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

NOTE

Preliminary

1. A copy of my Report dated 14 March 2023 has been supplied to the interested parties and they have commented upon it. I am now asked to consider those comments and give the PROWG Committee the benefit of my further advice in the light of them[1]. I should say at once that the comments have not caused me to change my mind. My recommendation continues to be that the land in question should not be registered as a town or village green for the reasons that I gave in my report.

Introduction

2. If the use of land is contentious it is not *as of right.* If a landowner puts up a prohibitory notice or notices he potentially makes use of the land contentious. In the present case the landowner put up prohibitory notices. In my report I conclude that in the circumstances of the putting up of these particular notices, use of the land was not *as of right*. Because use of the land was not *as of right,* I advised the registration authority that should not be registered as a village green because it is a requirement of registration that use is *as of right*.

3. In any particular case, there may be reasons why a notice might **not** make use of land contentious.

4. It might be that the notice is not clear. I consider that the notices in the present case were clear.

5. It might be that there were not sufficient notices put up so that it could be that there were many people who used the land who did not or could not appreciate that their use was contentious. I consider that in the present case sufficient notices were put up to make the use not *as of right.*

6. In two reported cases, the Court said that if people ignored a prohibitory sign and carried on using the land and the landowner took no further steps to stop them using the land, then the landowner acquiesced in the use which accordingly ceased to be contentious and became, instead, contentious. This view was rejected by the Court of Appeal in *Winterburn.* What the Court of Appeal decided in *Winterburn* is binding on the registration authority.

7. The prohibitory notices were put up in the present case by Avon County Council. The relevant period to be considered is 1998 – 2018. Avon County Council was abolished in 1996. The Applicants say that the notices ceased to be effective when Avon County Council was abolished. I do not think that this argument is correct.

8. On top of all this, in June and July 2016 there was a public inquiry, lasting eight days, into whether the land should be registered as a village green. I consider that this in itself made the use of the land at this time contentious. Local people were saying that the land had become a village green and the landowner was strongly resisting that claim. There is a distinction between resisting a claim to register a village green and resisting use of the land claimed as a

[1] I am not asked to advise about matters of procedure.

village green but it is a fine one and I consider that the circumstances of the public inquiry made it clear that the use itself was contentious.

9. The landowners claimed that the use of the land for a school under the relevant statutes was incompatible with use of the land as a village green and accordingly the land could not be registered as a town or village green. There is nothing in the statute governing the registration of village greens about land not being registered on the basis of statutory incompatibility; the relevant law is set out in two decisions of the Supreme Court. The limits of the concept are not clear. In my report I say that a court might extend the concept to the circumstances of the present case but the circumstances are distinguishable. The ownership of the land is divided between the school (lease) and the local authority (freeholder). Registration of the land of an independent school would not of itself be incompatible with its use under any statute; nor would it be incompatible with the non-use of the land by the local authority. It is only when the two elements are brought together that the argument arises. I am unconvinced by it.

Specific points

Paragraph 27 of the Applicants submissions in respect of my Report

10. The applicants argue that my interpretation of *Winterburn* and its application of it to this represent a fundamental misreading of the case. I have explained in my reading of it at paragraphs 41 to 46 of my Report and I disagree with the criticism. It is necessary for the Committee to take a view about this. If I were wrong, then the Avon County Council signs would have been ineffective. Subject to arguments about the effect of the public inquiry and as to statutory incompatibility the land would be registrable; and subject to arguments about statutory incompatibility ought to have been registered in 2018 upon the application by Mr Mayer.

Paragraph 35 of the Applicants' submissions in respect of my Report

11. In 2011 Mr Mayer made an application to register the land; in 2016 I submitted a report into Mr Mayer's application recommending that the land be not registered; in 2016 the registration authority rejected the recommendation in my report and decided to register the land. That decision was challenged by the School and the decision was quashed on the basis that the authority had not properly considered my report. It is correct to say that the judge did not specifically uphold what I said in my report about the effect of the notices.

