Case No: A3/2010/1194

Neutral Citation Number: [2010] EWCA Civ 1438
IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
His Honour Judge Behrens
[2010] EWHC 810 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th December 2010

Before :

LADY JUSTICE ARDEN
LORD JUSTICE SULLIVAN
and
LORD JUSTICE TOMLINSON

- -

Between :

	LEEDS GROUP PLC	**Appellant**
	- and -	
	LEEDS CITY COUNCIL	**Respondent**

- -
- -

Mr George Laurence QC & Ms Jane Evans-Gordon (instructed by DLA Piper Uk LLP) for the Appellant
Morag Ellis QC (instructed by **Leeds City Council**) for the Respondent

Hearing dates : Wednesday/Thursday, 24th/25th November 2010

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Judgment **Lord Justice Sullivan :**

Introduction

1. This is an appeal against the Order dated 7th May 2010 of His Honour Judge Behrens sitting as a Judge of the High Court dismissing two claims by the Appellant, one under section 14 of the Commons Registration Act 1965("the 1965 Act"), the other for judicial review. In both of those claims the Appellant challenged the registration by the Respondent of land known as Yeadon Banks on the outskirts of Leeds as a town or village green ("TVG") under the 1965 Act, as amended by the Countryside and Rights of

Way Act 2000 ("the 2000 Act"). Part of Yeadon Banks, some 5½ acres, is owned by the Appellant ("the Leeds Land"), the remainder is owned by the Respondent ("the Council Land").

The definition of a TVG

2. Section 22(1) of the 1965 Act as enacted defined "town or village green" for the purposes of the Act, as follows ([a][b] and [c] added):

> "*'town or village green' means [a] land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years.*"

The three categories of TVG are usually referred to as Class A, Class B or Class C TVGs. We are concerned with a Class C TVG.

3. The definition in section 22(1) was amended with effect from 30th January 2001 by section 98 of the 2000 Act to substitute for the words after "lawful sports and pastimes", the words "or which falls within subsection (1A) of this section".

So far as material, subsection (1A) provides ([i] and [ii] added):

> "(1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants of [i] any locality, or of [ii]any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either -
> (a) continue to do so, or
>
> (b)…."

4. Thus, there are two limbs to Class C village greens under subsection (1A). Under the first limb reliance may be placed on user by a significant number of the inhabitants of any locality. Under the second limb reliance may be placed upon user by a significant number of the inhabitants of any neighbourhood within a locality. In the present case we are concerned with the second limb. Section 22 has been repealed by the Commons Act 2006, but it is common ground that the 2006 Act is irrelevant for the purposes of this case. The critical enactment is subsection 22(1A) of the 1965 Act as amended by the 2000 Act. It should be noted that all of the definitions in section 22(1) are to be applied "unless the

context otherwise requires".

Factual Background

5. The factual background is set out in some detail in the judgment of HH Judge Behrens [2010] EWHC 810 (Ch). For present purposes the following summary will suffice. A resident in Yeadon, Mr Jones, the Chairman of a group known as "KEYBAG", Keep Yeadon Banks Green, applied on 16th July 2004 to register Yeadon Banks as a Class C TVG. The Appellant objected to the application. The Respondent appointed Mr Alun Alesbury, a barrister with considerable expertise in the law relating to Commons Registration ("the Inspector"), to hold a non-statutory public inquiry into the issues raised by the contested application. The inquiry was held on 7th and 8th November 2006, and was followed by a formal inspection of Yeadon Banks on the 9th November.

6. In his Report dated 20th December 2006 the Inspector recommended that the Respondent should amend the Register of Town and Village Greens by the addition of Yeadon Banks. As the judge said, the Report is a detailed and lengthy document. In paragraphs 30 – 44 of the judgment the Judge referred to those passages in the Report in which the Inspector dealt with the issues of "neighbourhood" and "locality". It is unnecessary to repeat all of those passages.

7. It is sufficient to note that in respect of the "neighbourhood" issue the Inspector concluded that:

(1) Two areas, described in the evidence before him and known as "The Haws" and "Banksfield", each qualified as a neighbourhood for the purposes of subsection 22 (1A) (para.13.35).

(2) Alternatively, The Haws and Banksfield taken together qualified as a neighbourhood for that purpose (para.13.42).

> "Thus my conclusion on the matter of 'neighbourhood' is that Banksfield and The Haws may quite reasonably, and correctly, be regarded either as two adjacent neighbourhoods, or as one overall neighbourhood. On either basis I conclude that they meet the test of 'neighbourhood within a locality' contained in Section 22(1A)."

8. So far as "locality" is concerned, the Inspector concluded that the neighbourhood/s were within a locality for the purposes of section 22(1A) because either:

(1) Yeadon, which was a unified civil parish from the early 18th century until 1937, and had its own Urban District Council from 1895 to 1937, after which as a result of successive local government reorganisations it was for the most part absorbed into an enlarged City of Leeds (para.13.19); or

(2) the City of Leeds (para.13.21); or

(3) the ecclesiastical parish of St. Andrew, Yeadon (para.13.22);

was such a locality.

