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

REPORT

Preliminary

1. 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 Fields. The two applications are:
   (i) dated 13 September 2018 by Ms Emma Burgess; and
   (ii) dated 22 July 2019 by Ms Kathy Welham.

2. In my capacity as Inspector I am asked to prepare a report for the consideration of the City Council together with my recommendation as to whether the land should be registered or not. I am also asked to determine whether it is necessary that before I prepare my report there should be a public inquiry.

The background to the applications

3. In 2011 Mr David Mayer applied to Bristol City Council, as registration authority, to register Stoke Lodge Playing Fields as a town or village green. The Playing Fields were owned by Bristol City Council which, in its capacity as landowner, objected to the registration. Cotham School, which used the Playing Fields, also objected to the registration, as did two other users of the fields.

4. Under section 15 of the Commons Act 2006, in order for the Playing Fields to be registered as a town or village green, it was necessary for the registration authority to be satisfied that the land in question had been used by the inhabitants of a locality, or a neighbourhood within a locality, for a period of twenty years for lawful sports and pastimes; and that that use had been *as of right*. The relevant period of use was 1991 to 2011 (i.e. the 20 years to the date of the application).

5. As registration authority, the City Council appointed me as Inspector to consider the application and to report to it with my recommendation as to whether the land should be registered or not. The procedural history thereafter is somewhat complicated and is set out paragraphs 2 – 6 of the *Report* which in due course I made to the City Council in October 2016. The short point is that in order to enable me to make a recommendation, I decided that it was appropriate that there should be a public inquiry. Such inquiry took place over 9 days in June and July 2016.

6. 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 notices 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. I relied upon a case decided in the Court of Appeal as to the effect of notices which, of

course, was binding upon the City Council in making a decision upon the application (*Winterburn v Bennett*[1]*).*

7. The three notices had been erected in 1991 by Avon County Council, which had been abolished in 1996. It will be seen that on the basis that the existence of the signs made use of the land by local people contentious and not *as of right*, the use of the land between 1991 and 1996 when Avon County Council was abolished could not have been *as of right*. Mr Mayer's application was bound to fail on this basis. However it could be argued, and was argued, that the use of the land between 1996 and 2011 **was** as of right. On this point, in my report to the City Council, I said:

   I think that there are two points here. 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 had put up had continuing effect. These may be interesting points but it seems to me that they do not fall for determination in the present case. The two Avon County Council signs that are still in place, though clearly not new, are not decrepit; and the one that was at access point [12], although subject to some graffiti before it was removed, was similarly not decrepit as shown in the photograph dating from 2007 ...[2]

8. Apart from the issue as to whether the use was *as of right*, another issue that I considered was one based on the concept of what has become known as "statutory incompatibility", namely that the registration of the land was incompatible with it being held by the City Council as land for the purpose of education. Seeking to apply the leading cases on the point, namely *R (Newhaven Port and Properties Limited) v East Sussex County Council*[3] (in the Supreme Court) and *Lancashire County Council v Secretary of State*[4] and *R (NHS Property Services) v Surrey County Council* [5] (both decided in the High Court), I decided that there was no such incompatibility. 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 decision on this point.

9. 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 heard argument but postponed delivering his own judgment until after the Court of Appeal had given its judgment (on 12

[1] [2017] 1 WLR 646 (CA).
[2] Paragraph 390.
[3] [2015] AC 1547 (SC).
[4] [2016] EWHC 1238 (Admin).
[5] [2016] 4 WLR 130.

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.

10. 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.

11. Following the quashing of the registration of the land, on 14 September 2018, Emma Burgess made a fresh application to Bristol City Council as registration authority to register the Playing Fields 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.

12. Bristol City Council and Cotham School[6] 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.

13. By the time that Ms Burgess came to make her application, permission had been given for an appeal to the Supreme Court in the *Lancashire/Surrey* case. Accordingly, the City Council as landowner and the School submitted that a decision on Ms Burgess's application should be deferred until after judgment had been handed down in the *Lancashire/Surrey* appeal. By the time that Ms Welham came to make her application, argument in the *Lancashire/Surrey* case had just been heard; however judgment had not been handed down. This occurred on 11 December 2019. The judgment was evidently potentially important because it reversed the judgment of the Court of Appeal in the *Lancashire*/*Surrey* case. Bristol City Council as landowner and the School were able to take it into account in their objections to Ms Welham's application, arguing that it necessarily should lead to its rejection. In separate submissions, they argued that Ms Burgess's application should be rejected for the same reason. Both Ms Burgess and Ms Welham have responded in writing to the Objectors' case on statutory incompatibility.

