

VILLAGE GREEN APPLICATION TVG03
WROUGHTON PLAYING FIELDS
REPORT ON A NON-STATUTORY PUBLIC INQUIRY

Introduction

- 1 On 18th March 2014 Dr Andrew Humphries made an application to Milton Keynes Council as Common Registration Authority (CRA) to register land at Woughton Playing Fields, Woughton on the Green, Milton Keynes as a town or village green (TVG) pursuant to the Commons Act 2006 s.15(2). The CRA registered the application under reference TVG03.

- 2 Milton Keynes Council is the freehold owner of the whole of the application land. It objected to the application on 24th December 2014 on the ground that it fails to satisfy the statutory tests for registration. More particularly, the Council contended that any use of the land for lawful games and pastimes had been indulged in *by right* rather than *as of right*. If that is correct, the CRA may not register the Land as a TVG.¹ In view of the Council's interest in the application land it decided that it ought to convene a non-statutory public inquiry to consider the preliminary issue of whether its use has been by right or as of right. As I explained during the inquiry, and for the avoidance of doubt, the limited scope of my instructions required me to proceed on the assumption that the land had been used by a significant number of the inhabitants of a locality who have indulged in lawful games and pastimes on the land for a period of at least 20 years. Therefore references in this report to such use is not to be taken to mean that it has been proved.

- 3 I held the inquiry on 27th and 28th October 2015. I heard evidence from a number of local residents and Mr Paul Sanders, the Council's Assistant Director of Community Facilities. Prior to the inquiry each party provided me with a bundle of documents. Some of that material was referred to at

¹ R (o.a.o. Barkas) v North Yorkshire County Council [2014] UKSC 31

the inquiry. However, in writing this report I have read and taken into account all of the documents that have been provided to me, including a bundle of additional papers that were submitted on the second day of the inquiry concerning the transfer of the application site to the Council from Milton Keynes Development Corporation (MKDC). I also made an unaccompanied site visit to Woughton Fields on 28th October.

The application land

- 4 The application land is part of a “multi sports site” known as Woughton Sports Ground. It forms part of a wider network of linear parks that were laid out by Milton Keynes Development Corporation during the development of the New Town.
- 5 The principal vehicular and pedestrian access to the sports ground is from Newport Road which leads to a large car park situated in the south-west corner of the site. There are a number of formal and informal pedestrian accesses along the western, northern and eastern boundaries of the site and wider access is provided by several paths, some of which are hard surfaced.
- 6 The north-west and south-west quadrants of the sports ground contain a range of permanent sports and leisure facilities. They include a “dome” that is used for indoor sports, a large pavilion, tennis courts and a range of floodlit all-weather sports pitches.
- 7 The remainder of the sports ground comprises the application land. It includes an area of grassland to the east of houses fronting Newport Way. The land accommodates a large number of grass sports pitches. It also contains what appeared to be artificial cricket pitches and an all-weather baseball diamond. Tree belts enclose the southern, eastern and part of the northern boundaries of the site, which creates a pleasant, open “parkland-like” environment, albeit it is plainly well managed and maintained to allow organised sports take place over much of the area. The application relates solely to this part of the sports ground.

- 8 Although the dome, all-weather pitches and tennis courts are fenced (and a sign restricts the use of the astroturf to “authorised users”) there are no controls on entry to that part of the sports ground from Newport Road, Standing Way or land controlled by the Parkland Trust. There are no signs prohibiting or purporting to restrict entry to any part of the facility and no evidence was given alleging that any had been erected in the 20 years preceding the application. On the contrary, various pedestrian access points to the application land are sign-posted as part of the Ouse Valley Park. Consequently the whole of the complex, including the playing fields, but excluding the pavilion, dome and fenced all weather pitches, may be accessed freely by the public at any hour of the day or night.

The Council’s acquisition of the application land

- 9 Milton Keynes District Council (as the authority was previously styled) acquired the application land under a transfer from MKDC dated 27 March 1992. Schedule 1 of the transfer records that the land was acquired for use as a “District Park. There is no record of the powers that were relied on to acquire the land. Nor was I provided with any evidence that the land has subsequently been appropriated for any use.

- 10 Under Schedule 4 of the transfer the Council covenanted:-

“Not to use or occupy the Land or any part or parts thereof or permit or suffer the same to be used or occupied for any purpose other than the purpose specified in the First Schedule hereto and/or for the following purposes:-

- (a) The provision establishment and management of facilities (including works of art) for recreational, educational and leisure time occupation of the public by the provision of parkland, woodland and recreational amenity spaces and by promotion management development and preservation the improvement of the Land for the said inhabitants (and to ensure uninterrupted access thereto for the said inhabitants).