9. On the question of user, the Inspector's conclusion was:

> "13.66 …. that the Objectors' argument that there was insufficient use made of the land to have put a reasonably observant landowner on notice of the use rights being asserted is simply untenable. The evidence strongly suggests ample and open recreational use being made of the land during the whole of the 20 year period I am concerned with, and indeed for considerably longer than that."

Having said that the authorities made it clear that the issue was very much a matter of impression, the Inspector said that in his view:

> "13.68 …. the evidence in this case abundantly supports the conclusion that a significant number of the local inhabitants have used the land for lawful sports and pastimes."

10. The Inspector's Conclusion and Recommendation were as follows:

> "14.1 I conclude that the Applicant has proved his case that the whole of the land of Yeadon Banks (i.e. the parts owned both by the City Council and Leeds Group PLC) has been used for not less than 20 years prior to the date of his application in July 2004, by a significant number of the inhabitants of the Banksfield/The Haws neighbourhood of Yeadon, as of right, for lawful sports and pastimes; and that this use continued through and beyond July 2004.
>
> 14.2 This is not a conclusion reached on a narrow balance

of conflicting evidence. My advice would be that the Applicant has in this instance clearly established his case on the evidence beyond any reasonable doubt.

14.3 Accordingly I recommend that the Register of Town and Village Greens maintained by the City Council should be amended by the addition to it of the land at Yeadon Banks shown on the map accompanying the Applicant's application."

11. The members of the Respondent's Plans Panel (West) were advised "to receive and consider the Inspector's Report" and to decide whether Yeadon Banks satisfied the definition set out in section 22(1A), the relevant part of which was set out in the report of the Respondent's Director of Legal and Democratic Services. Having done so, the members resolved that the report be noted, that Yeadon Banks did satisfy the definition set out in section 22(1A), and that the Officers be authorised to amend the register accordingly.

The Judgment

12. Before the Judge there was no challenge by the Appellant to the Inspector's conclusion that a significant number of local inhabitants had used the land for lawful sports and pastimes (para.21). It was submitted on behalf of the Appellant that the Inspector had erred in concluding that for the purposes of subsection 22(1A):-

(a) "Neighbourhood" included "neighbourhoods".

(b) The Haws and Banksfield together formed one neighbourhood.

(c) If they did not comprise one neighbourhood, The Haws and Banksfield were two separate neighbourhoods.

(d) Yeadon, and if not Yeadon;

(e) Leeds, and if not Leeds;

(f) The ecclesiastical parish of St Andrew, Yeadon, was a locality.

13. It was also submitted that no reasonable owner could reasonably have been expected,

before the coming into force of the new definition of a class C TVG on 30th January 2001, to resist the recreational use of Yeadon Banks by those living nearby in The Haws and Banksfield because such a use was incapable, as a matter of law, of giving rise to a claim to register the land as a TVG (because the users originated not from a locality, but from a neighbourhood/s). This submission was referred to in the judgment as the "As of Right Claim".

14. The Judge concluded that:-

(a) There was no logical reason why there could not be two or more neighbourhoods for the purposes of subsection 22(1A) (paras.92-97).

(b) The Haws and Banksfield did not form one composite neighbourhood (para.106).

(c) Each of The Haws and Banksfield was properly described as a neighbourhood, so there were two separate neighbourhoods (paras.104 and 107).

(d) Yeadon was a locality for the purposes of subsection 22(1A) (para.89).

(e) If Yeadon was not a locality, the ecclesiastical parish of St Andrew was the relevant locality (para.90).

(f) The fact that two houses in the neighbourhoods out of well over 600 were not in the parish was de minimis (para.90).

15. The Judge rejected the "As of right Claim (paras.108 – 110). He accepted to the Respondent's submission that there was no evidence to suggest that the reason why the Appellant had taken no action to prevent the use of its land for lawful sports and pastimes was because it had concluded that the users did not originate from a locality; and he referred to a passage in the speech of Lord Rodger in Oxfordshire County Council v Oxford City Council [2006] UKHL 25, [2006] 2 AC 674 ("the Oxfordshire case").

The Grounds of Appeal

16. Before considering the grounds of appeal, it is important to note those conclusions of the judge which were not challenged by Mr Laurence QC on behalf of the Appellant. There was no challenge to the judge's conclusion that, on the facts, "both The Haws and Banksfield were properly to be regarded as neighbourhoods within the meaning of section 22(1A)". Nor was there any challenge to the judge's conclusion that the fact that two houses in the neighbourhoods out of well over 600 were not within the ecclesiastical

parish of St Andrew was to be regarded as "de minimis". At the outset of the hearing it was accepted by Mr Laurence that the two neighbourhoods, The Haws and Banksfield, fell within an administrative area known to the law: the ecclesiastical parish of St Andrews.

