IN THE HIGH COURT OF JUSTICE **CO/6298/2009**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
BETWEEN:

THE QUEEN
(on the application of
(1) Oxfordshire and Buckinghamshire
Mental Health NHS Foundation Trust
(2) Oxford Radcliffe Hospitals NHS Trust)

Claimants

and

OXFORDSHIRE COUNTY COUNCIL

Defendant

and

(1) PAUL DELUCE

(2) CHRISTOPHER WHITMEY

(3) ROSIE BOOTH

Interested Parties

FIRST INTERESTED PARTY'S
DETAILED GROUNDS FOR CONTESTING THE CLAIM

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1. The First Interested Party made the application for registration as a town or village green of Warneford Meadow, Oxford, which the Defendant as commons registration

authority decided on 6 April 2009 to accept. It is that decision which the Claimants[1] are seeking to challenge in these proceedings. The First Interested Party says that the decision involved no error of law on the part of the Defendant or of the Inspector who (having conducted the 15-day non-statutory inquiry into his application and visited the Meadow on a number of occasions[2]) recommended registration, in either of the respects alleged by the Claimants in their Detailed Statement of Grounds or at all.

2. The First Interested Party does not dispute the content of the Statement of Facts attached to the Claim Form, so far as it goes.

As of right

3. However, in order to have a proper appreciation of the context of the "no public right of way" sign which according to the Claimants rendered use of the Meadow for lawful sports and pastimes contentious and therefore *vi* and so not "as of right" (Detailed Statement of Grounds paragraphs 2-7) and the conclusions reached by the Inspector with regard to that sign, it is necessary to read and have regard to more of his Report than is quoted by the Claimants in their Statement of Facts, and also paragraphs 7-20 of the First Interested Party's Response to the representations made by the objectors in relation to the Inspector's Report ("the Response") which the Inspector effectively adopted at paragraph [14] of his further Report.[3] A complete copy of that Response[4] and its appendices forms Appendix 1 to these Detailed Grounds for contesting the claim.

4. The Court's attention is drawn in particular to the following paragraphs of the Report:

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[1] The First Interested Party notes that two of the Health Authority objectors to his registration application (the landowner, the Secretary of State for Health, and the Strategic Health Authority with responsibility for the land in which Warneford Meadow is situated) have not joined in bringing this claim.

[2] Report paragraph [8], Claim Bundle p. 37.

[3] Claim Bundle p. 144.

[4] References in the Response in the form "LOB/no/no" are references to volumes and pages in the inquiry bundles of the Health Authority objectors. In the Report, those bundles are referred to simply by the letter 'B'.

[70]-[73][5] These confirm that the erection of this and other identically worded signs in January 1989 occurred soon after the date of making by Mr Pomfret of the Campaign for the Protection of Rural England (CPRE) of an application for a modification order under section 53(2) of the Wildlife and Countryside Act 1981 to add certain footpaths to the definitive map of public rights of way (21 November 1988). The obvious inference to be drawn from the timing, positioning, and wording of the signs was that they were erected in response to that claim and specifically targeted at linear routes in an attempt to prevent public rights of way being established over them.

[81][6] In this paragraph the Inspector quoted from the letter of objection to the modification order application drafted by Messrs Clarks on behalf of the Health Authority landowner the following year, in May 1990 (inferred by the Inspector, surely correctly, to have been drawn up on instructions from their client): this is the source of the statements that the Health Authority had "*never had a policy to discourage the use of the site as open space by members of the public, but ... has never intended to dedicate any particular route through or around the perimeter of the site as a public footpath...*" and had "*not objected in the past [to its use] as open space by the public*".

5. The modification order process took a long time. It was not until 2 December 1997[7] that Oxfordshire County Council made a modification order which (if confirmed) would add to the definitive map some of the footpaths claimed by the CPRE, including FP111 across the Meadow; not until October 2000 that an inquiry into that order was held;[8] and not until 2002 that the order was confirmed (with modifications, but none affecting FP111 south from Roosevelt Drive).[9]

6. The Court is asked to note that:

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[5] Claim Bundle pp. 51-52.
[6] Claim Bundle p. 54.
[7] Report paragraph [87], Claim Bundle pp. 55-56.
[8] Report paragraph [90], Claim Bundle p. 57.
[9] Report paragraphs [99], [101], [102], Claim Bundle pp. 59-60.

(a) The Inspector found as facts that of the several "no public right of way" signs erected by the Health Authority landowner in response to the CPRE's definitive map modification order application, two were erected on the Meadow; one was where FP111 left Roosevelt Drive in a southerly direction; the other was near (not, as the Claimants assert in paragraph 3 of their Detailed Statement of Grounds, at) the Hill Top Road entrance to the Meadow[10].

(b) Critically, he also found as facts that those signs were specifically referential to FP111 and (in the case of the second) also to the diagonal path running from FP111 to the orchard (which was not claimed by the CPRE)[11], not generally referential to the entire 20 acre area[12] of the Meadow.

(c) No notices were erected at any of the other access points to the Meadow[13].

