COMMONS ACT 2006

IN THE MATTER OF AN APPLICATION TO REGISTER LAND AS A VILLAGE GREEN

LAND AT HOLLYCROFT FIELD, EAST CHILTINGTON, EAST SUSSEX

OPINION

1. I am asked to advise on behalf of East Sussex County Council, ["the Council"], as to the merits of an application made pursuant to section 15(2) of the Commons Act 2006, ["the 2006 Act"], to register an area of land as a town or village green. My conclusions are summarised from paragraph 54 onwards at pages 21 to 23 below.

2. The application is made by East Chiltington Parish Council, ["ECPC"], in respect of land, ["the Land"], known as Hollycroft Field, Chapel Lane, East Chiltington. The Land extends to 3.1 acres and is flat and open. It is bordered on two sides by hedges, on one side by a football pitch, (the pitch is not part of the application), and on the south side is open to an area of housing known as Hollycroft. I visited the Land and the surrounding area on the 26th January 2017.

3. The application is accompanied by 45 User Evidence Forms, although six of those[1] give direct evidence of use from two people taking the evidence of use to 51 people.

4. The Land is owned by Lewes District Council, ("LDC") which is the only objector to the application. Its letter of objection is dated the 5th June 2014, and in which LDC refers to the Council's consultation letter of the 25th April which had enclosed a copy of the application and supporting evidence. The basis of the objection can be summarised as follows:

a) The Land was acquired by the Rural District Council of Chailey, LDC's predecessor authority for the purposes of Part V of the Housing Act 1936,

[1] The forms are from John and Shelia Anderson, William and Jean Manville, Michelle and Michael Pearce, Teresa Shopland and Robert Symes, Michael and Gilly Webber and Hilda and Ray Wheeler.

["the 1936 Act"], which enabled a local authority to provide housing for the working classes;

b) Since the Land was laid out as a recreation ground it was made available to the occupiers of the Hollycroft estate under the statutory power within section 80 of the 1936 Act and subsequently under the similar provisions within section 12 of the Housing Act 1985, ["the 1985 Act"].
c) LDC holds the Land under section 12 of the 1985 Act.
d) Use of the Land by the local inhabitants was "by right" and not "as of right".
e) The fact that the Land may be used by persons other than local inhabitants does not invalidate the exercise of the statutory power within section 80 of the 1936 Act or section 12 of the 1985 Act.
f) User "by right", rather than "as of right", will not count as qualifying user in support of the application under the 2006 Act.
g) LDC relies upon the case of *R (Barkas) v North Yorkshire County Council [2014] UKSC 31.*

5. The letter of objection enclosed a statutory declaration of Gillian Marston dated the 5th June 2014 with three exhibits including 2 conveyances by which the LDC's predecessor in title acquired two parcels of land which the Land forms part of. Both conveyances contain a recital that the land was acquired for the purposes of part V of the 1936 Act.

6. It is also useful to set out at this stage certain paragraphs of the statutory declaration as follows:

"4. The Tenancy Manager and the Housing Officer for the area including East Chiltington have gone through such records as are still available and interviewed council officers with direct knowledge as to how the Council manages the Recreation Ground. The few remaining files that are still in existence demonstrate that Lewes District Council and its predecessor authority have managed the Estate and the Recreation Ground in their capacities as local housing authority….

11. The land at Hollycroft was partly developed as public sector housing accommodation in 1946. The remainder of the land was set aside as a recreation ground provided and maintained by the Rural District Council of Chailey and Lewes District Council as statutory successor…

12. Lewes District Council cannot find any copy records relating to ministerial consent but has no reason to believe that proper consent was not obtained.[2]

16. From the laying out of the Recreation Ground until the present day, the Recreation Ground has been made available to the public……"

7. At this stage, I note the following as regards the basis of objection and evidence in support:

a) Other than the issue of whether use of the Land was "as of right", LDC alleging that it was not as it was "by right", LDC does not allege that any of the other qualifying criteria for an application under section 15 of the 2006 Act have not been met.
b) There is no evidence from "*The Tenancy Manager"* or *"the Housing Officer"* as referred to in the statutory declaration, nor is either of them named. There is also no record of the interviews as alleged in paragraph 4, nor direct evidence from those unnamed council officers.
c) Although it is alleged that "*The few remaining files that are still in existence demonstrate that Lewes District Council and its predecessor authority have managed... the Recreation Ground",* no evidence of the files is produced nor are any specific details given as to what management of the Recreation Ground was carried out.
d) There is no evidence produced as to when or how the Recreation Ground was provided and subsequently maintained by LDC or its predecessor authority. There is no evidence as to how and when it was laid out, nor any evidence of ongoing maintenance.
e) Not only can the relevant government consent not be found for there to have been a valid exercise of the discretionary statutory power within section 80 of the 1936 Act or section 12 of the 1985 Act, there is also no evidence of an exercise of the power such as a resolution or other documentary evidence, nor any evidence that the ministerial consent was sought.

