APPENDIX D

IN THE MATTER OF
AN APPLICATION TO REGISTER LAND KNOWN AS
CHERRY ORCHARD PLAYING FIELD, HERNE, KENT
AS A TOWN OR VILLAGE GREEN

LEGAL SUBMISSIONS
IN RESPONSE TO REPORT OF MISS LANA WOOD
OF 18 SEPETEMBER 2009

Introduction

1. The Inspector's report of 18 September 2009 advised that the application to register land known as Cherry Orchard Playing Field, Herne, Kent as a town or village green should fail for four reasons:

    a) The land is held by the local authority to provide recreational facilities for the public and is managed to facilitate that use (e.g. parts of the land are let out for a fee, use is regulated by signs forbidding the playing of golf and bins are provided for the use of dog walkers). Therefore, the essential element of acquiescence in trespassory use by the local inhabitants is not present ("the 'as of right' issue").

    b) The local people who used the land freely for lawful sports and pastimes modified their behaviour when the pitches on the land were in use by teams who had booked to play on them so as not to interfere with those games. Their behaviour did not have the appearance of an assertion of a right. Even on those parts not physically occupied by matches or which can be sensibly said to be used for that purpose (e.g. the playground area, area in the eastern corner), the landowner would look at the use of the land as a whole and would conclude that the local people were not using the land as a whole as of right ("the registration of part issue").

c) The applicant failed to identify a qualifying locality which had existed for the whole of the relevant period (which was argued in the alternative to a neighbourhood) ("the locality issue").

d) It would be very doubtful whether it would be open to the Registration Authority now to conclude that use of the application land between 1984 and 2002 had been as of right, contrary to its earlier decision on 21 March 2003 ("the res judicata issue").

The 'as of right' issue

2. The Inspector's conclusion (at [9.31]) that the landowner's provision of recreational facilities and management of the land to facilitate recreational use are evidence that the landowner is not acquiescing in trespassory use by local inhabitants is wrong in law in light of R (Beresford) v. Sunderland City Council [2004] 1 AC 889 at [48] - [50].

3. The House of Lords held in Beresford that use will not be 'as of right' where the landowner's actions communicate to users that their use is conditional and may be terminated at any time. However, encouragement to use land for sports and pastimes, such as by providing recreational facilities, serves "not to undermine but rather to reinforce the impression of members of the public that their use was as of right" (per Lord Scott at [50]).

4. In particular, it is a material consideration that land is publicly owned. In such a case, the local authority landowner is expected to provide recreational facilities in line with the discharge of its functions for the benefit of the public. Lord Scott stated (at [49]):

> *"The fact that the land was publicly owned seems to me highly material ... Their [the public landowners'] functions were and are functions to be discharged for the benefit of the public. The provision of benches for the public and the mowing of the grass were, in my opinion, not indicative of a precatory permission, but of a public authority, mindful of its public*

responsibilities and function, desirous of providing recreational facilities to the inhabitants of the locality. In these circumstances there seems to me to have been every reason for the inhabitants of the locality who used the sports arena to believe that they had the right to do so on a permanent basis."

5. The Applicant cited these arguments to the Inspector and they are reported at [7.45] and [7.46] of the report. However, the report fails to consider them either in the discussion of Beresford at [8.26] – [8.35] or in the conclusion on 'as of right' in [9.31].

6. Canterbury City Council's provision of recreational facilities for the public and management to facilitate their use is a consequence of its exercising its public functions. In accordance with Beresford, the landowner was encouraging local people to use the land, which heightens, rather than defeats, the fact that their use was 'as of right'.

The Registration of Part Issue

7. The Applicant argued before the Inspector that the registration authority is entitled, without any amendment of the application, to register any part of the land which the applicant proves satisfies the requirements of section 22 of the 1965 Act (as amended) (Oxfordshire County Council v. Oxford City Council and another [2006] 2 AC 674 at [62]) (reported at [7.5] and [7.102]). The Applicant submitted that, if the application were to fail in relation to the 'pitch' areas of the land, the Registration Authority should consider registering the areas not occupied by the football or cricket activity, such as the children's' play area and area to the east of the land (these areas were conveniently highlighted as outside a red line on a plan provided by Mr Richard Davidson, Assistant Contract Manager, Canterbury City Council – see [7.83]).