(d) The contemporaneous documentary evidence showed that the signs erected in January 1989 were universally understood to be referential to footpaths: see Report paragraphs [76], [79][14].

(e) This understanding was publicly confirmed by the Health Authority landowner itself in the letter of 27 February 1989 written to Councillor Godden and quoted in the *Oxford Times:* see Response paragraphs 16-18.

> "*The position is that we do not at the moment accept the CPRE claims that additional footpaths have been established across the Churchill/Warneford*

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[10] Report paragraph [369], Claim Bundle pp. 107-108.
[11] Ibid.
[12] Report paragraph [1], Claim Bundle p. 35.
[13] See paragraph 10 of the Response (the Meadow is referred to in that document as "the Application Site").
[14] Claim Bundle pp. 53-54. The contemporaneous note of Mr Banbury referred to in paragraph [79] (that the signs had been erected to try to stop the establishment of rights of way which were not on the definitive map) was among the evidence which led the Inspector to reject the claim made for the first time by Mr Banbury in his evidence to the town/village green inquiry that their purpose had been "*to prevent access and vandalism on the hospital land and to protect the legal rights of the hospital authority*"*:* Report paragraphs [311], [314], [369], Claim Bundle pp. 97, 108.

site ... no more than that should be read into the erection of the notices to which you refer."

7. In the circumstances there is no merit in the argument that the Inspector and the Defendant ought to have found that the particular "no public right of way" sign near the Hill Top Road entrance to the Meadow rendered use of *the whole 20 acres* for *lawful sports and pastimes* contentious, as alleged in paragraph 7 of the Claimants' Detailed Statement of Grounds. The contrary conclusion reached by the Inspector and the Defendant was the only conclusion to which any decision maker could reasonably have come. If (which is denied) there are any circumstances in which the words "no public right of way" could carry the meaning contended for by the Claimants, no reasonable person would have so interpreted them in the particular circumstances of this case.

8. During the interval between the close of the inquiry and the completion of the Inspector's Report, judgment was delivered in *R(Lewis) v Redcar and Cleveland Borough Council* [2008] EWHC 1813 (Admin). This led to an exchange of post-inquiry submissions,[15] and informed the Inspector's approach. Among the points made by the Judge were the importance of the surrounding context in construing notices (paragraph 21), the relevance of the public's response (paragraphs 21-23), and the ease with which a landowner wishing to erect a notice prohibiting access to his land for general recreational purposes can do so using natural and straightforward language (paragraph 22).

9. Sullivan J noted (at paragraphs 12-16) that there was no binding authority on the question whether disregarded prohibitory notices had the effect of rendering subsequent use of land forceful and not as of right. Like the claimant in that case (see paragraph 16), the First Interested Party reserves the right to argue that they do not. However, it is unnecessary because, like the notices at issue in that case ("*Warning It is dangerous to trespass on the golf course*" – see paragraph 11), the "no public right of way" signs

[15] Report paragraph [10], Claim Bundle p. 37.

erected in January 1989 were not prohibitory of lawful sports and pastimes over the Meadow.

10. The First Interested Party points out that according to Lord Hoffmann in *R (Godmanchester Town Council) v Secretary of State for Environment, Food and Rural Affairs* [2008] AC 221, at paragraph 24, the presence of a notice saying "No right of way. Trespassers will be prosecuted" does not prevent use of the way for 20 years satisfying the conditions which give rise to the presumption of dedication as a highway under section 31(1) of the Highways Act 1980 (one of which is that use be "as of right"), although it will satisfy the proviso to that subsection (i.e. be sufficient evidence that there was no intention to dedicate the way as a highway) and so rebut the presumption. So a "no public right of way" sign does not even render *vi* and not as of right public use for passage of the path to which it is referential, let alone use of surrounding land (to which it is not referential) for lawful sports and pastimes (which it does not mention).

11. The Claimants criticise the Inspector for not adopting an objective approach to the interpretation of the "no public right of way" signs on the Meadow (paragraphs 4-7 of the Detailed Statement of Grounds). This criticism is unfounded. In saying that the signs "***did not purport to …*** *restrict general use of the Meadow for recreation by local people*",[16] the Inspector was evidently looking at them from an objective point of view.

12. Further, the Inspector in his Further Report adopted paragraphs 7-20 of the Response, which as the Claimants concede[17] addressed the interpretation of the signs from the standpoint of a reasonable person ("*What the terms of the notices, in conjunction with their positioning and timing, would have indicated to a reasonable person was that the landowner's thinking was to try to prevent the establishment of rights of way …"* (paragraph 12); "*The messages conveyed by the notices were twofold: 'there is no public right of way along this route' and 'the landowner has no intention of dedicating a public right of way along this route*' (paragraph 13)). It so happened that the

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[16] Report paragraph [384], Claim Bundle p. 111.
[17] Paragraph 5 of their Detailed Statement of Grounds.

contemporaneous documentary evidence showed that the landowner's actual intention in erecting the signs coincided with the intention which on a literal reading, *a fortiori* in the particular circumstances of their erection, would have been attributed to the landowner by a reasonable person.