[2] It is taken that this is reference not only to the ministerial consent required for a valid exercise of the discretionary power within section 80 of the 1936 Act, but also to the consent of the Secretary of State required for a valid exercise of the discretionary power within section 12 of the 1985 Act. My references to ministerial consent herein shall include both consents.

8. Following this, the matter was then considered by officers of the Council and a report was prepared to its Commons and Village Green Registration Panel which was due to convene on the 14th October 2015. That report was however never presented because shortly prior to then the ECPC informed the Council by letter dated the 12th October 2015, that "*important and new material evidence had just come to light*". In summary ECPC alleged that the new evidence showed that between 1978 and 1989, the Land was fenced off and used exclusively as farmland. The ECPC alleged that it was therefore not made available by LDC, or its predecessor authority, as public amenity land and not used as such prior to 1989. Accordingly it alleges that any use of the Land was "as of right" and not "by right".

9. In support of the allegation in the letter of 12th October 2015, ECPC subsequently produced three letters from witnesses as follows:

i) A letter of the 6th November 2015 from Mrs Sharon Vaisey who farmed Birchington Farm, East Chiltington from 29th September 1978 with her first husband, Mr Derrek White. The Farm formed part of the Wootton Farm Estate which was owned by the Council until 1998. In the letter, Mrs Vaisey states that she was shown the Land by a Mr Alger in September 1978 which she understood had no formal agreement on it but which had historically been used by the tenant of Birchington Farm to keep the Land tidy. Mrs Vaisey confirms that their use of the Land was to cut hay off it until 1986. There is no mention in the letter of any public use of the land for recreation.

ii) A letter of the 4th November 2015 from Barry Manville of 16 Hollycroft. In that letter Mr Manville says that until about 1986 the Land was fenced off and farmed. He worked, as a farm labourer, for both Mr & Mrs White and for Mr Alger before them, and Mr Manville says that the Land was used for arable purposes and by Mr Alger for cattle. The fence was to stop access to the Land and also to prevent the cattle from straying.

iii) A letter of the 4th November 2015 from Andy Manville of 2 Hollycroft. He also worked during the school holidays for both Mr & Mrs White and for Mr Alger and his recollection of the use of the land prior to around 1986 is largely consistent with that of Mr Barry Manville.

10. The Council carried out further consultation as a result of the new evidence which lead to a lengthy and protracted exchange of submissions and further evidence between LDC and ECPC. The main issues arising from that exchange is summarised below, together with my observations on some of the matters raised, but full reference should be made to those submissions in considering the matter.

11. The initial response from LDC was in an e mail from Mark Reynard[3], the Head of Legal Services. In that e mail, LDC responded to the further evidence of ECPC. It also provided new evidence by way of an agreement, ("the Licence"), made between LDC and Derek White dated the 4th of January 1985 and allowing for the mowing of the Land and taking the hay or grass therefrom, but not more than twice during the license period which expired on the 2nd January 1986. Mr White paid the LDC £35.00 for the benefit of the Licence.

12. The response of LDC can be summarised as follows:

a) There was no evidence of a lease of the Land between 1978 and 1989, although it had found the Licence as referred to above;
b) It believes that the Licence reflects the practice which would have occurred between 1978 and 1989 in respect of the Land, namely, an annual licence allowing for not more than two cuts to the Land and the hay/grass crop taken therefrom;
c) It alleges that there is no reason to believe that this practice prevented the recreational use of the Land by the public and is therefore not inconsistent with LDC's assertion that use was "by right" and not "as of right".
d) It alleges that the arrangement is consistent with the evidence of Mrs Vaisey and the purpose which she notes which was "to keep the land tidy" and take hay from it.
e) It asserts that the LDC's Parks Manager had stated that from at least as early as 1990, maintenance of recreation grounds was by private contractors and it is stated that it is believed that prior to this it was common for LDC to rely upon mowing licences to maintain recreation grounds.

[3] My e mail is undated as it is included within the e mail trail which was subsequently sent to the ECPC on the 8th February 2016.

f) It notes that the Licence did not permit the licensee to fence off the Land.

g) LDC note the apparent inconsistency between the new evidence of Mr Barry Manville and Mr Andy Manville, and Dr Harrison in alleging that the Land was not used by the public for recreation prior to 1989, and the evidence of users submitted with the application.

h) LDC alleges that there is an inconsistency between the ECPC saying on the one hand there was no public access prior to 1990 and on the other hand that there was public access "as of right".

i) LDC repeats its position that from the laying out of the Land as a recreation ground, until today, that this was done as an exercise of the power under section 80 of the 1936 Act and section 12 of the 1985 Act and accordingly public use for recreation, whenever it occurred was "by right" and not "as of right".