12. Accordingly, strictly speaking, in my report on the current applications, I was wrong to say that the judgment of Wyn Williams J *upheld my interpretation of the signs and advice that use in the period 1991 – 2011 had not been as of right.*

13. What I should have said is that Wyn Williams J *did not disagree with my interpretation of the signs and advice that use in the period 1991 – 2011 had not been as of right.*

14. There are however non-disagreements and non-disagreements. If Wyn Williams J had thought that what I had said about signs was wrong, one would have expected him to say so; potentially if he thought what I had said was wrong, he might have upheld the decision of the registration authority.

15. Moreover, the matter did not stop there. The registration authority went on to re-consider Mr Mayer's application in the light of my report. It decided not to register the land. It was thereby

endorsing my report and recommendations. That decision was not thereafter subject to judicial review.

Paragraphs 36 to 40 of the Applicant's submissions in respect of my Report

16. In the submissions of the Applicants that I addressed in my Report, they developed a new and additional argument that, despite the Avon County Council notices, the use of the land at all times was being acquiesced in so that user was not contentious[2]. This new argument had nothing to do with the intrinsic effectiveness of the signs and had not been made to me in my consideration of Mr Mayer's application. If it is correct it follows that, on the face of it, the land should have been registered upon Mr Mayer's application[3]. It is a complicated argument, involving an interpretation of reports and minutes of Avon County Council and a consideration of the legal position of the School as it was affected over time by various Education Acts. I dealt with that argument in detail and point by point in my Report; if I were now to respond to paragraphs 36 to 41 of the Applicants' submissions on my Report I would only be rehearsing once again what I said in my Report.

Paragraph 41

17. The Applicants criticise the way I address events "on the ground". There are a number of matters which would indicate that the use of the land was not contentious but was being permitted. This is not a *bizarre* conclusion as the Applicants suggest in their submissions on my Report; the question is how these matters are to be addressed in the context of the prohibitory notices. I conclude that the use of the majority remained contentious and that the use of some was indeed permitted. This would mean that the use of nobody was *as of right.* I reject the argument that somehow by virtue of these matters, the County Council was *acquiescing* in the use (so that the use, if it were acquiescing, would be *as of right*). I do not consider that the recent statements of [redacted] and [redacted] advance a consideration of this aspect of the matter.

Paragraphs 52 to 54 of the Applicants' submissions on my Report

18. At paragraph 158 of my Report dated 14 March 2023 I said of the proposition that the public inquiry was a well publicised cause celebre that the Applicants did not contend to the contrary. The reason for saying this is that the Applicants' submissions to me dated 21 December 2022 contained a considerable amount of material about the significance of the 2016 inquiry but did not take the simple point that it was not a cause celebre. However at paragraph 14 of their submissions they point out that they had contended to the contrary in their earlier submissions, from which they had not resiled. I am sorry that I misunderstood the position. The Applicants starting point of course remains a submission that even if the public inquiry was a *cause celebre,* it would not mean that the use of the land thereafter was contentious. I have dealt with that argument in my report dated 14 March 2023 and do not want to add anything further about it here.

19. As to my conclusion that the 2016 inquiry was a well publicised cause celebre, it seems to me that my conclusion on this point is a matter of judgment on the material that was presented to me. In the light of material indicating that it **was** a well publicised cause celebre, the Applicants are, of course, asserting a negative. It would have been open to them, if they had wished, to produce witness statements from people using the land in 2016 who were ignorant

[2] It is summarised at paragraph 89 of my Report dated 14 March 2023.

[3] Although, as the Applicants accept, I could not make a recommendation to the registration based on facts of which I was ignorant: see footnote 3 of their submissions to me dated 26 October 2022. The correctness of the registration is, however, subject to the argument about statutory incompatibility.

of the public inquiry[4]. Their failure to do so does not count against them, of course; it merely shows that they have not, by reference to such material, displaced the conclusion that can reasonably be drawn from the material relied upon by the landowners. Looking at the matter realistically, it is hard to imagine such witness statements (if they could be assembled) raising any doubt as to what is, in the circumstances a common sense conclusion. What may appear to be a common sense conclusion may in any particular case be displaced; I do not think that it has been in this case.