17. The grounds of appeal contended that the judge had erred in law in concluding that:-

(1) The word "neighbourhood" in subsection 22(1A) could be read in the plural.

(2) Yeadon was capable of being a "locality" for the purpose of the subsection.

(3) It was sufficient for the ecclesiastical parish of St Andrew to qualify as a locality for that purpose that it was an administrative area known to the law.

(4) The Appellant's "As of right" submission should be rejected.

(5) The Appellant should pay all of the Respondent's costs in respect of both claims.

18. At an early stage in the hearing, Mr Laurence agreed that it was unnecessary to consider ground (2), since there was no doubt that the ecclesiastical parish of St Andrew was an area known to the law, and was therefore a locality for the purpose of subsection 22(1A), subject to the contention in ground (3) that this was not sufficient, and that in order to qualify as a locality the parish had to have certain other qualities, referred to in paragraph 84 of the judgment. During the course of his reply Mr Laurence said that ground (3) was no longer pursued. It was accepted that The Haws and Banksfield were within a locality for the purposes of section 22(1A).

19. Although the Appellant's written and oral submissions ranged far and wide over the meaning of "neighbourhood" and "locality" in the 1965 Act, given the judge's unchallenged factual conclusions and the withdrawal of grounds (2) and (3) the only remaining issues of substance (other than costs) are:-

(1) Whether "neighbourhood" in subsection 22(1A) should be interpreted so as to include "neighbourhoods".

(2) What the judge called the "As of right" point, which Mr Laurence renamed the "User of inadequate quality before 30th January 2001" point.

Neighbourhoods

20. The starting point is section 6 (c) of the Interpretation Act 1978 (the 1978 Act). Applying normal rules of statutory construction the singular "neighbourhood" includes the plural "neighbourhoods" unless the contrary intention appears. It is not suggested that any contrary intention appears from the express language of section 22 itself. Mr Laurence submits that a contrary intention is to be inferred because of the background against which subsection 22(1A) was introduced by the 2000 Act. At common law, while user by the general public could not give rise to any right of recreation, long user by the inhabitants of a locality would give rise to such a right. This was reflected in class C in section 22(1) as originally enacted (see para.2 above).

21. At common law, if those who used the land came from more than one locality that was fatal to the claim: see Edwards v Jenkins [1896] 1Ch 308, per Kekewich J at p.313. In paragraph 11 of the Oxfordshire case Lord Hoffmann, having referred to the view expressed by Lord Denning MR in New Windsor Corpn. v Mellor [1975] Ch 380 at p. 387, that Kekewich J. had gone too far, said that there was "no doubt that the locality rule was the pinch-point through which many claims to customary rights of recreation failed to pass". The need for there to be a single locality from which the users of the relevant land came was incorporated into Class C in section 22(1) as originally enacted. Lord Hoffmann described the events leading up to the enactment of section 22(1) in 1965 and its amendment in the 2000 Act. He said that the question raised in the debates on the bill which became the 2000 Act had been "whether the locality rule did not make it too difficult to register new village greens" (para.26).

22. In paragraph 27 of his speech Lord Hoffmann considered the meaning of what had been described in the Court of Appeal by Carnwath LJ ([2006] Ch 43 at para.65) as the "new concept" of a "*neighbourhood* within a locality" introduced by section 98 of the 2000 Act:

> "27 "Any neighbourhood within a locality" is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries. I should say at this point that I cannot agree with Sullivan J in R (*Cheltenham Builders Ltd) v South Gloucestershire District Council* [2004] JPL 975 that the neighbourhood must be wholly within a single locality. That would introduce the kind of technicality which the amendment was clearly intended to abolish. The fact that the word "locality" when it first appears in subsection (1A) must mean a single locality is no reason why the context of "neighbourhood within a locality" should not lead to the conclusion that it means "within a locality or localities"."

23. Mr Laurence submitted that the "mischief" which the new subsection 22(1A) was

intended to address was the need for those claiming registration of a piece of land as a TVG to be able to demonstrate that they were the inhabitants of a locality, when the only available administrative area known to the law might be a very large area, and the remedy adopted by Parliament was to preserve the need for the users to come from one area, but to enable them to identify a smaller area, a neighbourhood, which need not be defined by formal, administrative boundaries. If, as Lord Hoffmann said the word locality in limb (i) of subsection (1A) must mean a single locality, then the word neighbourhood in limb (ii) must also mean a single neighbourhood, whether or not Lord Hoffmann's view that locality in limb (ii) could mean localities was correct. Mr Laurence submitted that Lord Hoffmann's view was not correct, and that locality in both limbs of Class C meant a single locality.