13. In respect of these further submissions from LDC, at this stage I note the following:

a) It does appear in my view that there may be some conflict between what some of the users said in their evidence forms as regards their use of their Land during the period 1978 to 1986/1989 and what is said within the further representations by ECPC. However, the user evidence forms are not so detailed as to break down how much use of the Land there was by them during this period, how regularly it was used and if so for what purposes. These are the sort of issues which would be explored through further evidence if they were relevant to determine the matters in dispute.

b) LDC claims that the position now adopted by ECPC in claiming that there was no public access prior to 1990 but also claiming that use was "as of right", is logically inconsistent. In my opinion there is nothing necessarily inconsistent in this position. In my view the position of ECPC is that it is the public use of the Land from 1990 onwards which it relies upon as being "as of right" and amounting to sufficient use to satisfy the criteria of section 15 of the 2006 Act. The case of ECPC does not rely on evidence prior to 1990 and its case is that either before or after 1990 any public use of the Land for recreational purposes could not have been "by right" but there is no need to consider the

nature of any use prior to 1993. It is on this basis that I will be considering the matter in my opinion.

c) Other than the Licence, there is little by way of further evidence within the further submissions. It is noted that despite the submissions, there is no evidence provided by the "Council's Park Manager", who is not named, and nothing to link maintenance of the Land in the way it is alleged to be common practice. There is no evidence of what maintenance, whether directly by LDC or by private contractors, was carried out by or on behalf of LDC in respect of the Land.

d) The Licence itself makes no reference to the purpose for which the Land is to be mown, no more than twice per year, other than to allow for the taking of the hay or grass therefrom and, by virtue of clause 5, in so doing to keep the Land in a clean a tidy condition. It does not appear on the face of the Licence that the purpose is to keep the Land in a clean and tidy condition, in and of itself, and nowhere is there any reference to Land being used for public recreation or to any of the relevant provisions of the 1936 Act or the 1985 Act.

e) The Licence did not include the mowing of the football pitch adjacent to the Land which must have been maintained by other means despite being owned by LDC. This would seem inconsistent in my view with LDC's claim that it was by the use of such licences that it maintained land which it owned for recreational use.

14. On the 11th February 2015, ECPC made a statement responding to these further submissions by LDC. In that statement ECPC confirm that the use period relied upon is from 1993 onwards[4] and it does not rely upon any evidence of use prior to then. In addition, ECPC refer to the fact that the Licence is for one year only and it is speculation as to what earlier or subsequent licences may have said. Furthermore, there is no evidence as to whether the terms, particularly as regards fencing of the Land, were adhered to during the relevant year, and there is no evidence that it was required not to be fenced in any other licences if any were in fact created.

[4] Paragraph 3 of the statement.

15. In addition, the statement of ECPC alleges a distinction between the present circumstances, from those in the *Barkas Case* as relied upon by LDC. Three issues are submitted in support for the distinction:

a) There is no evidence of the necessary Ministerial consent under section 80 of the 1936 Act having been obtained, or at least having been requested, in order to demonstrate a valid exercise of the discretionary power within that section[5];
b) There is no evidence that the Land was ever initially laid out as a recreation ground by either LDC or its predecessor authorities pursuant to those powers. In addition there is no evidence that it was maintained as such by LDC or its predecessors. ECPC refer to the fact that the Licence makes no mention of this purpose and as it would only be cut not more than twice per year, with a hay or grass crop being taken, this would in fact suggest the contrary.
c) The fact that the playing field, adjacent to the Land, was not maintained by a mowing licence, undermines the assertion made by LDC that this was the way that LDC carried out maintenance of its land which had been laid out and provided as a recreation ground.

16. Following this, on the 16th May 2015, LDC submitted a final response to the statement made by ECPC. The submissions of LDC in that statement can be summarised as follows:

a) LDC accepts that the Land has been open to the public to use for recreation for at least the last 20 years.
b) The Land was acquired by LDC's predecessor in title expressly for the purposes of Part V of the 1936 Act.
c) Since 1946 the Land has been open for public recreational use and has never been subject to a tenancy.
d) In 1985 the Land was mown twice pursuant to the Licence and the hay taken away and it should be presumed that the terms of the Licence were complied with.

[5] For the purposes of my opinion I have assumed that the same point is taken as regards the Secretary of State's consent for the purpose of section 12 of the 1985 Act.

e) It is alleged that it is possible that such annual licences had subsisted between LDC and Mr White since 1978.
f) The Land need not have been a formal, well- manicured sports ground and it is submitted that mowing twice a year would have sufficed in allowing a variety of recreational uses to take place.
g) The suggestion that the Land was fenced off until 1986 should be rejected.
h) It is alleged that the Land was being maintained for LDC's purposes which was to make it available for public recreation. In this regard LDC places reliance on Mrs Vaisey's evidence that it was a requirement to keep the Land tidy for LDC.
i) Use of the Land was "by right" having been provided and maintained as a recreation ground which local inhabitants have in fact used as such. LDC claims that, as a matter of fact, LDC's predecessor in title set aside the Land as a recreation ground and it and then subsequently LDC maintained and managed it as such pursuant to section 80 of the 1936 Act and section 12 of the 1985 Act.
j) The presumption of regularity can, in the absence of evidence to the contrary, be relied upon to infer the relevant Ministerial consent was obtained for the exercise of those powers – that is the initial provision of the recreation ground and its subsequent maintenance and management.
k) Accordingly, LDC alleges that the matter is indistinguishable from the *Barkas Case* and that the use by the public of the Land for recreation after 1946 was "by right" and not "as of right".
l) Alternatively, LDC submits that the circumstances of the matter show that the use of the Land for recreation was a matter which was permitted by it and its predecessors and that they did not merely tolerate or acquiesce in such user. The acts LDC relies upon are the alleged setting aside, providing, managing and maintaining the Land as a recreation ground. These, LDC says, amount to positive acts which mean that user was by permission.

