149. In its objections to the applications the City Council say:

… between 2011 and 2018 the local inhabitants who supported Mr Mayer's original application were in conflict with the Council as landowner as to whether Mr Mayer was entitled to have the land registered. One of the grounds of objection of the Council and the other objectors was that the use of the land by local inhabitants was not at any time as of right because it was contentious during the relevant period. The Council's view and the inquiry itself was a well-publicised local cause celebre. *Few people who might have been affected by it would not have known of it or the views expressed by*

[61] This may be a convenient place to note an argument made by the School which it says arises if the argument on statutory incompatibility is rejected. It is to the effect that if the land was used under the Education Act 1996 to provide recreational facilities for school children and young people and other categories of user are not excluded, those who are not excluded are permitted. This however has no regard to the signs; and the use of a recreation ground by members of the public when it is only local authority tenants who have an entitlement to go on the land (see *Barkas* at first instance: [2011] EWHC 3653 (Admin)) is a very different factual situation.

[62] By 2018, section 40 of the Local Government (Miscellaneous Provisions) Act 1982 had been replaced by section 547 of the Education Act 1996. They are in the same terms.

the Council, which Mr Mayer and his supporters sought to rebut. If the signage was itself insufficient to render the use contentious, the Council's public stance at the public inquiry did so[63].

150. The School support this objection.

151. As I understand it, the applicants contend that as a matter of law, the matters upon which the objectors seek to rely cannot have made the use of the land contentious. I do not think that this can be right. It is of course correct that what is relied upon involves no physical action in respect of the land, whether by fencing or by the posting of notices. But this cannot be a requirement of making use contentious. If I imagine a situation in which all users and potential users are told orally by the landowner or his agent that their use is contentious, I see no reason why this should not suffice. The School point out that David Richards LJ in *Winterburn* said *[p]rotest against unauthorised use may, of course, take many forms*[64].

152. In support of its objection, the City Council refer to *R v South Gloucestershire Council, ex parte Cheltenham Builders*[65]. The facts in that case were rather different to the facts of the present case. In that case also there were two applications for registration of a town or village green. The first was subject to objection by the owner of the land; not, it may be noted, on the basis that the claimed use had been contentious. In the light of this objection the applicants withdrew their application, later submitting an application in respect of a smaller site. The relied on period of use after the withdrawal of the first application was held to be contentious in the context of the second application. The case is thus authority for the proposition that an objection to a first application may render use in respect of a subsequent application contentious and not *as of right*. It is also authority for the proposition that for use to be contentious there does not have to be a physical act in respect of the land. Contrary to the Applicant's submissions, I do not think that what Sullivan J decided in this regard is in any sense *obiter* and, for that reason, not binding.

153. Nonetheless it is important to note that in *Betterment Properties v Dorset County Council*[66], Morgan J doubted what Sullivan J had held in *Cheltenham Builders*: he said *I am far from certain that I would have reached the same decision as Sullivan J in the* Cheltenham Builders *case*[67]. It seems to me that this this doubt relates to the facts: as in the case before him, nothing had changed on the ground. However in the case before him Morgan J was able to distinguish the facts of *Betterment* from those of *Cheltenham Builders*, so the decision in that case does not directly call *Cheltenham Builders* into question, even if he thought (which he may well not have done) that as a matter of law, there were a requirement for something to change on the ground.

154. It is not open to me, or to the registration authority (unlike Morgan J or another judge of the High Court) to hold that *Cheltenham Builders* was wrongly decided. It seems to me that I have to proceed on the basis that for user to cease to be of as of right does not require as a matter of law something to change on the ground.

155. In support of their proposition that as a matter of law something has to change on the ground, the Applicants also rely on *R (Lewis) v Redcar and Cleveland BC.* This was a case where, as in *Cheltenham Builders* and the present case there were two applications. The first application was rejected after a public inquiry. When it came to consideration of the second application, it was not contended that the circumstances of the first inquiry rendered contentious the use relied upon in respect of the second application. *Lewis* went to the Supreme Court and the applicants urge upon me

[63] See paragraph 17 at p 20.

[64] See paragraph 40.

[65] [2004] 1 EGLR 85.

[66] [2010] EWHC 30

[67] See paragraph 139.

that the effect of the Supreme Court's decision (which was to uphold registration of the land) is that, as a matter of law, objections maintained at a public inquiry cannot render contentious use in respect of a subsequent application. It seems to me that it is not possible to derive such a proposition from circumstances where a point was not argued. However it does seem as though in the particular facts of *Lewis* the argument that the use was rendered contentious by reference to the public inquiry in respect of the first application may not have been available. The inquiry sat between December 2005 and January 2006. The second application was made in June 2007. It would not have been defeated by the fact of use being contentious after December 2005 because of the then two year "grace period" existing by virtue of section 15 (3) (c). The inquiry would have had to have been before June 2005 potentially to render the use relied upon in the second application not as of right.

156. To hold that, as a matter of law, there is no reason why the public inquiry should not render use contentious is not to hold that it actually did.

157. In this regard the applicants say:

… the Council's resistance of the 2011 TVG application does not demonstrate that the use was contentious post 2011. The council's case before the previous Inspector concerned, inter alia, whether the use was "as of right" between 1991 – 2011. Such opposition merely indicated that the Council was of the view that the local inhabitant's use of the land had not been as of right ***during this time****. The fact that the Council's barrister cross-examined some of the applicant's witnesses merely accepts that the use had been as of right between 1991 – 2011. It did not indicate that the use post 2011 was contentious*[68].