(b)The establishment and management of parkland facilities picnic areas play areas botanical gardens wild life reserves arboreta open air theatres art facilities information centres and other facilities of a like nature for the use and benefit of the inhabitants of Milton Keynes and the surrounding area....”

11 Schedule 5 of the transfer operates as a clawback mechanism under which MKDC was entitled to recover the land in the event *inter alia* there occurred a “change of use of any of the land....to a use other than that specified in [the foregoing provisions of Schedule 4].”

12 Prior to the transfer, MKDC granted a lease of “Woughton on the Green Playing Fields” to the Trustees of Milton Keynes Sports Club. The Sports Club took bookings for the use of the sports pitches (including those situated on the application land). The Council became the Sports Club’s landlord on the date of the transfer and subsequently maintained the sports pitches and the public paths that ran across the site. The lease determined in 2010. Thereupon the Council assumed responsibility for all aspects of the management of the site, including pitch bookings and fee collection.

13 On 19th August 2014 the Council entered into a Deed of Dedication with the National Playing Fields Association which relates to the whole of the sports ground. The Deed provides:-

“The Council DEDICATES the property in celebration of the Diamond Jubilee of Her Majesty Queen Elizabeth II as a public playing field, sports ground or field and recreation ground for the benefit of the inhabitants of Milton Keynes and thereabouts and the site will be titled the Queen Elizabeth II Field The Pavilion at Woughton on the Green”.

14 The terms of that agreement include a corresponding undertaking “Not to use the Property or permit the Property to be used for any purpose other than as a public playing field, sports ground or field and recreation

ground.” The Deed also makes provision for the disposal of the sports ground subject to a requirement to provide a replacement site of equivalent or better quality.

The case for the Applicant

- 15 Local people gave evidence that they have used the application site for more than 20 years for a variety of sports and pastimes, including walking, running, kite flying, cricket, football, blackberrying, fishing, cycling and for community celebrations. Most gave evidence that they did not usually access the playing fields from the main entrance at Newport Road and few remembered seeing the sign that directs people from the car park to the sports pitches. That was attributed to a tendency to enter the application site through a separate pedestrian access off Newport Road and the church footpath; via a gate from the Parks Trust’s land; and from open land bordering the Ouzel River. A clear and consistent view was expressed that “Woughton Playing Fields” are regarded as a different entity to the “sports ground”, although several witnesses agreed that their references to watching certain games, such as hockey or tennis, must have related to the sports ground rather than the playing fields. On that basis the Applicant argued that even if the use of the sports ground might be regarded as permissive such consent should not be “extrapolated” to the playing fields that comprise the application land.
- 16 Witnesses to the inquiry expressed some uncertainty and indifference as to the ownership of the land. Most of those who filled in questionnaires generally recognised the Council is the owner. A good number of users report seeing and having been seen by the Council’s maintenance staff. No one reported ever having been challenged. None of those who gave evidence considered they needed permission to use the land, although one questionnaire refers obliquely to the use of the application site being authorised. Generally residents appeared to take the view that they have made free use of the land because they could. Several witnesses expressed the opinion that they used the land as of right. The Applicant accepts that local people avoid straying onto any part of the application

site that is in temporary use for organised sports. However, such deference is characterised as peaceful co-existence rather than an implied permission to use the land.

- 17 The Applicant relied on the absence of any record that the land had been acquired or held under the Public Health Act 1875 or the Open Spaces Act 1906 (or any other relevant statutory provision²) as evidence that it is not, and has not been, held by the Council for recreational purposes. He also argued that even if it is held for some undisclosed statutory purpose that purpose (whatever it might be) would not necessarily be incompatible with the continuing use of the land for those purposes. The Applicant drew comfort for that proposition from a decision at Moorside Fields in Lancaster. That was a case in which an application to register a TVG was referred to the Planning Inspectorate. The inspector who conducted the inquiry into that matter concluded the land was held for educational purposes and that on the facts there was “no clear incompatibility between LCC’s statutory functions and registration of the Application Land as a town or village green”. Dr Humphries relied on that decision to submit the land application land ought not to be regarded as having been used by right.

The case for the Council

- 18 The case for the Council was set out in the detailed written submissions of Miss Stephanie Hall. They were provided to Applicant and to me before the inquiry opened. They were supplemented by written closing submissions and by the oral evidence of Mr Sanders, who relied on a witness statement and the exhibits attached to it.