13. The Claimants criticise as an "unnecessary complication" the introduction of the "reasonable landowner".[18] It is pointed out that that is not an invention of the First Interested Party, but derived from authority. Sullivan J in *Lewis* at paragraph 23 put the matter in the way he did ("*Given the ambiguity and the wording of the notices (to put their possible meaning at its highest from the point of view of the defendant), no landowner in the position of the defendant could reasonably have concluded that by erecting those notices, it had made it sufficiently clear that it was not acquiescing in the continued use of the land for recreational purposes by local users*") because in his exegesis of the concept "as of right" in *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [2000] 1 AC 335 ("*Sunningwell"*), Lord Hoffmann said that the English theory of prescription is concerned with how the matter would have appeared to the landowner (pp. 352H-353A), and in *R (Cheltenham Builders Ltd) v South Gloucestershire Council* [2004] JPL 975 at paragraph 69, Sullivan J said that "*In my judgment, the question following their Lordships' decision in Sunningwell must be not whether those using the land knew that their user was being objected to or had become contentious, but how the matter would have appeared to the owner of the land, since in cases of prescription the presumption arises from the latter's acquiescence…"*

14. But whether looked at from the viewpoint of the reasonable landowner or the reasonable user, the First Interested Party says that the January 1989 "no public right of way" signs referential to FP111 and the diagonal path did not convey the message "Do not indulge in lawful sports and pastimes anywhere on the Meadow" and did not render use of the Meadow for lawful sports and pastimes *vi,* and the Inspector and the Defendant made no error of law in so concluding.

[18] Paragraph 6 of the Detailed Statement of Grounds.

Neighbourhood

15. The only error of law[19] which the Claimants allege to have been committed by the Inspector and the Defendant in respect of the "neighbourhood" element of the definition of "town or village green" is described in paragraphs 9-10 of the Detailed Statement of Grounds. Effectively, they say that the correct approach is to draw a red line on a map around the area where the users of a claimed green lived, and if that line does not exactly coincide with the boundaries of a locality or neighbourhood, to reject the application, *even if* the evidence establishes that there is a locality or neighbourhood a significant number of the inhabitants of which indulged in lawful sports and pastimes on the land as of right for at least 20 years and continued to do so up to the date of the application for registration.[20]

16. That is absurd and at odds with the plain wording of section 22 of the statute as amended by section 98 of the Countryside and Rights of Way Act 2000 ("the 2000 Act").[21] In *Oxfordshire,* at paragraph 68, Lord Hoffmann said this of the amended definition:

> *"There is a clear statutory question: have a significant number of the inhabitants of a locality or neighbourhood indulged in sports and pastimes on the relevant land for the requisite period?"*

Although he (no doubt accidentally) omitted the words "as of right", asking and answering that single question (reading those words in) leaves no room for the approach to the locality/neighbourhood issue which the Claimants advocate in their Detailed Statement of Grounds. If the answer to the single statutory question is "yes", the land must be registered; the registration authority cannot nonetheless refuse to

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[19] At paragraphs 8(1) to (3) of their Detailed Statement of Grounds, the Claimants make some observations, which are dealt with in the Inspector's Further Report at paragraphs 9 to 12 (Claim Bundle pp. 142-143) and in the Response at paragraphs 32 to 37.

[20] The date up to which use must have "continued" within the meaning of section 22(1A) of the 1965 Act as amended: *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 ("*Oxfordshire*").

[21] Reproduced at Claim Bundle p. 32.

register it on the basis that other people indulged in sports and pastimes on the land as well.

17. That point was made in the Response, at paragraph 44, as part of the "locality and neighbourhood" section (paragraphs 32-46). The Inspector in his Further Report[22] specifically considered and rejected the Claimants' alleged "fit" requirement, agreeing with the First Interested Party that the statutory wording unambiguously contained no such requirement, but that if there were any ambiguity, recourse to Parliamentary materials under the *Pepper v Hart* principle would support that construction. If and insofar as necessary to resolve any ambiguity, the Court will be referred to the statement of Baroness Farrington of Ribbleton, the Government spokesman introducing by way of amendment the clause which became section 98 of the 2000 Act.[23]

18. The approach advocated by the Claimants entails reading into section 22(1A) words which are not there ("*land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality,* **and no other persons**, have indulged in lawful sports and pastimes as of right, etc"), the addition of which is not justified by any accepted canon of statutory construction.

19. The Inspector and the Defendant did not misdirect themselves as to the law in respect of the "neighbourhood" issue and there is no basis for the Court to disturb the decision to register Warneford Meadow.

Ross Crail

[22] Paragraph [12], Claim Bundle p. 143.

[23] The relevant passage is quoted in paragraph 45 of the Response and the relevant pages of *Hansard* are copied at Appendix 2 hereto. For completeness, it is pointed out that it was never judicially determined that under the original wording of section 22 applicants had to demonstrate that use had been predominantly by people from the locality; Lord Hoffmann in *Sunningwell* at pp. 357-358 was "*willing to assume, without deciding, that the user should be similar to that which would have established a custom*" for the purposes of rejecting an argument that use had to have been *exclusively* by inhabitants of the locality.

-- October 2009

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