[6] The School now holds a long lease of the land.

Documentation

14. The City Council as registration authority have helpfully prepared a paginated bundle containing the essential documents. References in this Report to page numbers without other attribution are to this bundle.

    The bundle contains the following substantive material:

    In relation to Ms Burgess's application

    Ms Burgess's application (pp 1 – 9)

    Objection to Ms Burgess's application by Cotham School (pp 11 – 17)

    Objection to Ms Burgess's application by Bristol City Council as landowner (pp 18 – 23)

    89 objections to Ms Burgess's application by members of the public (pp 42 – 135)

    Response by Ms Burgess to the objections of Cotham School and Bristol City Council (pp 24 – 41)

    Response by Ms Burgess to the objections by members of the public (pp 136 – 162)

    Submissions by Ms Burgess on the issue of statutory incompatibility (pp 185 – 193)

    Submissions by Cotham School on the issue of statutory incompatibility (pp 229 – 235)

    Submissions by Bristol City Council as landowner on the issue of statutory incompatibility (pp236 – 238).

    In relation to Ms Welham's application

    Ms Welham's application (pp 163 – 183)

    Objection to Ms Welham's application by Cotham School (pp 239 – 251)

    Objection to Ms Welham's application by Bristol City Council as landowner (pp252 – 268)

    27 Objections to Ms Welham's application by members of the public (pp 287 – 318)

    Response by Ms Welham to the objections of Cotham School and Bristol City Council (pp 269 – 286)

    Response by Ms Welham to the objections by members of the public (pp 319 – 340)

    In relation to both applications

    Letter dated 25 June 2020 on behalf Cotham School (pp341 – 342)

    Letter dated 30 June 2020 from Ms Burgess and Ms Welham responding to letter dated 25 June 2020 on behalf of Cotham School (pp343 – 346)

    E mail dated 2 July 2020 on behalf of Bristol City Council as landowner responding to letter dated 25 June 2020 on behalf of Bristol City Council as landowner (pp347 – 349)[7].

[7] I also note e mails from the Applicants and interested parties at pp 352 – 356.

Should there be a public inquiry?

15. I consider first whether it is necessary that there should be a public inquiry before I can make a recommendation to the City Council as registration authority.

16. In respect of applications for the registration of new town or village greens, Bristol City Council as registration authority have approved an *Outline Procedure* (2012). The relevant part of the procedure provides
    (a) Straightforward cases where there is no conflict of evidence, or no significant objection will be dealt with on the paperwork. The decision will be taken by the delegated officer (Strategic Director of Corporate Services) or [the Public Rights of Way and Greens Committee] as appropriate. Whether or not an independent inspector needs to be appointed prior to determination, particularly where the Council is the landowner, is a matter for PROWG.
    (b) In other cases there will be a public inquiry, i.e. a hearing, open to the public where both sides are able to present their evidence and make representations … Where the Council is landowner the inquiry will be conducted by an independent legally-qualified inspector …

17. In the present case, Bristol City Council as registration authority have asked me to decide whether it is necessary for there to be a public inquiry.

18. In a case in which in which important facts are in dispute and where the resolution of those factual issues is determinative of the application it will usually be necessary for there to be a public inquiry.

19. In respect of the land which is the subject of the applications which I have been asked to consider there has already been a lengthy public inquiry. This was in respect of an application relating to the period 1991 – 2011 rather than 1998 – 2018 but "on the ground" it is evident that the use has carried on in the same way. Thus the dispute is not about whether local people have used the land for sports and pastimes but is essentially twofold, namely whether
    (i) statutory incompatibility operates to preclude registration; and
    (ii) use of the land has been *as of right.*

20. The first issue turns on the legal basis on which the land is held. This is not in dispute.

21. As regards the second issue, what Ms Burgess and Ms Welham are saying is that the abolition of Avon County Council in 1996 makes all the difference and that thereafter the use by local people was *as of right.* I shall have to judge whether this submission is correct but the fact that Avon County Council was abolished in 1996 is not in issue.

22. The documentation identifies a further aspect of whether the use of the land has been *as of right.* Bristol City Council as landowner and Cotham School argue that, if it was not contentious before, the use of the land became contentious when Mr Mayer's application was objected to and was the subject of a public inquiry. The facts surrounding the objections and the public inquiry are set on in my *Report* dated 14 October 2016 and are not controversial.