17. In respect of these further submissions from LDC, at this stage I note the following:

a) Other than the Licence there is no evidence of any other licences, annual or otherwise, to cut and take hay from the land as is alleged at paragraph 2(e) of the submissions.
b) There is no evidence that such mowing, for not more than twice a year, would have been sufficient and adequate to maintain the Land for recreational purposes as is alleged in paragraph 2(f) of the submissions. It is noted that such infrequent cutting is in sharp contrast to the regular maintenance required in respect of the adjacent playing field and the regular maintenance of the Land carried out by ECPC since at least 1990 onwards. In addition, it is noted that in order to take a crop of hay from the Land the vegetation would need to have been allowed to grow to some considerable length.
c) There is no evidence provided that LDC, or its predecessor authority, as a matter of fact, set aside or provided the Land as a recreation ground. In respect of the assertion, that as a matter of fact, LDC and its predecessor authority subsequently maintained and managed the Land as a recreation ground, the only evidence which LDC has provided, allegedly in support of such assertions, is the Licence. Beyond this, the submissions appear to rely upon supposition and speculation and such matters of hearsay as a referred to in the statutory declaration of Gillian Marston.
d) Other than as mentioned at (c) above, there is no evidence produced as regards the alleged exercise of the power under section 80 of the 1936 Act or section 12 of the 1985 Act.
e) In respect of the alternative submission made by LDC, that use was by permission due to positive acts of the landowner, no alternative or additional evidence of the facts relied upon with regard to those acts is produced. In essence the submission relies on the same matters as the primary submission save that it is provided as an alternative argument if it is considered that the presumption of regularity cannot be applied and therefore it could not be inferred, for that reason only, that the power under either section 8 of the 1936 Act or Section 12 of the 1985 Act had been exercised.

18. Following these submissions, ECPC, made a final statement dated 26th August 2016 together with submitting a bundle of evidence of some 121 pages, some of which was new evidence. The submissions on that evidence are lengthy amounting

to 27 pages, have clearly involved a considerable degree of impressive historical research and I shall not attempt to summarise fully the arguments advanced herein; full reference should be had to those submissions. However, it appears to me that the thrust of those submissions is as follows:

a) ECPC refer to the fact that it is common ground that the Land has been used by the public for recreation for at least the last 20 years.
b) Evidence is produced which is relied upon to show that from its acquisition the Land was subject to various farming activities, including an alleged letting to a Mr Weller in 1950. That tenancy initially included the Land and the adjacent site of what is now the playing field and football pitch.
c) In or around 1970, the current playing field/football pitch land was separated and set aside as recreation land let to ECPC. This was possibly as a result of a survey carried out in 1969, which concluded that there were no permanent recreation grounds in the Parish.
d) After 1970, the tenancy of the Land transferred from Mr Weller to Mr Alger and it is alleged that this appears to have continued for some time until it is known, that the Licence arrangement was in place with Mr White. It is noted that the Licence makes no mention of section 80 of the 1936 Act or any desire of LDC to use and maintain the Land for public recreation.
e) There is a consideration of the arrangements for holding the annual village fair on the Land from 2008 onwards. It was noted that until 2015, the arrangements were notified to LDC only for the purposes of insurance. In 2015, the first attempt was made by LDC to charge a rent for the hire of the Land for the fair. This was rejected by the ECPC and the fair went ahead in that year and in 2016, without permission from LDC.
f) Detailed legal submissions are made in respect of the application of the *Barkas Case* and the relevance of the presumption of regularity. ECPC make the following points:

i) There is an initial burden on ECPC to show that use was “as of right”, but once there is prima facie evidence of this, the burden is then on LDC to show that use was “by right” is shifted to LDC to prove. The cases of *R (Mann) v Somerset CC [2012] EWHC B14 (Admin)* and *Lancashire CC v SSEFRA [2016] EWHC 1238 (Admin)* are relied upon.

ii) As regards the presumption of regularity, there needs to be some cogent evidence of an act that was done in purported exercise of a statutory power, for the presumption of regularity to attach to. The presumption cannot be used to show that the acts themselves were done; it only potentially overcomes an absence of evidence of an administrative process that would otherwise be required to give validity to those acts. There must however be evidence of the acts in exercise of the statutory power.