158. It seems to me that the applicants' argument is best considered by reference to an example. Consider an application for registration of a town or village green where the landowner accepts that he acquiesced in members of the public entering on his land but disputes that the use has been by a significant number of local people. There is a public inquiry where the landowner makes clear his objection to registration and to the continuance of the use. If I assume that he or she is successful on the basis, a further application might be made seeking to bolster the evidence already given and in any event relying on a period of 20 years terminating at a later date than the 20 years originally relied upon. It seems to me highly arguable that the landowner can say in objection to the second application that his objection to the first rendered use after that date contentious. Local people might not have known about the objection until the inquiry but they would have known thereafter. To say as one might, that the objection only related to the first period of use seems artificial and not reflective of the reality of the situation.

159. It is even more artificial if the case of the landowner at the inquiry was that the use by local people was not *as of right* by reference to signs erected on the land and those signs were still *in situ*. That of course was the position in the present case[69]. In addition, it was clear at the inquiry that the City Council and the School were objecting because they were concerned with the incompatibility, as they saw it, between the use of the land as a town or village green and its use as a school playing field; and based a legal argument upon that suggested incompatibility. Whether or not that argument was correct – a matter, of course, which I have considered above - it made it clear that the continuing use of the land by local people was contentious.

160. Putting the matter broadly, the applicants are saying that the public inquiry made it clear that the registration of the land was contentious; not the use of it for lawful sports and pastimes. Although I accept that this is not a distinction without a difference, it does seem to me that the difference is immaterial in the present context. Local people who knew about the public inquiry would in practice have realised that the City Council as landowner and the School were objecting to the use of the land for lawful sports and pastimes.

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[68] See paragraph 14 at p 28.

[69] Noting, of course, the replacement of one of the Avon County Council signs in 2009.

161. Thus it seems to me that the applicants' response on the facts – namely that post-objection, the only use that was rendered contentious was 1991 – 2011 – does not reflect the reality of the situation.

162. I accept that even this does not necessarily mean that the use post 2011 was by the public inquiry rendered contentious. It might not have been because very few people knew about the objection. The situation might be that although the owner of the land was objecting to the use at the public inquiry, his objections were insufficient to bring it home to local people that this was the case. However, in my judgment, the City's statement that the inquiry was *a well publicised cause celebre* is correct and I note that the applicants do not assert to the contrary. I heard 28 witnesses and throughout the inquiry there was a high level of public interest. In this context, the Cotham School Parent and Carer Group have submitted to me extensive material reflective of local understanding that the use was contentious at the time of the public inquiry and remained contentious thereafter. I have noticed, for example, an appeal for funds by Save Stoke Lodge Parkland which must date from early 2017. The leaflet is headed *Stoke Lodge – the battle continues* ... The Group have also plotted on a map the eleven locations around the playing field pre-2018 where campaign signs were posted (as well as the addresses of those who have provided evidence questionnaires). It is evident that users of the playing field will have seen them.

163. Accordingly I accept the City's assertion that *Few people who might have been affected by it would not have known of it or the views expressed by the Council…*

164. This being so, it seems to me that few people who would have been affected by it would not have realised that their use of the land was not contentious.

Conclusion and Recommendation

165. When I first advised the City Council on this matter, I took the view that a significant number of the inhabitants of a neighbourhood had indulged in lawful sports and pastimes on the playing field in the period down to 2011. I think that they continued to use the playing field in the same way in the period after 2011 down to September 2018. Accordingly the only reason why the land might not be properly registered on the applications of Ms Burgess or Ms Welham is because the relevant use in the periods applicable to their applications was not *as of right*; or because, by virtue of statutory incompatibility, registration would be incompatible with the statutory purposes for which the land is held.

166. My conclusions on these issues are as follows:

(a) I think that, as constituted, the application of Ms Burgess must fail because, after 24 July 2018, the use relied upon was not *as of right*: use which was as of right did not continue down to 13 September 2018. If necessary, I would, by reference to section 15 (3), have advised the City Council that the application could be appropriately amended to rely on a twenty year period which ended no later than 24 July 2018. However given the scope of Ms Welham's application (which relates to the 20 year period down to 24 July 2018) it is not necessary that the application should be so amended, and I advise that it should be rejected on the basis on which it was made. It should also be rejected, in my view, for the same reasons that Ms Welham's application should be rejected (as to which, see further below).

(b) As regards Ms Welham's application, I consider that the Avon County Council signs continued to be effective after 1996 so that the use of the land by local people in 1998 and down to at least 2012 was contentious and not *as of right;*

(c) If the use was not contentious before 2016, it became contentious at that time as a result of the wide publicity given to the objection to registration of the City Council as landowner and the School by virtue of the public inquiry; if it was contentious already, the public inquiry will have served to emphasise its contentiousness. Thus, use after 2016 was not *as of right*;

(d) The possibility exists that between 2012 and 2016, use of the land was not contentious but by virtue of an implied permission. However if this was the case, use in this period was permissive and not *as of right.* Either way, it was not *as of right*;

(e) I do not consider that either application fails because of statutory incompatibility.

(f) In the event, I consider that both applications should be rejected because, as explained above, the use relied upon in the relevant periods in each case was not throughout *as of right.*

167. I am mindful that in my consideration of the extensive written submissions made to me I have not addressed in terms every argument that has been addressed to me. As noted above, I do however consider that I have identified and addressed the key issues that arise on the facts.

PHILIP PETCHEY

14 March 2023