KENT COUNTY COUNCIL

CHURCH STREET PLAYING FIELDS

APPROACH OF REGISTRATION AUTHORITY TO REGISTRATION APPLICATION

OPINION

1. I am asked by Kent County Council ("KCC") as registration authority ("RA") to give my opinion on a single question - namely whether the registration of land referred to as Church Street Playing Fields, Church Street, Whitstable, Kent ("the Land") as a town or village green ("TVG") under s.15 of the Commons Act 2006 ("the CA 2006") is permissible in the light of the decision of the Supreme Court in *R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs* [2021] AC 194 ("the Lancashire case") or is incompatible with the statutory purposes for which the Land is held.

2. This is a discrete question the answer to which could be determinative of the application for registration.

The Short Facts

3. The Land was acquired under three conveyances in the period 1927 – 1930. They refer to KCC "acting as the local education authority" and being "desirous of acquiring the [Land] for education purposes".

4. The Land was subsequently used as playing fields as part of the nearby (but not adjoining) school - Whitstable Community College ("the College") - until 2018 when the College became an Academy called Whitstable School.

5. I am told that Whitstable School was not granted any interest in the Land and KCC as landowner remains the freehold owner in possession of it.

6. The Land was used as school playing fields and for other non-school activities (apparently some such other user being with the consent of KCC as landowner and some not).

7. It is not now used for school playing fields. Other uses are said to continue and I will proceed on that basis.

8. The Land is not allocated for any particular development and there is no claim of any trigger event preventing registration having occurred.

9. On 27th November 2023, an application for registration as a TVG under s.15 of the CA 2006 was made on the basis of 60 years user as of the Land for lawful sports and pastimes informally by residents of the locality alongside use by a number of local schools and sports clubs ("the Application").

10. The Applicant stated that there was no statutory incompatibility (as explained in *Lancashire*) because:
    a. the School held a lease of the Land and was not under similar duties re: provision of education to KCC as education authority. "There is no specific statutory duty to which an academy school is subject, that is incompatible with registration…";
    b. KCC which held the reversion had no immediate entitlement to use the Land for educational purposes and thus had no statutory duties in respect of the Land; and
    c. the provision of playing fields for informal recreational and educational leisure activities was itself an educational purpose.

11. KCC as landowner objected ("the KCC Objection"), so far as relevant, on the basis that:
    a. there was no lease and it was in possession of the Land which was held by it for education purposes;
    b. *Lancashire* applied and that was a "knock out" blow to the registration.

12. The Applicant responded with a Representation in Response to Kent County Council's Objection prepared by Andrew Sharland KC ("the Applicant's Response") which, having made some procedural submissions, addressed statutory incompatibility and *Lancashire* at [11-14][1]. It was contended that:
    a. KCC had to show that the Land was held for a particular statutory purpose – there was no such evidence and the conveyances only demonstrated that the Land was held by KCC and "say nothing about the statutory purposes of which the Land is held"; and
    b. "critically, even if the Land is held for education purposes, it does not follow that this will give rise to statutory incompatibility preventing registration…. The present case is very different to *Lancashire*… [There] the land was immediately adjacent to a primary school. By contrast the Land is not attached to a particular school but is located someway from the nearest school. It is thus in a similar position to the land in issue in *R(Cotham School) v Bristol City Council* [2018] EWHC 1022 (Admin). In that case the relevant statutory duty applicable to the Land… was inter alia section 507A and 507B of the Education Act 1996…. The independent inspector appointed by the Council concluded that these statutory provisions did not give rise to statutory incompatibility if the land was registered as a TVG. The High Court rejected a challenge to this conclusion… The Court's conclusion on this issue in *Cotham School* is unaffected by the Supreme Court's judgement in *Lancashire* which concerned different statutory provisions".

13. The Applicant's Response did not dispute that the Land was not leased to the School or that KCC had not parted with possession of it. I will proceed on the basis that KCC is the freehold owner in possession.

[1] I do not need to address paragraphs 11 and 12. It is not in dispute that land held by a local authority can be the subject of registration as a TVG. All the examples quoted though were, as noted in *Lancashire @ [49],* where the land in question was not held for a specific statutory purpose or where there was no suggestion of statutory incompatibility.

Lancashire

14. An understanding of the reasoning of the Supreme Court in *Lancashire* and how it differs (fundamentally) from the reasoning of the lower courts is central to addressing the issue here.

15. Lancashire County Council ("LCC") as landowner objected to the application for registration of land belonging to it adjacent to a primary school on the basis that registration would be inconsistent with the statutory purposes for which the land was held – it would impede the ability to fulfil LCC's educational duties to provide suitable accommodation and to safeguard pupils (see High Court judgment at [69]).

16. The relevant statutory provisions relied on (at least by the time the case reached the High Court) included:

    a. s.8 Education Act 1944[2] and ss.13/14 Education Act 1996[3] concerning provision of school accommodation;
    b. s.542 of the EA 1996 and the School Premises (England) Regulations 2012 – concerning prescribed standards for schools including outside space for physical education and outside play; and
    c. s.175 of the Education Act 2002 which requires the education authority to make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children.