8. The objector did not provide any evidence that the Cherry Orchard had ever been used in its entirety by the landowner or someone who had sought their permission. As such, it was submitted that in the areas outside the red line on Mr

Davidson's plan (bar the buildings) there can be no question of deference ([7.83]).

9. The Inspector accepted as a matter of fact that the 'deferring' sporting activities of football and cricket did not cover the entire application site ([9.19]):

> *"Whilst it is the case that there are areas which are not physically occupied by the football matches, (for instance areas between the pitches ...), nevertheless in my judgment and as a matter of impression it can sensibly be said that during the football season when matches are taking place on all three pitches, the whole of the application site is being used for that purpose, except the pathways around the sides, the playground area and a small area in the eastern corner. The position will be similar when a cricket match is taking place, although there is more space between the edges of the site and the edges of the cricket pitch at the north western end, in particular, when the land is used for cricket rather than football."*

10. However, the Inspector concluded that "a landowner looking at the use of his land would look at the use of it as a whole and would conclude that the local people were not using the land as a whole as of right. He would not characterise the use of the areas which he did not require for football matches in a different way from those areas which are used" (at [9.43]).

11. It is submitted that it is not the case that a landowner would consider that local inhabitants were deferring in respect of the whole land. There was ample evidence, which was accepted by the Inspector, that local people would carry on lawful sports and pastimes on the land concurrently with organized matches taking place. They were deferring to an activity, namely football or cricket, by moving away from the pitches themselves and the areas immediately surrounding them when an organized match took place. However, the evidence was that local residents never deferred to the landowner in respect of the land as a whole. Deference in respect of the activities of football and cricket does not

give rise to the impression of deference in respect of the application land as a whole.

12. The areas where local people did not defer to football and cricket are clearly defined e.g. the children's play area and the area at the eastern corner of the site, and could be simply marked on a map.

13. Therefore, the Registration Authority should have been advised, were they to conclude that all other elements of section 22 are made out, to register those parts of the land identified by the Inspector (e.g. the playground area and the area in the eastern corner) where the application site is never used for organized football and cricket.

The Locality Issue

[7.66] – [7.68] and [9.36] – [9.38]

14. The Applicant relied on the locality of the Civil Parish of Herne and Broomfield which was formed in May 1996, after the commencement of the 20 year period. The Inspector's conclusion in respect of this locality was (at [9.38]):

> *"In my judgment the area now identified as the Civil Parish was not a qualifying locality during the period before it existed. I am not persuaded by Mrs Graham Paul's submissions that it would be appropriate to adopt a purposive approach to the legislation and not interpret it as requiring that the locality has existed for the whole of the relevant period."*

15. The 1965 Act (as amended) defines a town or village green as 'land on which for not less than twenty years a significant number of inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and ... continue to do so'.

16. There is no requirement in the 1965 Act that the administrative boundary of a locality must have been in existence for the entire 20 year period. As long as a locality is made out for the inhabitants at the time of registration, there is a defined area onto which registration can 'bite'; it does not matter that the locality

itself may not have been in existence at an earlier time. This is because the language of the statute means that class (c) rights vest in the inhabitants of the relevant neighbourhood or locality, not the locality itself. The emphasis is on the inhabitants' use, and that they must come from a specific place. The emphasis is not on the continuity of the place itself (see Applicant's submissions at [7.67]).

17. In addition, the creation of Herne and Broomfield Parish in 1996 recognised the existence of that area as a cohesive body; it did not create it. It was because Herne and Broomfield had an already cohesive local identity that the parish boundary was created; it did not become a cohesive identity because of a bureaucratic realignment.

18. Furthermore, adopting a purposive approach to statutory interpretation, it is highly unlikely that Parliament would have intended that a technical change in the boundary of a clearly identifiable locality would defeat an application that would otherwise have been successful.

19. It is equally unlikely that the Courts would be enthusiastic about this argument. The judicial trend away from adopting an overly technical approach to registration can be seen in Lord Hoffmann's speech in Oxfordshire at [27] where he stated that: '"any neighbourhood within a locality" is obviously drafted with a deliberate imprecision' and, as such, 'neighbourhood within a locality' means 'within a locality or localities'.