24. Ms Ellis QC submitted on behalf of the Respondent that far from there being a contrary intention for the purposes of section 6(c) of the 1978 Act, Parliament had, by choosing the new concept of a "neighbourhood within a locality" made it clear that limb (ii) in Class C was to be applied in a straightforward manner, untrammelled by any pre-existing common law technicalities. As she put it, Parliament in enacting limb (ii) was intending to dispense with any "Common Law baggage". By contrast with limb (ii) which introduced a new concept, Parliament had substantially retained the pre-existing law relating to "locality" in limb (i), with the addition of the requirement that "a significant number" of the inhabitants of the locality must have been using the land. In support of this submission she referred to Lord Hoffmann's view that, although "locality" in limb (i) must mean a single locality, the new concept of "neighbourhood within a locality" was obviously drafted with a deliberate imprecision which contrasted with the position at common law, and his view that to require a neighbourhood to be within a single locality (as I had thought was the requirement in the Cheltenham Builders case) would introduce the kind of technicality which the amendment was clearly intended to abolish.

25. She also submitted that, bearing in mind the object underlying the amendment – to make it easier for local communities (neighbourhoods) to protect community recreational assets, it would be absurd if long use by a significant number of the inhabitants of one community was sufficient to justify registration, but long use by a significant number of the inhabitants of two or more communities was a bar to registration. The more valuable the land was in terms of its recreational potential the greater would be the likelihood that it would be used by significant numbers of the inhabitants of more than one neighbourhood.

26. I accept the submission of Ms Ellis. Like the judge, I can see no logical reason why "any neighbourhood" in subsection 22(1A) should not include two or more neighbourhoods. There is nothing in the language of the subsection to suggest that "any neighbourhood" must mean only one neighbourhood. The fact that Parliament chose to retain the "Common Law baggage" associated with "locality" in limb (i) of the subsection is not a reason to infer that it intended that all aspects of the common law locality rule were to be grafted onto the new concept of "neighbourhood within a locality" in limb (ii). Lord Hoffmann's observations in paragraph 27 of the Oxfordshire case were obiter, but they

are, at the very least, persuasive. Lord Rodger and Lord Walker agreed with his speech (paras.114 and 124). If the amendment to section 22(1) was intended to abolish technicalities, and was obviously drafted with a deliberate imprecision to that end, it would be contrary to Parliament's intention to confine "any neighbourhood within a locality" to only one neighbourhood within a locality. By its very nature a locality is likely to contain a number of neighbourhoods. Mr Laurence submitted that this approach to subsection 22 (1A) would open the door to registration too wide, to the disadvantage of landowners. However, Parliament while abolishing technicalities in the limb (ii) of Class C, also made it clear that in respect of both limbs only user by a significant number of the inhabitants of the locality, neighbourhood or neighbourhoods, as the case may be, will suffice.

27. When considering whether there is a contrary intention for the purposes of section 6(c) it is helpful to stand back from the language of the subsection, and to look at the factual context in which it was enacted. In paragraph 13.37 of his Report the Inspector said:

> "13.37 Furthermore common sense suggests to me that there must be numerous instances within built-up areas where the very existence of an open space of any size will tend to create the impression of distinct neighbourhoods (even if within the same locality) on either side – precisely because the open space between them is itself not criss-crossed by connecting built-up streets. In my judgment it would be an absurdity, and a manifest distortion of Parliament's intentions, to hold that a town or village green can only validly be registered in such circumstances where it can be shown that all, or the predominant bulk, of the users came from the 'neighbourhood' on one side of the open space, and not the other."

The judge found the Inspector's views on this issue "particularly convincing"; so do I. Take the factual circumstances of this case by way of example. Banksfield is located to the west of Yeadon Banks, The Haws to the east. The two neighbourhoods are separate because they are physically separated in part by Yeadon Banks, in part by a former dye works and in part by a road, Otley Lane. Mr Laurence accepts that if he is right, user by a significant number of the inhabitants of either Banksfield or The Haws (i.e. the inhabitants to one side or the other of Yeadon Banks) would suffice for the purposes of registration under limb (ii) of Class C, but user by a significant number of the inhabitants of both neighbourhoods on both sides precludes registration. Such an outcome is fairly described as an absurdity. If Parliament's intention in enacting the 2000 Act was to remove unnecessary technical obstacles to the registration of land that was performing a valuable recreational function for local inhabitants, it would be a manifest distortion of its intentions to hold that, if the evidence demonstrates that that recreational function is valuable for two (or more) neighbourhoods rather than merely one neighbourhood, that is a bar to registration.

Quality of user

28. I agree with Mr Laurence that this ground of appeal is better described as the "quality of user" point. It is based on certain passages in the speeches of Lord Walker and Lord Hope in R(Lewis) v Redcar and Cleveland Borough Council [2010] UKSC 11 [2010] 2 AC 70 ("the Redcar case"). In paragraph 30 Lord Walker referred to the general proposition that had been relied on by Mr Laurence,

> "that if the public (or a section of the public) is to acquire a right by prescription, they must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him."