iii) There is no evidence of the exercise of the power under section 80 of the 1936 Act or section 12 of the 1985 Act. Moreover, the evidence produced by ECPC would suggest that the use of the Land by LDC was not in exercise of those powers, but used to raise revenue by letting and licensing for agricultural purposes.

iv) The *Barkas Case,* can be distinguished and does not apply and therefore user is "as of right" and not "by right".

v) As regards the alternative submission by LDC, that is implied permission by reason of positive acts, it is noted that no further evidence is relied upon as to those acts. Accordingly LDC has failed to show that the use was permissive.

vi) Moreover, whilst not a matter specifically relied upon by LDC, the submissions of ECPC consider whether there is anything in the requirements of holding the village fairs which would be sufficient to show use was by permission. The conclusion is that there is not and the user was "as of right". Alternatively that this one off use, even if by permission, would be de minimis evidence in the totality of user evidence and would not be sufficient to show that the overriding use was with permission and therefore "by right".

19. LDC were invited to make further representations on those final submissions, particularly as it contained considerable new evidence by way of documentation and also by way of analysis of the documents and their relevance and application to the matters in dispute. LDC did not wish to make any further representations or challenge any of those final submissions, including the new evidence. In addition, neither LDC nor ECPC wanted to take up the offer of the Council to hold a non-statutory public inquiry to consider the matter and both LDC and ECPC accepted

that the matter should be determined on the written submissions and evidence which had been submitted.

Issues not in dispute

20. It appears from the submissions made by LDC and ECPC, that save for the issue of whether the public user was “by right” or “as of right”, it is common ground that all the qualifying criteria for registration under section 15(2) of the 2006 Act are satisfied. On this basis, in my view the other qualifying criteria are met as follows:

a) The Land is land which is clearly defined within the meaning of the 2006 Act.
b) The Land has been used for lawful sports and pastimes. This includes informal recreation but not walking of such a character as would give rise to a presumption of a dedication of a public right of way. In my view this criterion is clearly satisfied on the user evidence for the range of activities specified with a range of activities from sports to kite flying, picnicking, community celebrations and bird watching, for example. There is no challenge to this.
c) The qualifying use must have been continuous throughout the relevant 20 year period. There is no challenge to the claim on this basis.
d) The use needs to be by a significant number of inhabitants of a locality or of a neighbourhood within a locality. There is no challenge on the basis this is not met. I note that ECPC claim the locality as the parish of East Chiltington. In my view there is little doubt that the locality is sufficiently defined as a civil parish. The significance of user numbers is not challenged on that basis. However, even if it were considered that on the basis of this more extensive locality, the user numbers were not sufficient to amount to a significant number, then in my view they would be sufficient on the basis that the Hollycroft Estate is a specific neighbourhood within the locality. In my view, the Estate would amount to a neighbourhood within a locality for the purposes of section 15(2) of the 2006 Act.
e) The use must be “as of right”, that is without, force, secrecy or permission. The only question in dispute is whether there was permission for the use as relied upon by LDC in opposition to the claim.

The Issue in Dispute.

21. It flows from this that the only issue in dispute is whether the qualifying user was "by right" or "as of right". In respect of this, LDC claims that it was "by right" for two reasons:

a) The primary submission is that the recreational use of the Land was permitted by the LDC as a result of the exercise of statutory powers within section 80 of the 1936 Act or section 12 of the 1985 Act by LDC or its predecessor authority. As regards this primary submission, in my view the key issue to be determined is whether at any stage there has been a valid, de facto exercise of the powers relied upon;
b) That LDC had carried out positive acts from which permission for such use could be lawfully inferred. In respect of this, the issue is what is the evidence of the positive acts relied upon and do they give rise to an inference of permission as opposed to mere acquiescence or tolerance of the use. I have noted above that LDC does not rely on anything else other than the matters it advances in support of its primary submission.

Burden and standard of proof

22. In my view the onus of proof lies upon the applicant, ECPC to show that all the qualifying criteria have been *properly and strictly proved*[6]*.* The standard of proof is on the balance of probabilities.

23. It is however necessary to consider where the burden of proof lies in respect of showing that the use of the Land was "by right", in particular, whether the burden is with LDC to show that the powers under section 80 of the 1936 Act and section 12 of the 1985 Act, had been exercised, or that there are positive acts from which to infer permission.