20. In the context of customary law, there is authority on the point, namely Bremner and others v. Hull (1866) LR 1 CP 748.[1] The case concerned a dispute which arose in 1863 or 4 as to the correct basis for the lections of churchwardens in the parish of Prestwich in Lancashire. The elections of churchwardens was generally to this time a matter regulated by custom. In Parliament – and this was common ground – there were five churchwardens, one for each township. The claimants in Bremner had churchwardens, one for each township. However it was objected

[1] I am grateful to have had my attention drawn to this and the following authority from a paper presented by Philip Petchey at a Francis Taylor Building seminar on town and village greens, entitled: 'A local habitation: neighbourhood and locality in the law of town and village greens'.

that in 1848 the township of Whitefield had been severed from the parish; before that the arrangements as regards a sixth churchwarden from the township had been the same as those in respect of the five unsecured townships. However, the approach of the Court was to treat the custom as one pre-existing 1848 and then say that the change effected in 1848 did not affect the position. Thus Erle CJ said (at p. 761; Keating J and Montague Smith J were to a similar effect):

> *As to the effect of the order in council creating Whitefield a new district, I am unable to see any difficulty. Taking away the care of souls in a portion of a parish or district does not affect the cure of souls in the rest of the parish, or the rights, powers and duties of the ecclesiastical officers appointed thereto.*

21. Another case which holds a changed boundary of a locality to be irrelevant is R v. Hundred of Oswestry (Inhabitants) (1817) 6 M and S 361. The case concerned the obligation of the inhabitants to maintain the Llanyblodwell bridge over the River Hanah. Originally, the hundred of Oswestry had comprised sixty townships. However, in 1543, a sixty first was added by statute – Abertanah, transferred from the county of Merioneth in Wales. It was argued that Abertanah was not liable to maintain the bridge, but the High Court rejected that argument. It seemed to view the hundred as having a legal existence independent of its precise boundaries (at p. 365 per Holroyd J):

> *Although the hundred has varied at different times in its component parts, still it may be charged as a hundred immediately.*

22. As the law of town and village greens and the 1965 Act have their roots in the law of commons, these authorities provide further evidence that the 1965 Act should not be interpreted as requiring the locality itself to be in existence for the full 20 year period. Accordingly, the Registration Authority should conclude that the locality of Herne and Broomfield Parish Council is a qualifying locality for the purpose of the 1965 Act. The Inspector's report does not allege that the inhabitants came predominantly from outside this locality.

The Res Judicata Issue

[7.47] – [7.56] and [9.32] – [9.35]

23. It should be noted that the Inspector has failed accurately to convey the reasoning in Thrasyvoulou v. Secretary of State for the Environment [1990] 2 AC 273 in [7.48] and [7.49] of her report, which was set out in the Applicant's closing submissions.

24. Lord Bridge stated in Thrasyvoulou at p. 290F – G:

> *A decision to grant planning permission creates, of course, the rights which such a grant confers. But a decision to withhold planning permission resolves no issue of legal right whatever. It is no more than a decision that in existing circumstances and in the light of existing planning policies the development in question is not one which it would be appropriate to permit. Consequently, in my view, such a decision cannot give rise to an estoppel per rem judicatum.*

25. This passage sets out that 'a decision to withhold planning permission' cannot give rise to an estoppel per rem judicatum; it has nothing to do with "a TVG decision", as suggested by the penultimate line of [7.48] of the report. As recorded in [7.48], a decision refusing to register land as a town or village green is the determination of a prescriptive right and so is not akin to a decision not to grant planning permission. Therefore, Lord Bridge's judgment at p. 290F – G is *not* of direct application to a TVG case.

26. However, Thrasyvoulou was concerned with the determination of the legal status of alleged unlawful development. The Applicant's submission was that the issue as to the determination of the legal status of alleged development, whether it be through an appeal against an enforcement notice on grounds (b) – (e) or the obtaining of what is now a CLEUD and was then an established use certificate, is a decision one way or the other. Either the development is lawful or it is unlawful. In that sense it is final. This submission has been misreported in [7.49] as "a planning decision is a 'one way or another decision' concerning the legal status

of alleged development" [emphasis added]. This is wholly inaccurate not only as a matter of planning law but in light of the passage cited from Lord Bridge's judgment in [7.48] (p. 290F-G) which clearly sets out that a decision to withhold planning permission resolves no issue of legal right whatsoever. The Applicant sought to distinguish Thrasyvoulou on the basis that a TVG decision is of a different nature to a determination of the legal status of alleged development, which has not been properly reported.