In paragraph 36 Lord Walker said that in the light of the authorities he had:

> "…. no difficulty in accepting that Lord Hoffmann was absolutely right, in *Sunningwell* [2000] 1 AC 335, to say that the English theory of prescription is concerned with "how the matter would have appeared to the owner of the land" (or if there was an absentee owner, to a reasonable owner who was on the spot)."

29. In paragraph 67 of his speech Lord Rodger analysed the structure of section 15(4) of the 2006 Act (paragraph (a) of which corresponds to subsection (1A) of the 1965 Act as amended):

> "67 In the light of that description it is, I think, possible to analyse the structure of section 15(4) in this way. The first question to be addressed is the quality of the user during the 20-year period. It must have been by a significant number of the inhabitants. They must have been indulging in lawful sports and pastimes on the land. The word "lawful" indicates that they must not be such as will be likely to cause injury or damage to the owner's property: see *Fitch v Fitch (1797)* 2 Esp 543. And they must have been doing so "as of right": that is to say, openly and in the manner that a person rightfully entitled would have used it. If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right (see *R (Beresford v Sunderland City Council* [2004] I AC 889, paras 6, 77), the owner will be taken to have acquiesced in it – unless he can claim that one of the three vitiating circumstances applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way – either because it has not been asked, or because it has been answered against the owner – that is an end of the matter…."

30. Mr Laurence submitted that the Appellant's predecessor could not reasonably have been expected, before 30th January 2001, to resist the assertion of any right by people living in the immediate vicinity of its part of Yeadon Banks, the Leeds Land, because there was no basis in law, before that time for user by such a limited class of people to result in the Leeds Land becoming registrable as a TVG. In summary, the submission is that user by such a limited class of the public was not, to use Lord Hope's words in the Redcar case "of such amount and in such manner as would reasonably be regarded as the assertion of a public right".

31. This submission was not made to the Inspector, and although the judge gave permission for it to be advanced as a new point, no evidence as to the amount or manner of the user of the land was given before the judge. Unsurprisingly, Ms Ellis submitted that the point is without any evidential foundation. She also submitted that, at least since the decision of the House of Lords in R v Oxfordshire County Council, Ex p. Sunningwell Parish Council [2000] 1 AC 335 any reasonable owner would be put on notice that those using his land for recreational purposes may well be asserting a public right to do so if their user of his land for that purpose was more than trivial or sporadic. I accept that submission. In paragraph 65 of his judgment in the Oxfordshire case, Carnwath LJ said that the use must be "sufficiently substantial to carry the outward appearance of user as of right". When considering the meaning of "significant" in subsection 22(1A) in R (Alfred McAlpine Houses Ltd.) v Staffordshire County Council [2002] EWHC 76 Admin; [2002] 2 PLR 1 I suggested that the answer to the question – "significant for what purpose?" - was as follows:

> "what matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers."

Of course, the landowner will not know, without carrying out a detailed investigation, whether those using his land for recreation are coming from a particular locality or a neighbourhood or neighbourhoods, but the fact that their recreational user of his land is more than trivial or sporadic will be sufficient to put him on notice that a right may well be being asserted, so he must choose between warning them off, or finding that the apparently asserted right has been established.

32. I have set out the Inspector's conclusions as to the extent of the user by the public for the 20 year period: see para. 9 (above). Since "ample and open recreational use" was being made of the land for considerably longer than the 20 year period (para.13.66), and the evidence "abundantly" supported the conclusion that a "significant number of local inhabitants" were using the land for lawful sports and pastimes" (para.13.68), the use was clearly of such an amount and manner as would reasonably be regarded as the assertion of a public right, even though neither the landowner, nor the registration authority pending

full investigation by the Inspector of an application for registration, would know whether the public right was being claimed by the inhabitants of a locality or the inhabitants of a neighbourhood or neighbourhoods, and in any case whether the use was by a significant number of those inhabitants.

(1) For these reasons I would reject ground (4) of the appeal. There is also the consideration mentioned by the judge in paragraph 110 of his judgment. Mr Laurence's submission, if correct, would in practice postpone the ability of the inhabitants of any neighbourhood to rely on 20 years user in limb (ii) cases in Class C until up to 20 years after the 30th January 2001.

Costs

33. The judge ordered the Appellant to pay the Respondent's costs of both the claims, under section 14 of the 1965 and for judicial review. It is submitted that he should have ordered the Respondent to pay the Appellant's costs in respect of the "neighbourhood" issue, because the judge did not accept the Inspector's conclusion that The Haws and Banksfield together comprised one neighbourhood, and this was the basis on which the Inspector had recommended adding Yeadon Banks to the Register, which recommendation the Respondent had accepted.