[6] See *R v Suffolk CC ex p Steed (1996) &75 P & CR 102 at page 111 per Pill LJ*

24. The submissions made on behalf of ECPC are that on these issues, once there is prima facie evidence of user as of right the burden shifts to LDC to show that the use was by right rather than as of right. ECPC rely on the cases of *R (Mann) v Somerset CC [2012] EWHC B14 (Admin)* and *Lancashire CC v SSEFRA [2016] EWHC 1238 (Admin).*

25. LDC has made no submissions in response to this legal point.

26. In my view, the burden of proof is upon ECPC to show, on a balance of probabilities, that the use was "as of right", which is part of the qualifying criteria under section 15 of the 2006 Act. I note paragraph 24 of the judgment in the *Mann Case* as relied upon by ECPC, which suggests the shifting of the onus of proof as submitted by ECPC. However, at paragraph 61 of the judgment the matter is considered in this way:

"For reasons given by the Inspector, the local inhabitants' use of the land appeared to be 'as of right'. This appearance shifted the evidential burden to the owner to raise a vitiating circumstance; in this case permission inferred from conduct. Thus it is the nature or characteristics of the owner's conduct which must be examined to ascertain whether ultimately, the inhabitants' use was 'as of right'. That was the exercise which was undertaken by the inspector and which he answered in the owner's favour."

27. In addition, in the *Lancashire Case,* the question of where the burden of proof lay was not in dispute, the landowner having accepted it was upon them. The case therefore did not decide the issue. I do note from the case though, that at paragraph 43, Ousley J considered that the Inspector's judgment on the question of the relevant evidence as to whether the land was held for educational purposes, was that the evidence was "too weak" for the necessary conclusion to be drawn in the landowner's favour. This, in my view, could be taken as considering that the landowner had failed to discharge an evidential burden rather than a strict legal burden of proof.

28. In my view, the burden of proof is with ECPC to show, on a balance of probabilities that the use was "as of right". However, where there is prima facie evidence that this is the case there must be an evidential burden, as opposed to a

legal burden, on LDC to produce some clear, cogent and unequivocal evidence that the use was by permission whether through positive acts or by reason of the exercise of statutory powers. If that evidence is "too weak", as in the *Lancashire Case*, it will not satisfy the evidential burden, however if it overcomes that burden, it will be for ECPC to show, on a balance of probabilities, why the user remained 'as of right' in the face of that evidence to the contrary. It is on this basis that I have considered the issue in dispute.

<u>LDC's primary submission - the recreational use of the Land was permitted by the LDC as a result of the exercise of statutory powers within section 80 of the 1936 Act or section 12 of the 1985 Act by LDC or its predecessor authority.</u>

29. In respect of this submission, LDC relies upon the decision in the *Barkas Case.* The LDC's primary submission is that but for evidence of relevant ministerial consent having been given, the facts of the present case are indistinguishable from that case. LDC alleges that the absence of evidence of consent can be rectified by reliance upon the presumption of regularity.

30. It is relevant to note a number of the Inspector's findings in the *Barkas Case*, which were not disputed in the subsequent appeal court challenges, as follows:[7]

31. The relevant land was purchased by the local authority in 1951 but the conveyance did not specify the statutory power under which it entered the conveyance.[8]

32. In 1996, the local authority passed bylaws applicable to amenity areas held under section 12 of the 1985 Act. The byelaws applied to the relevant land. The effect of the byelaws and their application to the land were displayed on notice boards close to the entrances to the land.[9]

[7] Page 203 at paragraph 2 of the judgment of Lord Neuberger.
[8] Pargaraph 93 of the decision report.
[9] Para 96 of the report.

33. The land was maintained by the Council by cutting the grass regularly in the summer and the Council had marked out football pitches weekly on the land and then subsequently annually, as well as providing goal posts.[10]

34. On the basis of this combination of facts, the Inspector found that it was a reasonable inference that the land was set out and maintained as a recreation ground pursuant to section 80 of the 1936 Act.[11]

35. The absence of evidence of relevant Ministerial consent, one way or the other, was dealt with on the basis of the presumption of regularity.[12]

36. The de facto acts of maintenance on their own, of which there was evidence had been carried out, could not give rise to an implication of permission. It was only the additional acts, the making of the byelaws applicable to the land and the display notices concerning them, which gave rise to sufficient evidence that the use was by right.[13]

37. In my view, these factual findings are crucial to a proper understanding and subsequent application of the *Barkas Case*.

38. On the evidence in that case, the conclusion was that there had been an exercise of the discretionary power under section 12 of the 1985 Act. Accordingly the recreational use was by reason of the exercise of the discretionary statutory power and was “by right” of the exercise of that power.

39. However, in my view, in the circumstances of this case there is no such clear, cogent and unequivocal evidence that the discretionary power was ever exercised.

40. Does the presumption of regularity alter any of this?

In my view the presumption of regularity, as relied upon by LDC, cannot be used to overcome an absence of requisite, sufficient evidence, to overcome the evidential burden to demonstrate an exercise of the statutory powers. All the presumption does

[10] Para 104 of the report.
[11] Para 122 of the report.
[12] Para 122.
[13] Para 119

is to overcome an absence of evidence of Ministerial consent to validate the exercise of the powers, if, and only if, there is de facto evidence that the powers were exercised. In my view the submissions made by ECPC are correct in this regard.

Is there sufficient evidence to support the primary submission of LDC, that is that the powers under section 80 of the 1936 Act and/or section 12 of the 1985 Act were exercised?