23. On all the issues I have detailed written submissions.

24. In these circumstances I have decided that it is not necessary that there should be a public inquiry.

25. I recognise that in doing so I shall deprive myself of the benefit of oral submissions by the parties. However my decision does result in a saving of costs to the parties. It will also mean that it will be possible for a decision to be reached more quickly than otherwise which is a significant benefit in circumstances where the dispute began nearly ten ago.

26. In reaching my conclusion as to the need for a public inquiry I have had regard to the City Council's *Outline Procedure.* It seems to me that it does not anticipate every circumstance and, in particular, did not anticipate the present situation where there has already been a lengthy public inquiry to establish the facts. I do not think it constrains me to hold a public inquiry in circumstances where there are good reasons for not doing so.

27. I have also noted the suggestion made by both Ms Burgess and Miss Welham that there are significant factual issues that need to be considered at a public inquiry[8]. Although I accept that some factual issues arise in respect of some of the matters in respect of which submissions have been made to me by the parties, I have not identified any factual matter going to the two main issues which potentially affects their determination.

28. I have also noted the objections by members of the public to both applications. These seek to emphasise the facts as these objectors perceive them to be; they do not present a version of the facts that is significantly different to that relied upon by the City Council as landowner and the School. All of them are concerned about the practical effects of registration in terms of the functioning of the school. These are not matters for the registration authority: registration occurs if the statutory criteria are fulfilled (and not otherwise). Whether or not it is a good idea that the land should be registered is not a matter for the registration authority.

29. I now set out my conclusions in respect of the two main issues.

Issue 1: statutory incompatability

30. It is argued by Bristol City Council as landowner and Cotham School that the land cannot be registered as a town or village green because registration would be incompatible with the educational purposes for which they hold the land; just as in *R (Lancashire County Council) v Secretary of State for the Environment* land held by Lancashire County Council could not be so registered because it was incompatible with the educational purposes for which they held the land.

31. In *Newhaven*, the Supreme Court had determined that land held by port authority could not be registered as a town or village green. This was because of "statutory incompatibility" between the regime under which the land was held as a port and its status if it were registered as a village green. To the question *Does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?* the Supreme Court gave the answer *It does not*[9].

32. It will be evident that this answer gives rise to a further question, one which *Newhaven* did not address, namely, *Does section 15 of the 2006 Act apply to land which has been acquired by a local authority (whether by voluntary agreement or by powers of compulsory purchase)*

[8] See pp 286 and 345.
[9] See the speech of Lord Neuberger of Abbotsbury PSC and Lord Reed JSC (with whom Baroness Hale of Richmond DPSC and Lord Sumption JSC agreed).

and which is held for statutory purposes that are inconsistent with its registration as a town or village green? On a simple view, the same answer – *It does not* – would be returned to this question. If land held by a statutory undertaker for its statutory purposes is not registrable then, on the face of it, land held by a local authority for its statutory purposes is not registrable – for the very same reasons. However, every reader of the speech in *Newhaven* would have appreciated, that this could not be the right answer, because in paragraphs 98 to 100 of their speech, Lords Neuberger and Reed referred to three cases where land was held by local authorities and had been registered as a town or village green. The Respondent registration authority cited these cases in its argument that statutory incompatibility had no application to the registration of village greens. In their speech, Lord Neuberger and Lord Reed consider each of these cases in turn, beginning their discussion by saying that *In our view they can readily be distinguished from this case*[10]. Of *New Windsor Corporation v Mellor*[11] they observed that:

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

33. I may add that at the time it acquired the land the Borough of New Windsor would not have been a statutory authority but have had an existence by virtue of a Royal Charter[12].

34. Of *Oxfordshire County Council v Oxford City Council*[13], they observed that:

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

35. It is certainly true that the point was not argued and that the specific powers under which the land was held were not identified in the judgment. On the other hand, it is clear that the local authority wanted to develop the land for housing and that its registration as a village green would frustrate this.