The Council’s primary case

- 19 The Council’s primary case was that the use of the application land is “by right” based upon a permission derived from statute. Consequently there

² Dr Humphries refers to the Local Government Act 1972, the Local Government (Miscellaneous Provisions) Act 1976 and the Housing Act 1985

is no requirement for such a permission to be communicated to the user in order to be effective in rendering use “by right”. That submission was founded on the absence of any indication in Barkas (or any other relevant authority) that subjective knowledge of the statutory power under which the land is held, or of any permission flowing from such a power, is a prerequisite for rendering use “by right”. It was contended that instead a “statutory permission” operates as a “publicly based licence” which continues for so long as the local authority continues to devote land to a relevant purpose.

- 20 The Council placed particular reliance on paragraph 21 of Barkas, in which Lord Neuberger held:

“...So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land “by right”...”

- 21 The Council further argued:-

“Lord Neuberger goes on to explain that, as Lord Hoffmann held in Sunningwell, the matter is to be judged by “how the matter would have appeared to the owner of the land” judged objectively, and in cases such as Barkas, where the landowner is a local authority holding land it considers to be in the nature of a park or public recreation space “...a reasonable local authority in the position of the council would have regarded the presence of members of the public on the field...as being pursuant to their statutory right to be on the land...”

- 22 In addition, The Council cited Naylor v Essex County Council³ as authority for the proposition that:

³ [2014] EWHC 2560 (Admin)

"Permission to use [the] land for recreational purposes is communicated to the public (if that is required) by the local authority making the land available for such recreational purposes"⁴.

- 23 On that basis the Council contended that it did not matter that the Council was unable to point to a document which stipulates the precise power under which the land was acquired or is held.⁵ Under the terms of the Transfer from MKDC it was bound to use the land as a "District Park". That obliged it to *"protect community access, as a park or sports facility"*. Further, the 1992 Lease obliged the Council to maintain the grass pitches. Reliance was placed on the fact that subsequently it did and continues to do just that.
- 24 In addition, the Council argued that until around 2014 its knowledge of the application land was that it was bound by the restrictions within Schedules 4 and 5 of the Transfer. Thus it was regarded as part of the historic sports ground facilities which MKDC had envisaged as being provided for the benefit of the residents of Milton Keynes. Those restrictions included a restriction on the use of the land for anything other than a "District Park". The Council also drew attention to Schedule 4 paragraph 1(a), which required the Council to *"ensure[ing] uninterrupted access thereto for the said inhabitants..."* and paragraph 6, which stipulated the Council should *"...allow public access at all reasonable times."*
- 25 The Council also relied on its decision to recover control of bookings for all of the pitches including grass pitches, the astroturf and tennis courts following the demise of the sports club.
- 26 On that basis, it was argued that the Council would have viewed the use of the land by members of the public as being pursuant to their statutory right to be on the land flowing from the Council's decision to retain the

⁴ Ibid at paragraph 39

⁵ The Council relied on 3 alternative statutory provisions under which local authorities may acquire and hold land for recreational purposes namely (a) Public Health Act 1875, s.164; (b) Open Spaces Act 1906, s.9; (c) Local Government (Miscellaneous Provisions) Act 1976, s.19

land in use as a District Park. It was further submitted that in those circumstances evidence provided by the Applicant's witnesses as to whether or not users of the application land viewed themselves as being there by permission, does not assist in the determination of whether the use was "by right".

- 27 The Council also deployed the argument that the evidence provided to the Inquiry by the Applicant's witnesses for the most part supported its case that the application land looks like a park or public sports ground and was interpreted as such by local people. Reliance was placed on the evidence provided by Mrs Brown who said that "*it [the application land] looks like a normal area for people to be allowed on*". The objector likewise adopted the evidence of Mr Standley, who said that the application land looked like a park from 1992, and that of Mr Loxton, who stated that "*the whole of Ouzel valley looks like a park*".

The Council's fall-back position

- 28 The Council's fall-back position was that judged objectively from the standpoint of the hypothetical land user it did enough by its actions to make it clear to members of the public that in continuing to use the land they were doing so with the implied permission of the owner. Specifically, the Council relied on Mann v Somerset⁶ to contend that its exercise of a right to exclude people from parts of the sports ground was inconsistent with use "as of right" as across the whole. That point was said to be reinforced by the letting out of pitches for a fee: the exclusion of non-fee payers is therefore to be regarded as consistent with the use made of the site as a whole. Against that background it was argued:-

- (a) the boundary of the application land neither reflects "the Site" properly considered by the Council or by a number of the Applicant's witnesses;

⁶ See R(Mann) v Somerset CC at para 71, 75 and 77 and references to "viewed objectively" at para 75 and to "bringing it home to the reasonable local inhabitant" within para 77.

- (b) there is no principled basis for seeking to sever the Sports Ground. A member of the public may wander around the site to watch football on the grass pitches or the astroturf, they may watch hockey on the astroturf or tennis being played on the tennis courts and they may book to play a game on any of the areas whether grassed or not;
- (c) the reasonable hypothetical user would also consider 'the land' to be the Sports Ground, given the use in fact made of the whole site by a number of the Applicant's witnesses.