20. In my Report at paragraph 158 I noted that the Cotham School and Parent had plotted on a map the eleven locations around the playing field pre-2018 where campaign signs were posted. The Applicants now submit that two of these locations do not relate to campaign signs and I accept that this may be the case. However in all this one must not lose sight of the wood for the trees. As regards the other nine, it seems to me that they do indicate an appreciation in the neighbourhood that the use of the Field was contentious and to seek (as the Applicants do) to construe them as not relating to a dispute as to a claimed entitlement to use the Field is tendentious. The nine signs are examples of evidence that the use of the Field was contentious.

Paragraph 56 of the Applicants' submissions on my Report

21. The School's lease of the Field was subject to

    ... all existing rights and use of the Property including use by the community.

    The Applicants assert that the effect of this is that, as a matter of law neither the School nor the City Council could lawfully object to the use of the Field by the community; if, as they clearly did, the School and City Council objected to the use of the Field they had no power to do so and any such objections fall to be disregarded[5]. In 2011 the community had no rights to use of the Field so that part of the provision in the lease can have no application. It seems to me that the lease was recognising that the Field was subject to use by the community. This did not stop the lessee (the School) or the lessor (the City Council) subsequently objecting to that use.

Paragraphs 58 to 60 of the Applicants' submissions on my Report

22. The Applicants' say that the installation of dog waste bins in 2012 did not cause use of the Field to be permissive. In my Report I acknowledge that this may be the case (see paragraph 142). But if this is so, the use simply went on being contentious.

Paragraph 42 of the Applicants' submissions on my Report: scope for disagreement

23. It will be helpful if I here deal with a point taken at paragraph 42 of the Applicants' submissions. It is made in relation to the conclusion in my Report dated 14 March 2023 on signs but also has potential relevance to my conclusion in respect of the effect of the 2016 inquiry.

24. In my Report dated 14 March 2023, I explained the law as best I could and sought to apply that law to the facts as I considered them to be. If I have got the law wrong a decision made

[4] Clearly 11% of those who have made witness statements in support of the current applications will have known about the inquiry in 2016 (see paragraph 52 of the Applicants' submissions on my Report). The statements of the remaining 89% evidently did not expressly address whether they knew or did not know about it. It is hard to imagine that the remaining 89% were ignorant of it but that is not a matter about which there is evidence.

[5] See also paragraph 49 (ii) of the Applicants' submissions on my Report.

on the basis of that erroneous explanation of the law is liable to be quashed. The decision of course remains that of the Committee and if they are persuaded for whatever reason that I have got the law wrong, they will so decide and resolve accordingly. In doing so they will not need any reminding that they are lay people and that the registration authority has instructed me because of my expertise in this area of law; and they will also see that I have sought clearly to explain what the law is. Ultimately I am either right or wrong, and they have to take a view about that.

25. As to the interpretation of the facts, there may, at least in theory, be scope for greater disagreement. It is open to a decision maker to disagree with an Inspector's finding as to fact for reason given and, more broadly, with an Inspector's interpretation of the facts for reason given. I say "for reason given" because if a decision maker disagrees with an Inspector without giving reasons the decision making process will be flawed and the decision liable to be quashed.

26. For reasons I have given, I think that the land in the present case should not be registered as a town or village green. Further, it is appropriate that I should say that in my view the scope for the registration authority to reach a different decision is limited if it applies the correct law. It is not for me to suggest a way through the law and the facts whereby they might conclude that the land is registrable as a town or village green; and for such a conclusion not to be challengeable in law: it is for the Applicants to do this if they can. What I can say is that it seems to me that what the Applicants have done in their representations is to assert that I have got a great number of things wrong without suggesting what, if I had (in their view) got everything right would be the facts and law on which the registration authority would properly conclude that the land should be registrable.

Statutory incompatibility

27. Bristol City Council as landowner and Cotham School consider that statutory incompatibility applies to the current situation. Cotham School press upon me the analogy between the position of the Secretary of State for Health in the *Surrey* case and the Secretary of State for Education in the present case. However, on the face of it, if statutory incompatibility applies in the present case it is because of statutory incompatibility vis a vis Cotham School or Bristol City Council or both combined. If the Secretary of State for Education is to be considered relevant it does seem to me that the application of the concept statutory incompatibility is being extended. I do not discount the possibility of a court so extending the concept but I do not consider it appropriate to advise the registration authority to do so in the present state of the law.

PHILIP PETCHEY

18 May 2023