36. Of *R (Lewis) v Redcar and Cleveland Borough Council (No 2)*[14], they observed that:

... [it] concerned land at Redcar owned by a local authority which had formerly been leased to the Cleveland golf club as part of a links course but which local residents also used for informal recreation. The council proposed to redevelop the land in partnership with a house-

[10] See paragraph 98. The discussion of the three cases is at paragraphs 98 to 101.
[11] [1976] Ch 380 (CA).
[12] Indeed this would have been the position when the litigation began. As I understand it, the Royal Borough of New Windsor ceased to exist on 31 March 1974, being replaced by a statutory authority established under the Local Government Act 1972 (the Royal Borough of Windsor and Maidenhead). This change in status is not reflected in the law report.
[13] [2006] 2 AC 674 (HL).
[14] [2010] 2 AC 70 (SC).

building company as part of a coastal regeneration project involving a residential and leisure development. Again, there was no question of any statutory incompatibility. ***It was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green*** (emphasis supplied)**.**

37. Again it is true that the point was not argued but registration of the land would have impeded the provision of residential and leisure development.

38. The conclusion of Lord Neuberger and Lord Reed was as follows:

101. In our view, therefore, these cases do not assist the respondents. ***The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility.***

This conclusion evidently goes beyond distinguishing the three cases on the basis that the statutory incompatibility was not argued.

39. In *R (Lancashire County Council) v Secretary of State for the Environment* it was argued successfully that statutory incompatibility applied to land held for statutory purposes (in that case, education) held by a local authority. In reaching that conclusion, the majority (Lord Carnwath and Lord Sales) had to consider once again the effect of the three cases where local authority land had been registered as a town or village green. I note that at the outset of their speech they said: *Our task in the present appeal is not to make policy judgments, but simply to interpret the majority judgment in Newhaven and apply it to the facts of these cases.*

40. The speech expressing the view of the majority[15] was that of Lord Carnwath and Lord Sales. Their view of the cases considered by Lord Neuburger and Reed was as follows:

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

41. I bound to say that this does seem to me to be a complete explanation; Lord Carnwath and Lord Sales do not "spell out" why they thought that Lord Neuburger and Lord Hodge considered that there was no statutory incompatibility in the *Trap Grounds* and *Lewis* cases.

42. As to the principle itself they observed:

It would be a strong thing to find that Parliament intended to allow use of land held by a public authority for good public purposes defined in statute to be stymied by the operation of a subsequent general statute such as the 2006 Act. There is no indication in that Act, or its predecessor, that it was intended to have such an effect[16].

43. In *Lancashire*, the Supreme Court held that the land was acquired for and remained appropriated to educational purposes, in exercise of the County Council's statutory powers as

[15] Lady Arden and Lord Wilson dissented.
[16] See paragraph 61.

education authority. The statutory provisions 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".

44. The land was divisible into four different areas. Areas A and B were used as for outdoor activities and sports in connection with Moorside Primary School; Areas C and D were identified as a replacement school site.

45. Applying the legal principle that they had identified as set out above at paragraph 19 above to the specific facts of the case, Lord Carnwath and Lord Sales said:

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

46. I turn to a consideration of the facts of the present case.

47. In 2010, 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 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. This was by virtue of a scheme made by the Secretary of State under section 8 of the 2010 Act.

48. It will be helpful now to take a step back. There are many independent schools in England that is, schools which are not owned and operated by local authorities. They are subject to regulation and inspection under Acts of Parliament but they are not provided by virtue of Acts of Parliament, and their owners (generally charitable trustees) are not under a statutory duty to provide education such as is imposed on a local authority[17]. On the face of it[18], land which they own will, in appropriate circumstances, be subject to registration as a town or village green. Academies are a new form of independent school. In the present case, Cotham School had a pre-existence as a maintained school and the land which it currently owns was previously owned by Bristol City Council as education authority[19]; however it might have been a school established by any person and not have had a pre-existence. I do not think that there would be any statutory incompatibility between the basis on which land was held by an entirely new academy and registration of that land in otherwise appropriate circumstances as a town or village green. Similarly, I do not think, subject to one matter, that there is any statutory incompatibility between the basis on which land is held by an academy which was formerly a maintained school and has now become an academy and the basis on which land is held by an academy which had no such pre-existence. In both cases, section 8 of the Education Act 1944, sections 13 and 14 of the Education Act 1996 and sections 175 of the Education Act 2002 have no application. Nor does section 542 of the Education Act 1996 (which prescribes open space standards for maintained schools) have any application.

49. 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.

50. Thus if any person is to run an Academy accordingly to law, he or she or it **must** comply with this standard. However this is rather different to a statutory requirement to provide educational facilities on a particular piece of land: I do not think that it properly can be so construed.