34. This submission focuses solely upon the recommendations in paragraphs 14.1-14.3 of the Inspector's Report (above). The members of the Respondent's Plans Panel (West) were invited to receive the report, and to decide whether the definition of a class C TVG in section 22(1A), which was set out in the Officer's report, was satisfied. When the members resolved that the Inspector's report be noted, they were referring to the report as a whole, not merely to the last three paragraphs. If the report is read as a whole, it is clear that the Inspector considered that the "neighbourhood" test was met whether The Haws and Bankside were regarded as one composite, or two separate, neighbourhoods. There is no indication that the members disagreed with this view. The judge having concluded that Yeadon Banks fell within the section 22(1A) definition of a TVG on the latter basis the Appellant's challenge to the registration of the Leeds Land as a TVG failed. Having heard the parties' submissions the judge was best placed to decide whether the issues should be disaggregated for the purpose of an award of costs. He decided that it would not be appropriate to do so. In a short judgment on 22nd April 2010 dealing with costs [2010] EWHC 1102 (Ch) he said at paragraphs 11 and 12:

> "11. ….The reality of the situation is that the Claimant lost on practically every issue and practically every submission made to the Court. These included the "as of right", "the locality issues", and "the two neighbourhoods issue". The only issue on which there was limited success was the issue of whether there was one composite neighbourhood. This, however, has to be seen in the context of the Inspector's advice that there were, in addition, 2

separate neighbourhoods and my finding to that effect.

> 12. In my judgment this is a case where the general rule should apply. There is no reason to deprive the Registration Authority of any of its costs in either set of proceedings…."

That conclusion was well within the scope of the judge's discretion as to costs, and there are no grounds for interfering with the judge's exercise of that discretion.

Conclusion

35. For these reasons I would dismiss this appeal.

Lord Justice Tomlinson

36. I gratefully adopt Sullivan LJ's exposition of the issues which arise on this appeal.

37. At paragraph 21 of his judgment he refers to the observations of Lord Hoffmann at paragraphs 11 and 26 of his speech in the *Oxfordshire* case to the effect:-

(1) that the locality rule was the pinch-point through which many claims to customary rights of recreation failed to pass, and

(2) that the only question raised in debates on the amendment to the 1965 Act was whether the locality rule did not make it too difficult to register new village greens.

After making this latter observation Lord Hoffmann continued, at paragraph 26 page 690 GH:-

> "In your Lordship's House, Baroness Miller of Chilthorne Domer described the need for the users to be predominantly from the local community, defined by reference to a recognised ecclesiastical parish or local government area, as a "loophole" in the 1965 Act which "allows greens to be destroyed" (Hansard (HL Debates) 16 October 2000, col 865)."

38. There were as it seems to me two facets to the pinch-point or the loophole. One was the rule that in order to establish the right to register land as a green under either class (b) or class (c) users had to come predominantly from the locality in question – see per Lord Hoffmann in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* 2000

1 AC 335 at 358B. The second was that in large built-up areas it was not easy to show that all the users came from a discrete area – they could demonstrate only that they came from a part of a locality, without being able to connect the user with residence in that larger administrative area.

39. One of the questions debated before us was whether s.98 of the 2000 Act should be regarded as having dealt with both points. On any view one purpose, and possibly the purpose, of the amendment was to deal with the second point by enabling a group identified by reference to an area smaller than a locality, namely the inhabitants of a neighbourhood, to achieve registration, provided that the user had been by a significant number of the inhabitants of the neighbourhood. In *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust & Anor) v Oxford City Council & Anor [2010] EWHC 530 Admin* Judge Waksman QC, sitting as a Judge of the High Court, decided that the introduction of the "significant number" requirement indicated a clear intention to dispense with the predominance test in relation to class (c) greens, and moreover in respect of both limb (i), locality and limb (ii), neighbourhood.

40. As Sullivan LJ points out at paragraph 27 of his judgment, Mr Laurence accepted before us that if neighbourhood must be restricted to the singular, proof of user by a significant number of the inhabitants of both neighbourhoods would in this case preclude registration. On reflection I am not sure whether Mr Laurence is necessarily right. If the predominant user test has survived in limb (ii) of class (c), he is plainly right, since the user by a significant number of the inhabitants of one neighbourhood would, on the facts of this case, defeat the claim to registration of the other. But if the predominance test has not survived, there would as it seems to me be in principle no bar to registration being achieved by either one neighbourhood or the other, although on the hypothesis that neighbourhood is to be restricted to the singular, not by both. In a case like the present where the user has been by a significant number of the inhabitants of two neighbourhoods, that would be an inconvenient and not altogether sensible result, since the rights acquired, or perhaps confirmed, by registration enure only for the benefit of those on the basis of whose user the land is registered. Whether in reality the inhabitants of the non-registering neighbourhood would be prevented from exercising the rights enjoyed by the inhabitants of the registering neighbourhood must depend upon the nature of the green and the zeal with which the owners sought to restrict its use to those entitled. It must be debatable however whether Parliament intended this sort of result.