17. LCC contended that the incompatibility of registration with the statutory educational purposes for which the land was held arose because registration would mean that it could not: (1) use the land to build a new school, new buildings being inconsistent with such registration; and/or (2)provide safe and adequate playspace if the public had access rights to the playing fields - inconsistent with the safeguarding function.

18. The Inspector concluded that the land should be registered because the registration as a TVG would not be inconsistent with the statutory purposes for which the land was held. In short summary: (1) the Land was not held under any specific statutory provision; (2) in so far as it was used as a playing field there was no necessary incompatibility; (3) there were no plans to build a new school on the remainder. Any need for a new school would not necessarily be met there. That conclusion was upheld by the judge and the Court of Appeal but the appeal to the Supreme Court was successful.

19. The fundamental relevant ratio of the Supreme Court was that for an incompatibility to arise it was *not* necessary that the land was actually being used or was intended to be used for an inconsistent statutory purpose. Instead, the issue of incompatibility was to determined as a matter of principle – by comparing the statutory purpose for which the land was held with the rights claimed pursuant to the CA 2006 rather than by carrying out a factual assessment of how the land was used or was proposed to be used. Given that

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[2] "to secure that there shall be available for their area sufficient schools" for providing primary and secondary education, sufficient in number, character and equipment**;**

[3] Which require local authorities to contribute to the development of the community by securing efficient primary and secondary education, and contains provisions equivalent to those of s8 of the 1944 Act

the statutory purposes included the construction of new school buildings and the provision of secure playing fields with which registration was incompatible, registration could not occur.

20. The land was in three key parts. Areas A and B were playing fields. Areas C and D were identified as a "Replacement School Site" but were not used by the school. Area E was an overgrown area and difficult to access.

21. As to Areas A and B, the Inspector found that there were no plans to expand the school onto the relevant land and no evidence to suggest that the school wished to use the relevant land other than for outdoor activities and sports and such use is not "necessarily incompatible" with TVG use.

22. As to areas C – E, the school was being expanded without use of those areas and there was no suggestion of a need to provide a school (or school extension) on areas C – E in the immediate future. Even if there was a need for more educational land in the future, the evidence did not demonstrate that this land needed to be kept available - "it is not necessarily the case that LCC would wish to make that provision the Application Land".

23. There was thus no "clear inconsistency".

24. The High Court and Court of Appeal upheld the inspector's approach – the Court of Appeal stating that:

> ***"The statutory purpose for which Parliament had authorised the acquisition and use of the land and the operation of section 15 of the 2006 Act were not inherently inconsistent with each other. By contrast with [the Newhaven case] there was no "specific" statutory purposes or provisions attached to this particular land. Parliament had not conferred on the county council, as local education authority, powers to use this particular land for specific statutory purposes with which its registration as a [TVG} would be incompatible."***

25. The core question for the Supreme Court was whether that approach to statutory purposes was correct. It held that it was not. The Supreme Court adopted a far broader approach.

26. The test was not whether the land had been allocated by statute itself for particular statutory purposes but whether it has been acquired for such purposes and is for the time being so held. An "incompatibility between general statutory powers under which land is held…. and the use of such land as a [TVG] excludes the operation of the 2006 Act" [57]. "It would be a strong thing to find that Parliament intended to allow use of land held by a public authority for good public purposes defined in statute to be stymied by the operation of a subsequent general statute such as the 2006 Act" [61]. There was no indication of such Parliamentary intent.

27. Thus, the playing fields engaged the statutory duties of LCC to safeguard children - free from risk from strangers and from risks to health from e.g dog mess. More generally,

registration was incompatible with the "use for any of the areas for education purposes including the potential construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes [or that there were plans to use them for such purposes] only that they are held for such statutory purposes… The 2006 Act was not intended to foreclose future use of the land for education purposes to which it is already dedicated as a matter of law" [65].

28. It follows that the focus is on the statutory purposes for which the land is held and not the use to which the land is currently put or is planned to be put.

29. The approach of the Supreme Court to the linked *Surrey* case is consistent with that and does not require elaboration.

Cotham School

30. Reference has been made to the decision of the High Court in *R(Cotham School) v Bristol City Council* [2018]EWHC 1022 (Admin) which was decided after the Court of Appeal judgement in *Lancashire* but before the Supreme Court decision.

31. An application was made to register land owned by Bristol City Council ("BCC") which was held for education purposes and largely laid out as playing fields first for Fairfield School and then Cotham School. The registration was granted and the school challenged on a number of grounds. It was successful on two grounds but did not succeed on the statutory incompatibility argument. It did not need to pursue the statutory incompatibility ground further to force a fresh decision.