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[17] As to which, see paragraph 43 (1) and (2) above. I appreciate that it could be argued that they have such a duty by virtue of their status as charity trustees. On the basis, it could be argued that no land of a charity could be registered as a town or village green. As far as I am aware, this point has never been argued in the courts and, in the absence of clear authority I do not think this can be made one of the building blocks of the argument in this case.

[18] But see footnote 11 below.

[19] The reversion of the lease of the playing fields is of course still owned by the City Council.

51. At paragraph 48 above I said that, "subject to one matter", I did not think that there was any statutory incompatibility between the basis on which land is held by an academy which was formerly a maintained school and has now become an academy and the basis on which land is held by an academy which had no such pre-existence. I turn now to consider that one matter.

52. It seems to me that if the position were that Cotham School had remained a maintained school and the land on which it stood and the playing fields the subject of the present advice had remained in the ownership of Bristol City Council, the situation about which I am asked to advise would be indistinguishable from that in the *Lancashire* case. The position that currently obtains is that the reversion of the 125 year lease is still owned by Bristol City Council. Is it perhaps the position that the land is not registrable as a town or village green not by reference to the 125 lease vested in the School but by reference to the reversion of the lease vested in Bristol City Council?

53. In my judgment the answer to this question is that the land is not not[20] registrable by reference to the reversion of the lease. It seems to me that before a scheme was made by the Secretary of State under Schedule 1 to the Academies Act 2010, the land was held by Bristol City Council under the duties identified under the same sections as were identified in the *Lancashire* case. It seems to me that the position thereafter is different. It ceased, in practice, to have any statutory duties in respect of the land. It so happens that under Schedule 1 to the Academies Act 2010 the land continues to be used for the purposes of education but there is no necessary requirement for this by virtue of the mechanism by which the transfer of the immediate interest in the land was effected. As far as Bristol City Council were concerned, it might have been required to transfer the land to provide a site for a new hospital. On what basis, them, does Bristol City Council continue to hold the reversion to the land? In my judgment, it is not by reference to any specific power; it is by reference to the sort of unspecific power that the majority had in mind in *Newhaven* in the three cases which it considered at paragraphs 98 to 100 of that case.

54. In reaching this conclusion, I am conscious that if the land in the *Lancashire* case is properly not registrable, it can be argued that there is no sensible reason why the land in the present case should also properly be not registrable. There is however a significant difference between the two situations. In the first the relevant land is directly owned by a local authority under specific statutory duties to use it for the purposes of education. In the second, it is directly owned by an independent school which is not under a statutory duty to provide education. It is under a duty to provide educational facilities but that is by a reference to contract with the Secretary of State (and not directly a statute) and the duty is not specific to the land which it owns. I am also conscious that it may be argued that I have taken too narrow a view of the concept of statutory incompatibility. I recognise that a Court might so conclude. However it will be seen that my approach does reflect that in *Newhaven* as interpreted in *Lancashire* because it does identify a category of local authority land which is not subject to statutory incompatibility.

55. What I have written above is on the basis that the time to consider statutory incompatibility is the time when the application is made. If it were the case that it was necessary that the land should be registrable throughout the relevant 20 years, it will be apparent that in any

[20] The double negative is intended.

particular case it might be that, there being statutory incompatibility at some earlier stage, the land might not be registrable, even though no statutory incompatibility existed at the date of putative registration. In the present case, the position would be that the land would not have been registrable before 2010 (being land held for purposes of education by Bristol City Council) only becoming registrable after the land passed into the ownership (or substantial ownership) of the School. It might be observed that it would be odd for the School (to whom statutory incompatibility does not apply) to rely on the earlier period of incompatibility when it was owned by Bristol City Council. The public purposes as defined by Parliament, about the stymying of which the majority were concerned in *Lancashire*, would not be stymied. On the other hand, it may be observed that it is odd for land to be registrable on the basis of twenty years use when for a significant part of that twenty years it was not registrable because of statutory incompatibility. At paragraph 47 of *Lancashire*, the majority point out that cases on rights of way and easements were of assistance by way of analogy; it might be argued that the incapacity of a relevant owner at any time during the relevant period in those analogous circumstances points up the force of the latter argument.