41. In my view there is not sufficient evidence to demonstrate this and discharge an evidential burden. There is nothing on the face of the conveyances in respect of the Land to conclude that specific powers in respect of the Land had been exercised. There is no evidence provided or suggested, to show when and how the Land was initially laid out and provided for public recreational use.

42. With regard to the ongoing maintenance of the Land, all that LDC can provide is the Licence, which it says demonstrates that LDC maintained the Land as a recreation ground. However, there is nothing on the face of the Licence to clearly show this. There is no mention of recreational use of the Land on the Licence. It is at best equivocal on the matter, although in my view, the wording of the Licence is more akin to supporting an agricultural purpose for the Land. It is in any event for one year only. The hearsay evidence of maintenance contained in the statutory declaration of Gillian Marston takes matters no further in my view as, apart from being hearsay, it is simply to imprecise to attach any sufficient weight to it. The remainder of the submissions by LDC, amount to speculation as to how the Land would have been maintained as noted in my paragraphs above

43. In short, in my view, the evidence relied upon by LDC, to discharge the evidential burden upon it is simply “too weak” and accordingly, the use would not have been “by right” by reason of the exercise of the statutory powers under section 80 of the 1936 Act, or section 12 of the 1985 Act, in respect of the Land.

44. However, even if it is considered that the evidence provided by LDC, is sufficient to discharge the evidential burden, in my view, the evidence and submissions of the ECPC is sufficient to show on a balance of probabilities that the powers had not been exercised in respect of the Land. There is, in my view, ample evidence to

demonstrate that the Land remained in agricultural use until 1990 and that neither before nor after then had the powers been exercised in respect of it.

45. Therefore in my opinion, the *Barkas Case* can and should be properly distinguished and in my opinion, the LDC's primary submission, in respect of the user being "by right" must fail.

LDC's alternative submission - that LDC had carried out positive acts from which permission for such use could be lawfully inferred.

46. LDC have made this submission in the alternative to its primary case that the use of the Land is by reason of the exercise of the powers under section 80 of the 1936 Act and section 12 of the 1985 Act.

47. However, LDC has expressly advanced the case on the same evidential and factual basis as its primary submission. The reason for the alternative case is that if it is considered that the presumption of regularity cannot be applied to the issue of evidence of Ministerial consent, then LDC claim that implied permission arises by reason of the same acts of maintenance, management and setting out of the Land as a recreation ground as it relied upon in respect of the primary submission. In advance of its case, LDC relies upon the obiter remarks of Lord Neuberger at paragraph 21 of the *Barkas Case.*

48. In respect of this submission, in my view the key issue is what is the evidence of the positive acts relied upon and do they give rise to an inference of permission as opposed to mere acquiescence or tolerance of the use.

49. I have already considered above that evidence provided by LDC is too weak and not sufficient to overcome the evidential burden in respect of the primary submission by LDC; it has to provide at least some cogent evidence of the positive acts. There is in my view, as considered above, no or no sufficient evidence that the Land was either initially laid out or identified for public recreation use by LDC or its predecessor authority, or that they subsequently managed and maintained it for that use thereafter.

50. Accordingly, in my view the situation is different to that in either the *Barkas Case,* or in *R (Beresford) v Sunderland City Council [2004] 1AC 889,* as in both those cases there was no dispute that the Council had carried out positive acts to provide and maintain the land for recreational use. Of course, in *Beresford*, it was considered that such acts could not give rise to an implied licence although the judgment was subsequently considered as not good in law by some of the obiter remarks within the *Barkas Case.*

51. By contrast, the situation in the present matter is akin to that in the case of *Oxfordshire County Council v Oxford City Council and another [2006] UKHL 25, (" The Trap Grounds Case"*), as relied upon by ECPC. In that case there was no evidence that the land had been laid out or identified in any way for public recreational use and it was confirmed that recreational use of the land by the public, involving the exercise of no statutory power, or statutory incompatibility, may therefore be "as of right". The situation was expressly recognised in the *Barkas Case* as a situation whereby land in public ownership could be subject to modern village green rights.[14]

52. I also note that in the *Trap Grounds Case,* that the user was considered capable of being "as of right" notwithstanding a small element of permissive use which the Court regarded as de minimis.[15] Although LDC have not relied upon the evidence of the holding of the annual fair on the Land as being evidence of a permissive use, ECPC have considered the matter and submitted that if it is evidence of permission it is de minimis and should not prevented the user being "as of right". In my view, I agree with the stance adopted by ECPC in that regard and would also consider that if that evidence is of permissive user then it is de minimis.

53. Accordingly, in my view, the ECPC have shown that the user is "as of right" rather than "by right".

[14] Paragraphs 66 and 76 of the judgment.
[15] Pargraph 13 of the judgment.

Conclusions

54. Save for the issue of whether the public user was “by right” or “as of right”, it is common ground that all the qualifying criteria for registration under section 15(2) of the 2006 Act are satisfied.