Discussion

29 In Barkas, Lord Neuberger held at [21]:-

"So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise. In *Sunningwell [2000] 1 AC 335* , 352H-353A, Lord Hoffmann indicated that whether user was "as of right" should be judged by "how the matter would have appeared to the owner of the land", a question which must, I should add, be assessed objectively. In the present case, it is, I think, plain that a reasonable local authority in the position of the council would have regarded the presence of members of the public on the field, walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that the field was being held and maintained by the council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors."

30 At [24] his Lordship added:-

"I agree with Lord Carnwath JSC that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right", simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for 20 years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so. The position is very different from that of a private owner, with no legal duty and no statutory power to allocate land for public use, with no ability to allocate land as a village green, and who would be expected to protect his or her legal rights."

31 Against that background, I find as follows:-

- (1) There is no record of the powers that were relied on by the Council when it accepted a transfer of the Wroughton Playing Fields from MKDC. Nor is there any record of the powers upon which the Council continues to hold the land. That is unfortunate, but it is not an unusual state of affairs: whilst some local authorities maintain sealing registers which specify the powers that authorise a transaction in my experience that is by no means a universal practice. However, there is overwhelming evidence that it must have relied on the relevant provisions of the 1875, 1906 or 1976 Acts to take and then hold the land (including the application land) for recreational purposes. Specifically:-

- (a) Under the transfer the Council accepted the land for use as a "District Park" subject to covenants that required it to be used for recreational purposes.
- (b) The land (including the application land) has actually been laid out, maintained, made available and used for a variety of formal and informal recreational uses.
- (c) The Council has positively invited the use of the application land for recreational purposes. Such use has not been confined to organised sports on the playing fields; the stiles and gates that give access to adjoin land owned by the Parkland Trust and signs that direct the public onto the application land as part of the Ouse Valley Park are evidence of that invitation.
- (d) The Deed of Dedication is also evidence of how the Council views the land. However, because the Deed postdates the application I accord this piece of evidence little weight.

32 The terms upon which the application land was acquired by the Council and its laying out and actual use of the land for recreational purposes is evidence that it was and still is formally "allocated" for that purpose. That is plainly a lawful use. The Applicant did not produce any evidence to show or otherwise assert that the application land is allocated for a particular different purpose. Indeed, the appearance, character and use of the land is such that it is difficult to conceive of any other lawful purpose for which it might have been allocated.

33 The application land having been allocated (as I have found) for recreational purposes, it is wholly unsurprising that the Council has never objected to its use by local people for those purposes.

- 34 Absent any unusual additional facts the use of the application land is use by right, not as of right.
- 35 The Applicant has not produced any evidence which points to the contrary conclusion that the use of the application land has been as of right.
- 36 Accordingly, I conclude the use of the application land has been by right rather than as of right.
- 37 Having found in favour of the Council's primary case it is unnecessary to determine whether its fall-back argument also succeeds. However, I have formed the impression that although the character of the application land is very different to that of the remainder of the sports ground, it is experienced and used as a single entity. The use of the permanent built and fenced facilities on the western part of the sports ground is undoubtedly permissive. On the facts, I therefore conclude the permissive use of that part of the sports ground operates in practice as an implied licence to use the whole site (including the application land) for recreational purposes.

Conclusion

- 38 The application land has been used by right, not as of right. Or it has been used by local people under an implied permission granted by the Council.

TIMOTHY LEADER

4-5 Gray's Inn Square
Gray's Inn
London WC1R 5AH

Thursday 12th November 2015

Appearances

For the Applicant:

Andre Humphries PhD, MBA, FCIM

Who called:-

Thomas Standley Local resident

Valerie Brown Local resident

John Eaton Local resident

Roger Loxton Local resident

Cllr Michael Blomley (Parish Councillor)

Cllr Peter McDonald (Ward Councillor)

For the Council

Miss Stephanie Hall of Counsel

Instructed by Nathan Holden of Freeths Solicitors

Who called:-

Paul Sanders BA FCIM

Assistant Director of Community Facilities

Documents

Applicant's bundle of inquiry documents

Applicant's list of witnesses (including a statement by Peter McDonald; Extract from the minutes of MKC dated 25 March 2015; Decision of Alison Lea MA (Cantab) Solicitor on an application for a TVG at Moorside Fields, Lancaster)

Applicant's closing submissions

Council's bundle of inquiry documents

Council's opening statement

Council's closing statement and copies of all authorities cited

Bundle of documents relating to the transfer of property and other assets to MKC

Extracts from MKC's Sealing Register