56. The answer to this aspect of the matter is not spelt out in the Commons Act 2006 nor can it be conclusively deduced from any policy considerations articulated in respect of statutory interpretation. Statutory incompatibility was held in *Newhaven* to fall to be considered at the time of registration. It seems to me that it would require the authority of the Court to extend it so that it became a requirement of registration that statutory incompatibility did not exist at any stage during the relevant 20 year period. Moreover, I am confident that a Court would not take that further step, thereby preventing registration of land as a town or village green at a time when there is no statutory use of the land which would be frustrated by registration. This does not seem to me to make much sense.

57. I am conscious that the Court in *Newhaven* and *Lancashire* has given the Commons Act 2006 a narrow interpretation. It is difficult to predict with certainty that it might not further limit the application of the Act in a future case (like the present, if it had to rule on it). I would expect the School and perhaps the City Council as landowner to argue that the views I have expressed above are wrong. I am conscious both that (i) in any case my advice, given in good faith and with the benefit of my expertise may not be advice with which a Court (as the law in this area shows, potentially the Supreme Court) agrees[21] and (ii) on many legal questions, two competing views may be taken. Ultimately the City Council as registration authority has to take a view about the matter. In doing so, it will note that the matter is not in my view determinative i.e. as explained below, I consider that the application fails for other reasons.

Issue 2: ***as of right***

58. I consider first the effectiveness of the Avon County Council notices after 1996.

59. I begin by reminding myself that the relevant twenty year period in respect of both applications is 1998 - 2018[22].

[21] The three-fold disagreement in the Supreme Court in *Lancashire* demonstrates just how difficult this area of (judge-made) law is,

[22] September 2018 in respect of Ms Burgess's application and July 2018 in respect of Ms Welham's application. Since there is before the registration authority an application in which the relevant 20 year period ends before the erection of new notices in 2019, it is unnecessary to consider a possible amendment to Ms Burgess's

60. 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

(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).

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

62. As explained above, the submission of Ms Burgess as regards the Avon County Council signs is that they are not relevant to her application because at the beginning of the 20 year period that applies to her application (1998), Avon County Council did not exist. She argues 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.

63. 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 Mr Mayer's application will not obtain.

64. In considering Mr Mayer's 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 Mr Mayer did continue after 1996 and in my *Report* dated 14 September 2016 I did express a view about it which is set out at paragraph 7 above. It will be helpful to repeat it here:

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.

65. 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.

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application so that it would be made under section 15 (3) or for the registration authority to consider any period down to a date other than that of the application.

66. Bristol City Council as landowner and Cotham School rely on the view set out in my Report. 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[23]

67. 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 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 would have been 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 fact altered its position from objection to acquiescence.

68. 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.

69. Further, that analysis would suggest that the notices were still effective in 1998 when began the relevant period on which Ms Burgess and Ms Welham 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, this finding is fatal to both applications because neither Ms Burgess or 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.

70. In fact I would go further and say that it is my conclusion that the use continued to be contentious - on the same basis as it was contentious in 1998 - down to 2009, when one of the Avon County Council signs was replaced by a Bristol City Council sign[24].

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[23] See p 20.

[24] I noted in my *Report* dated 14 October 2016 that there was no positive evidence that the sign that was replaced existed beyond 2007. Nonetheless it would appear on the balance of probabilities that it did continue to

71. After 2009 the situation becomes factually more complicated. In 2009, as noted, one of the Avon County Council signs was replaced by a Bristol City Council sign which was not as effective as the sign it replaced[25]. Ms Welham points out that in 2012 the City installed dog waste bins and that in 2016 it installed a play park with access from the playing fields.

72. Were it necessary to decide the point, I consider that the use continued to be contentious until at least 2012. 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. I note in this context that the City Council (albeit, in the alternative) argue in respect of Ms Burgess's application[26] that it should be implied from the way that the land was used that they had implied permission.

73. I would 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.

Issue 3: the public inquiry in 2016

74. In its objection to Ms Burgess's application, 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 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*[27].

75. In support of this submission, the City Council refer to *R v South Gloucestershire Council, ex parte Cheltenham Builders*[28].

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exist until it was replaced in 2009. In any event, it makes no practical difference whether the situation "on the ground" changed in 2007 or 2009.

[25] See paragraph 397 of my *Report* dated 14 October 2016.

[26] See p 21 of the Bundle. The point does not seem to be repeated in its objection to Ms Welham's application.

[27] See paragraph 17 at p 20.

[28] [2004] 1 EGLR 85.