41. It might be thought therefore that the question whether neighbourhood should be regarded as only singular is in turn informed in part by the answer to the question whether the predominance test survives the 2000 amendment. If the predominance test has survived, it might be thought that Parliament must have intended that neighbourhoods, plural, should achieve registration since otherwise in cases such as the present registration would as a result of the amendment have become more or at any rate no less difficult than before. Parliament plainly intended to make the task less difficult. In *Oxfordshire County Council v Oxford City Council & Another* [2005] EWCA Civ 175; [2006] Ch 43 Carnwath LJ, at

paragraph 65 of his judgment, pages 64-65, after observing that the 2000 Act introduced the new concept of a neighbourhood within a locality, and required no more than a significant number of local users, observed:-

> "Whatever precisely that expression means (which happily is one of the few issues not before us) it can only have the effect of weakening still further the links with the traditional tests of customary law."

42. On the other hand, the use by Parliament of the deliberately imprecise expression 'neighbourhood' might be thought of itself to overcome this potential problem, since it may not be difficult to define the relevant neighbourhood by reference to the green and the area in which those who habitually use it for recreational purposes reside. The Inspector was prepared to adopt that approach here, as Sullivan LJ has recorded at paragraph 7 of his judgment. The judge's rejection of that approach has not been challenged before us but I am not myself convinced that the Inspector was necessarily wrong, and I am not convinced by the judge's view, at paragraph 106 of his judgment, that the Inspector's conclusion denuded the word 'neighbourhood' of any real meaning. If neighbourhood is a deliberately imprecise term, as Lord Hoffmann thought and as I respectfully agree, it is not necessary to infer that Parliament intended by the 2000 amendment to sweep away the centuries old rule that the right to indulge in the relevant activities on a village green attached to the inhabitants of a single defined area rather than to the inhabitants of more than one area.

43. If conversely the predominance test has not survived, that might tell in favour of construing neighbourhood in the singular alone since otherwise the concept of a green has become in reality almost completely divorced from the traditional tests of customary law.

44. I find it very difficult to discern any clear legislative intent, beyond an intention to make it easier to register new village greens. I do however have grave doubts about imputing to Parliament an intention to relax the requirement that the right to enjoy the green should attach to the inhabitants of a single area, however defined. It must I think have been considerations such as those which led Lord Hoffmann to observe that the word 'locality' when it first appears in sub-section (1A) must mean a single locality – paragraph 27 of his speech in the *Oxfordshire* case at page 691 of the report, set out by Sullivan LJ at paragraph 22 of his judgment. Those considerations seem to me to lead inexorably to the conclusion that so too the word 'neighbourhood' must mean a single neighbourhood. I would therefore allow the appeal. However I have misgivings about this outcome. Although we heard no argument on the point, I am unpersuaded that the Inspector was wrong on the facts of this case to conclude that Banksfield and The Haws may quite reasonably in this context and for these purposes be regarded as one neighbourhood. Registration on that basis is not however sought to be upheld.

45. Although in the light of the view I take on the unavailability of registration on the basis

of user by the inhabitants of more than one neighbourhood the further issues canvassed on the appeal do not arise, I would had they arisen dispose of them in the same manner as proposed by Sullivan LJ, with whose judgment on these points I entirely agree.

46. I would therefore allow the appeal.

Lady Justice Arden

47. There is an illuminating account of the history of the law of town or village greens ("TVGs") in the speech of Lord Hoffmann in *Oxfordshire County Council v Oxfordshire City Council* [2006] 2 AC 674. He explains the background to the registration system set up by the Commons Registration Act 1965 and how there were originally three types of TVG that could be registered. The first two (Class A and Class B TVGs) were TVGs resulting from the allotment of land by local authorities as TVGs, and TVGs to which the inhabitants of a locality had a customary right.

48. The only type of TVG which can now be registered is that of Class C TVGs which arise from 20 years' use for recreational purposes. As Sullivan LJ has explained, the statutory definition of these TVGs was amended with effect from 30 January 2001 by s 98 of the Countryside and Rights of Way Act 2000 ("the 2000 Act").

49. Section 22(1) of the 1965 Act as originally enacted defined "town or village green" for the purposes of the Act, as follows:

> "'town or village green' means [Class A TVGs] land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [Class B TVGs] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or [Class C TVGs] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years." (words in square brackets added)

50. The effect of the amendment to this definition was to substitute for the words after "lawful sports and pastimes", the words "or which falls within subsection (1A) of this section". That subsection, so far as material, provides:

> "(1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of inhabitants of [Limb 1] any locality, or [Limb 2] of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either -
> (a) continue to do so, or

(b)…." (Limb 1 and Limb 2 added)

51. The Explanatory Notes to s 98 describe the two-fold effect of the amendment succinctly in these terms:

> "*Section 98* amends the definition of town and village green contained in section 22 of the Commons Registration Act 1965. It introduces reference to a neighbourhood and provides that use of the land for lawful sports and pastimes must be by a significant number of people from the locality or neighbourhood (rather than simply by "the inhabitants")."