32. On the statutory incompatibility issue, the School had argued that registration was incompatible with statutory purposes. The inspector found to the contrary [88]. The High Court expressly adopted the approach of the Court of Appeal in *Lancashire* directing itself that registration would only be defeated if "the land in question is held for a defined statutory purpose and the registration of the land would allow local inhabitants to acquire rights which were incompatible with the continuing use of the land for those statutory purposes. In each case the relevant statutory provisions must be interpreted with care so as to permit of an analysis as to whether the statutory purposes for which the land in question is held would be defeated by registration"[91].

33. The inspector had referred to s.507A Education Act 1996 under which the local education authority was required to secure that education facilities included adequate facilities for recreation and physical training; and the equivalent requirement on academies (s.94 Education and Skills Act 2008). The Land was held by the Academy.

34. The High Court held - applying the Court of Appeal approach in *Lancashire* - that none of the statutory provisions "specifically relate to this land" [96]. The Inspector had concluded on the facts that "duties and functions of the landowner (as education authority in respect of educational provision) can be carried out – albeit with difficulty (including financial difficulty) in some instances" [96] alongside registration as a TVG. The High Court considered that the Inspector's detailed conclusions based on a careful appraisal of the provisions and the evidence presented were unimpeachable and this ground of challenge failed.

35. It is of course important to focus on the relevant statutory purposes for which the land was held but I do not find the decision in *Cotham* persuasive because it was reached before the decision of the Supreme Court in *Lancashire* and appears to have been in large part influenced by the (now rejected) reasoning of the Court of Appeal in *Lancashire*. I do not agree that the fact that different statutory provisions were in play in *Cotham* means that the logic of *LCC* does not apply to it or that the decision in it is thereby unaffected by the Supreme Court decision.

Analysis

36. Contrary to the Applicant's Response, the historic conveyances make clear that the land was acquired for educational purposes – "the Council acting as the local education authority and being desirous of acquiring the same for educational purposes…".

37. For essentially the reasons given by Ouseley J in *Lanchashire* at first instance at [57], and the Supreme Court @ [32] it is appropriate to infer that there were resolutions underpinning the acquisition at the time (although I am not aware that any such resolutions or the reports leading to them have been identified).

38. There is no evidence to support any inference other than that each part of the Land was acquired for statutory educational purposes.

39. There was no definition of, or limit on such purposes. There is no indication in any material that the statutory purposes for which the Land was held was limited to playing fields. The educational purposes were thus broad.

40. The land was, in fact, laid out, maintained and used as playing fields, latterly for the College. I do not know the intensity or nature of the use.

41. The College became an academy in 2018 but I am told that the Land was not conveyed to the new school and that Kent County Council is the freeholder in possession of the Land. There is no lease. I will assume this is all factually correct[4]. If that is correct, the Applicant's points summarised in the first two bullets of para 10 above are wrong

42. There is no evidence (or suggestion) that the Land has ever been appropriated for use for other statutory purposes. Applying the principles and approach in *Lancashire* (as subsequently discussed in *R (Adamson) v. Kirklee*s [2020] EWCA Civ 154 [2020] 2 P&CR 9) the only possible inference is that the Land has at all times been held for education purposes.

43. Those purposes include to fulfil the statutory provisions relied on in *Lancashire* and summarised at para 16 above. I can find nothing in the papers to suggest any limitation

[4] if it is not correct then the statutory provision under which the Academy holds the Land would need to be investigated.

on the range of educational purposes for which the Land was held or the statutory provisions in support of which it can, thus, be used.

44. It would follow that this is no basis here to distinguish Lancashire in respect of the relevant statutory provisions. There would thus be the same incompatibility.

45. It is said that the fact that the Land is physically separate is a relevant distinguishing feature. I do not agree. That fact does not go to the question as for what purpose the Land is held – there is nothing to prevent Land which is not adjacent to an existing school (or not used with an existing school) being held for education purposes.

Further Material

46. There is very limited material provided to establish the history of the acquisition of the Land and its subsequent use – reports to committee on acquisition; details of subsequent use; details of the resolutions and transaction in respect of the School in 2018 and why the Land was retained by KCC at that time including reports to committee explaining the rationale.

47. I have above relied on the original conveyances, the absence of any evidence of any later appropriation and the retention of the Land on the creation of the School and drawn inferences from all that in accordance with the approach that Ouseley J would have adopted in *Lancashire (*as subsequently approved by the Supreme Court).

48. If further information is provided as to the background and how the Land was acquired, held, used and subsequently retained in 2018, then the clear conclusions I reach above may need to be revisited.

Conclusion

49. On the assumptions and inferences I have referred to above, and on the basis that the Land is held for educational purposes by KCC as landowner and that the statutory provisions thus engaged are as in paragraph 16 above, I conclude that there is no relevant basis to distinguish *Lancashire,* that there is a bar to registration and that the result is that the Application would have to be refused.

50. It would not be necessary to investigate the merits of the claims re: historic use for 20 years and whether it was "as of right" and no need for a public inquiry to be held. The Applicant would of course have to be given the opportunity to comment on the *Lancashire* conclusion including orally to the committee if KCC as registration authority is minded to accept my opinion set out above.

David Forsdick KC

Landmark Chambers

10th September 2024