76. The School makes the same point in its objection, also referring to the *Cheltenham Builders* case[29].

77. The City Council and the School both repeat this objection in respect of the application by Ms Welham[30].

78. Ms Burgess's Response is as follows:

> *... 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 apllicant'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[31].*

79. She seeks to distinguish the *Cheltenham Builders* case.

80. Ms Welham's Response is in identical words[32].

81. I should begin by observing that the City's statement that the inquiry was *a well publicised cause celebre* is in my judgment correct and I note that it is not challenged by Ms Burgess or Ms Welham. I heard 28 witnesses and throughout the inquiry there was a high level of public interest. Accordingly, the objection will not fail, if it does fail, on the basis that whatever was conveyed to the public was not sufficiently widely disseminated. 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…*

82. 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.

83. It is even more artificial if the case of the landowner at the inquiry is that the use by local people is not *as of right* by reference to signs erected on the land and those signs are still *in situ*. That of course is the position in the present case[33]. 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.

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[29] See paragraph 7 of its objection at p 51.
[30] See paragraph 36 at p 311 and paragraph 32 at p 297of their respective objections.
[31] See paragraph 14 at p 28.
[32] See paragraph 24 at p 278.
[33] Noting, of course, the replacement of one of the Avon County Council signs in 2009.

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. If the use was contentious it was not *as of right* and the period of use. If use of land between 2016 and 2018 was not as of right, neither Ms Burgess nor Ms Welham have established the requisite 20 years' use to support registration.

84. I consider that my conclusion is supported by the judgment of Sullivan J in *R (Cheltenham Builders Ltd) v South Gloucestershire Council.* The facts in that case were rather different to the facts of the present case but underlying the conclusion was a consideration of whether an objection to a village green application could render use continuing thereafter contentious (so that a second application based on use *as of right* down to the date of the second application was bound to fail). Sullivan J held that it could render subsequent use contentious.

Implied permission

85. As an alternative to its argument that use of the land was not as of right because it was contentious, Bristol City Council as landowner argue that the use was not as of right because it was permissive:

20. The previous inquiry heard substantial evidence as to the use of the land, which was substantially marked out as planning fields, and used as such by schools and sports clubs until 2014. That usage was by arrangement with the Council, and the nature of the arrangement entitled the user to exclusive use of the relevant part of the land for the duration of the period that they were to use it.

21. The nature, frequency and extent of this use were overt acts on the part of and authorised by the landowner. The public were aware of the nature of those acts, namely that the users were being granted exclusive use of defined areas for defined periods of time, and that in consequence they were being excluded from it correspondingly, and would be excluded from whatever areas over whatever periods the Council chose to use for educational purposes, including the whole.

22. In consequence they would have thought, had they thought about it, that they were able to use those parts of the land that they did use because they were being permitted to do so by the implied licence of the landowner[34].

86. Obviously, this argument is advanced as an alternative; use cannot at one and the same time be contentious and permissive.

87. For completeness, I should address this argument.

88. There is no reason why a party to proceedings cannot advance arguments in the alternative; he or she cannot know what view the Tribunal will take of his or her first argument and therefore it is appropriate for him or her to consider the position if it **is** rejected. However in the present case it seems to me that the City Council as landowner cannot realistically maintain an alternative argument here. The evidence shows that the Council's predecessor put up signs contesting the use of the land. Those signs may or may not have been effective but it is hard to see how Avon County Council, consistently with those signs, could have regarded a person

[34] See.p 21.

coming on to the land as other than a trespasser. If Avon County Council so regarded him or her, the County Council cannot have been impliedly giving him or her consent to come on to the land. Moreover as *R (Lewis) v Redcar and Cleveland Council (No 2)* showed there is no reason why co-existence between the use of land for sports and pastimes by local inhabitants and for sporting activity has the result that that use by local people is permissive (i.e. the fact that local people used the land for walking their dogs when the golfers were not using it for golf did not carry the implication that their use was permissive). Further, I note that an implied permission argument was run in *R (Lancashire County Council) v Secretary of State for the Environment* (albeit at a late stage) and in circumstances where the landowner did not itself use the land. The Supreme Court emphasised that *passive acquiescence, even by a statutory authority with power to permit recreational use, is not enough*[35]. I note *R (Mann) v Somerset County Council*[36], referred to by Bristol City Council; I agree with Sir Wyn Williams in *R (Cotham School) v Bristol City Council* that this *is a case which turns very much on the facts as found by the Inspector [in that case] and the inferences drawn by him*.[37]. If I were wrong in considering that the use was contentious in 1998 and thereafter I do not consider that it was permissive. As I have explained above, I do accept it is possible that the position changed in 2012 so that between 2012 and 2016 use was indeed permissive.