55. In respect of the public recreational use, ECPC relies upon use after 1990. There is no dispute that such use occurred as a matter of fact for the relevant period of time. The only issue is whether such use was “as of right”.

56. For the use to be “as of right”, it must be without force, without secrecy and without permission.

57. There is no dispute that the use was without force and without secrecy. The only issue is whether it was without permission. LDC says that the use was with permission for two reasons:

i) that in respect of the Land, LDC and its predecessor authority had exercised their discretionary powers under section 80 of the 1936 Act and section 12 of the 1985 Act. Although there is no evidence of the relevant Ministerial consent for a valid exercise of those powers, LDC relies upon the presumption of regularity to overcome that evidential gap. Accordingly, LDC claims that the use of the Land for recreational purposes after the exercise of the statutory powers was “by right” and not “as of right”. There was permission to use the Land by reason of the statutory powers. LDC relies upon the decision in the *Barkas Case.*

ii) Alternatively, LDC submits that if it is considered that the presumption of regularity cannot be relied upon to establish a valid exercise of the statutory powers, it relies upon an alleged implied permission to use the Land for recreational use. In this regard, LDC alleges that it and its predecessor authority had not merely tolerated and acquiesced in that use, but that they had carried out positive acts to facilitate and permit that use. LDC does not advance any additional evidence as to what those acts are and it relies upon the same evidence and acts as it advances in respect of

its primary submission that the statutory powers were exercised. Accordingly, LDC alleges that by reason of an implied permission, the use of the Land was “by right”.

58. In my view the burden of proof is upon ECPC to show that the use of the Land was “as of right” and therefore without permission. The standard of proof is on a balance of probabilities. However, in my opinion, once ECPC have established a prima facie case of user evidence “as of right”, then there is an evidential burden upon LDC to show why that use was with permission.

59. In my view, such evidence as LDC has produced and relies upon is too weak and insufficient to discharge the evidential burden upon it. The conveyances by which the Land was purchased do not show that the specific statutory powers were being exercised; there is merely reference to the wider provisions of Part V of the 1936 Act. The Licence is for a one year period only, and contains no reference whatsoever to there being any recreational use of the Land. The purpose of the Licence is apparently, on the face of it, to permit the cutting of a grass or hay crop from the Land not more than twice per year. I note that cutting the vegetation on the Land not more than twice per year would leave substantial periods of time when it was left uncut and there is no evidence to show that such infrequent cutting would have been sufficient to be consistent with recreational use of the Land. There is no evidence that LDC maintained other recreational land on such an infrequent basis.
60. The evidence of the Licence is therefore at best equivocal on the point, although in my view it is more consistent with an agricultural use of the Land than as demonstrating a public recreational use, especially when considered with the additional evidence of contemporaneous agricultural use which ECPC have produced. LDC has produced no other evidence of any acts of maintenance or management of the Land for recreational purposes.

61. Alternatively, even if the evidence provided by LDC is considered sufficient to overcome the evidential burden upon LDC, in my view the evidence and submissions made by ECPC are sufficient to rebut that evidence and establish that on a balance of probabilities that it was more probable than not that the statutory powers under section 80 of the 1936 Act or section 12 of the 1985 Act had not been exercised. Accordingly there was no statutory permission for public use of the Land

for recreational purposes and such use of the Land after 1993, as relied upon by ECPC, was “as of right”.

62. The presumption of regularity relied upon by LDC can only overcome the absence of evidence of Ministerial consent in respect of there being a valid exercise of the statutory powers. It cannot, in my view, overcome the lack of evidence or sufficient evidence that the power was, as a matter of fact actually exercised. LDC would need to provide the evidence that the Land was actually provided and maintained by it and its predecessors, or otherwise show that the power was actually exercised and it cannot claim that the presumption of regularity can be assumed not only to show the relevant Ministerial consent was obtained but also to presume that merely because the Land was purportedly purchased under Part V of the 1936 Act, and used for public recreation, that therefore one of the specific discretionary powers under that Part of the Act was actually exercised.

63. In my view, the alternative submission made by LDC, that is that the public recreational user of the Land was by implied permission, similarly fails. LDC produces no additional evidence of what positive acts are relied upon to support this submission and for the reasons above, my view is that such evidence as it has produced is not sufficient to show that either LDC, or its predecessor authority, set the land out as a recreation ground, or took any positive steps of maintenance or management for those purposes of allowing the public to use it for recreational purposes.

64. Accordingly, in my view, the use of the Land for the relevant period, which it is accepted as a matter of fact occurred, was on a balance of probabilities, “as of right”. All of the other qualifying criteria of section 15(2) of the 2006 Act are not in dispute, and in any event in my view are satisfied on a balance of probabilities. Accordingly, in my view, the application to register the land should be confirmed.

If there are any other queries arising in this matter whether as a result of my advice or otherwise, then my Instructing Solicitor is very welcome to contact me.

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12th March 2017