27. With respect, there may have been an unintentional cross-reading in the report between the concepts of a refusal to grant planning permission and the issue of determination of the legal status of alleged development, in respect of Thrasyvoulou. The Registration Authority should therefore act with caution if it is minded to adopt the Inspector's conclusions on res judicata.

28. In her analysis at [9.32] to [9.35], the Inspector concludes that "the public interest in the finality of litigation would lead a court to conclude that a landowner should not be subjected to repeated applications in relation to the same piece of land relying on the same period of use and the same facts". No reference is made to the judgment in Thrasyvoulou.

29. Further, the Inspector fails to state whether this conclusion would apply where there was a change of factual circumstances, in spite of the fact that she identifies a change of circumstances since the 2002 application, namely that the first application was rejected on the ground that the use of the land was not as of right, because the land had been acquired by the local authority under the Physical Training and Recreation Act 1937 for use as a sports and recreation field ([9.33]).

30. In order to justify her conclusion that the fact that the land was held under the 1937 Act was *not* fatal to the application, the Inspector distinguishes the 2003 decision on the basis that:

    a) it must have been a conclusion on a mixed question of law and fact; and

b) so far as conclusions of fact were reached, they were reached without the benefit of a public inquiry, such as has now been held, so therefore without the benefit of any oral evidence.

31. If the Inspector's conclusion is to imply that this change in circumstances (i.e. the fact that the benefit of a public inquiry has enabled a wholly different conclusion on the evidence from the 2003 decision) is irrelevant to the issue of res judicata, that is wrong in law. Thrasyvoulou makes it clear that, in the context of that case, had there been a subsequent material change of use, the principle would not apply.

32. Alternatively, if the Inspector has failed to give regard to this change in circumstance in reaching her conclusion, she has failed to take into account a material consideration.

33. Furthermore, with regard to a change in the law (which the Inspector acknowledges there was in this case: [9.34] lines 1-3), the Inspector states (at [9.34]): "Where the law has changed, the applicant (or any other interested party)'s remedy is to apply for judicial review of the first decision". This statement fails to acknowledge the fact that an application for judicial review must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose (CPR r. 54.5). Therefore, judicial review could only be an effective remedy in highly unusual circumstances where a change in the law occurred almost immediately after a decision not to register land as a town or village green. Given registration authorities' reluctance to make TVG determinations when High Court or appellate litigation is pending, the circumstances when such a remedy could be effective are even narrower. Therefore, the Inspector's conclusion that a change in the law should not enable a repeat application is based on unsound reasoning.

34. Finally, the Registration Authority would be wise to be aware that the Applicant has been advised by counsel in Oxfordshire (in the HL) that the res judicata argument in Thrasyvoulou was raised before the House of Lords in the course of

argument, and their Lordships were wholly unimpressed by it; to the extent that it (unfortunately) did not make its way into their judgments. Therefore, it appears highly unlikely that a Court would have sympathy with the Inspector's conclusions in this regard.

35. The Inspector's conclusion that "use during the period when the landowner was maintaining an active objection to the first application should not be regarded as use as of right" (at [9.35]) is not accompanied by any reason or reasoning. In particular, the Inspector has failed to grapple with the Applicant's arguments that it was not common knowledge in the area at the time of the first application, or thereafter, that the landowner was maintaining an active objection (reported at [7.54] – [7.56]). It is unclear whether the Inspector has concluded on the facts that it was common knowledge; or that it was not, but despite that, the objection can nevertheless be 'active'.

Conclusion

36. The Inspector's conclusions in relation to the four issues identified above are flawed. All other elements of the statutory definition have been made out by the Applicant. Therefore, the Registration Authority should, despite the recommendation of the Inspector, register the parts of the land known as Cherry Orchard Playing Fields which are not used for organized football and cricket (e.g. the children's' play area and area to the east of the land, as shown outside the red line on Mr Davidson's plan (bar the buildings)) as a village green.

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