Other arguments

89. At paragraph 19 above I say that the dispute is essentially twofold – as to statutory incompatibility and whether the use of the land has been *as of right* because contentious; and I have addressed these arguments at paragraphs 30 to 88 above, together with the alternative suggestion that use was not *as of right* because it was permissive. I note that at p 5 of its initial submission, the City Council took a point as to whether use had been by the inhabitants of an identified locality. I considered the question of whether use had been by the inhabitants of a locality or neighbourhood within a locality at paragraphs 453 to 460 of my *Report* dated 14 October 2016. I think that no point of substance arises on this aspect of the applications which should lead to them being rejected. If it were necessary for the registration authority to consider a locality or neighbourhood within a locality different to that identified in the applications, it seems to me that it would be appropriate for it to do so. Cotham School note that since the public inquiry an application has been made to register a public footpath across the land[38]. The point is that in my *Report* dated 14 September 2016 I may have over-estimated the use of the land by members of the public for lawful sports and pastimes because some of that use may have had reference to a putative public footpath. I cannot envisage this point making any difference to my conclusion as to the significance of the overall quantum of use. However this may be, exploring the issue would, on the face of it, involve factual matters which would appropriately be the subject of oral evidence. In circumstances where the issue as to whether the use that did take place was *as of right* is determinative, it seems to me that it disproportionate in terms of effort and costs to seek to explore this issue further.

90. The submissions disclose an argument as to whether the replacement signs erected in July 2018 by the School were effective. Ms Burgess submits that they were not because they were inconsistent with the terms of the lease of the land to the school by Bristol City Council. For their part, Bristol City Council as landowner and the School dispute this and point to the agreement of the City Council to the erection of the signs. I note also that there is a point that

[35] See paragraph 42 at p 21.
[36] [2017] 4 WLR 170.
[37] See paragraph 86.
[38] See paragraph 15a at p 16.

one of the signs was taken down after failing to obtain advertisement consent. None of these matters is relevant to Ms Welham's application for reasons explained above. I do not propose to examine them further in this *Report.*

Conclusion and Recommendation

91. For the reasons set out above:

    I do not consider that either application fails because of statutory incompatibility (see paragraphs 30 to 57 above)

    However I do 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 thereafter was not *as of right* (see paragraphs 58 to 72 above);

    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 (see paragraphs 74 to 84 above);

    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* (see paragraphs 73 above).

    Because use of the land was not *as of right* during the relevant periods, one of the statutory requirements for registration has not been met. In the circumstances, both applications should be rejected.

Procedure

92. My *Report* will now fall to be considered by officers. On the face of it, subject to any other matters arising, it will then be presented to the Public Rights of Way and Greens Committee. In the ordinary way it would be available for the parties to see not fewer than five days before the meeting of the Committee at which it is to be considered. It is a matter for officers but it seems to me that there would be merit in specifically giving the parties the opportunity to comment and in respect of a longer period (say 21 days). Although, by now, one might think that all that might be said on the issues, **has** been said, experience suggests that, given the opportunity to comment, the Applicants and Objectors would both take that opportunity. Officers might feel able to field those comments themselves or they might wish to refer them to me for comment before, at last, referring the matter to the Committee.

93. The merit of this procedure is that it ensures that everything that is relevant is taken into account in the Committee's decision and that if, as must at least be contemplated, proceedings for judicial review are brought in respect of the decision, the issues are narrowly defined.

94. It is appropriate to say something about the prospect of judicial review if the Committee accepts my recommendation. Although there can be no certainty about it, I am confident that such a challenge would fail and I think that the Applicants would struggle to obtain permission to bring the proceedings. As I have indicated, it is possible that the Objectors would succeed in persuading a court that, in addition to the applications being properly

rejected on the basis that the requisite use was not *as of right*, they should also be rejected on the basis of statutory incompatibility.

95. As far as I am concerned, the requisite legal basis for rejecting my recommendation does not exist. I am either right or wrong about the law. If I am right, by rejecting my recommendation, the Committee would expose itself to successful challenge by way of judicial review. If the Council were minded to reject my recommendation, I would recommend that it first obtains the advice of a QC.

PHILIP PETCHEY
2 March 2021