52. In my judgment, it is significant that Parliament chose to put Class C TVGs into a separate subsection. It thus loosened the links between the new "neighbourhood-based" TVGs from the historic forms of TVGs. We also know from the speech of Lord Hoffmann that the expression "any neighbourhood within a locality" was drafted with "a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries." (see the *Oxfordshire* case at [27]). Moreover, this point led Lord Hoffmann to the conclusion (obiter) that, even though the expression "any locality" in Limb 1 must mean a single locality, there was no reason why the expression "neighbourhood within a locality" in Limb 2 should not mean "neighbourhood within a locality or localities". That is not a point that we have to decide in this case, and I for my part express no concluded view on it. I further note, however, that at [38] of his speech Lord Hoffmann counselled against ("at any rate without full argument") embarking on "the process of introducing some elements of the traditional village green into the statutory definition", thus emphasising the importance of interpreting section 22(1A) as it stands.

53. The crucial issue to be decided is whether there can be more than one neighbourhood within a locality for the purposes of Limb 2 of s 22(1A). This is a matter on which Sullivan and Tomlinson LJJ have expressed differing views.

54. At first glance the obiter observations of Lord Hoffmann in [27] of his judgment in the *Oxfordshire* case tend to support Mr Laurence's case since the terms in which [27] is written assume that there is only one neighbourhood. At common law, a TVG had to be for a single locality only: see *Edwards v Jenkins* [1896] 1 Ch 308.

55. However, in 2000 Parliament rewrote the conditions for a TVG for the purposes of Class C TVGs, and as I have said put the definition into a new sub-section. Formerly there was only a single defining unit (the locality): there are now two defining units (the neighbourhood and the locality). This is where the balance has been struck between the landowner and the inhabitants of a Class C TVG.

56. There is no necessary link between a locality (an administrative area) and a neighbourhood. A

neighbourhood is not a sub-division of a locality. This may be a further point that led Lord Hoffmann to his conclusion that it is unlikely that Parliament intended a neighbourhood to be wholly within a single locality. By parity of reasoning with the various points that Lord Hoffmann made, since it is common knowledge that many villages and towns have more than one neighbourhood, it is in my judgment unlikely without some clear indication to that effect that Parliament intended that no Class C TVG should be registered if it was used by a significant number of inhabitants from more than one neighbourhood. The landowner is protected by the other requirements of s 22(1A), particularly the requirement for use to be continuing.

57. The statutory presumption in s 6 of the Interpretation Act 1988 is that in any Act, unless the contrary intention appears, the singular includes the plural. This applies to the words in s 22(1A) but the context is a sufficient contrary intention for the word "locality" where it first appears in that sub-section to be confined to the singular for the reasons given in Lord Hoffmann's speech in the *Oxfordshire* case. It is unusual for the same word to be used in different sense in the same enactment but in this case Lord Hoffmann has powerfully suggested that "a locality" does not mean any single locality when the word "locality" is next used in sub-section (1A). Is the word "neighbourhood" in s 22(1A) to be interpreted as "any single neighbourhood" like the word "any locality" when in first appears? In my judgment, and in respectful disagreement with Tomlinson LJ, for the reasons given above and those given by Sullivan LJ there is no such contrary intention in s 22(1A).

58. The only other point in this case which needs now to be is decided is the "quality of user" point. On this I agree with Sullivan LJ for the reasons he has given.

59. Accordingly, I too would dismiss this appeal.

60. The only other matter on which this court needs to rule is an application to amend the grounds of appeal in effect to argue that section 22 (1A) is to be interpreted as not taking away the vested rights of an owner of land in so far as the applicants rely on acts of use under the amendments brought about by s 98 of the 2000 Act s 22(1A) which would be insufficient to give rise to a TVG at common law (irrespective of the length of use). Mr Laurence with our permission made this application in writing after the conclusion of the hearing of this appeal and, while we have received written submissions from both parties, we envisage that both sides would need to amplify their argument orally. It would thus be wrong for us to rule on it at this stage.

61. Undoubtedly, at the time that the acts of use occurred they were insufficient in law to give rise to a TVG at common law. In the *Oxfordshire* case, Lord Rodger explained that this amendment did not prejudicially affect any vested right of a person who had not then filed his application. Mr Laurence submits that his observations did not deal with the position of the landowner in the present case. Section 98 of the 2000 Act took effect only some two months after Royal Assent. Miss Ellis does not oppose the grant of permission in principle

though she asks in effect that permission be on terms that the Respondent is not liable for costs if the ground succeeds. The point is both arguable and an important point of law and by this judgment and with the agreement of Sullivan and Tomlinson LJJ I would give permission for that amendment. However, in view of the lateness of the application, we do so on the grounds as to costs proposed by the Respondent. We direct that the appeal on this new ground be heard on a date to be fixed by the same constitution of this Court. In giving permission for this point to be raised, we give no indication as to its merits.