

39 FROM 39

Episode 6

Village Greens and Rights of Way
Three Perspectives

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R(Lancashire CC) v SSEFRA; R(NHS Property Services) v Surrey CC [2019] UKSC 58

The View from on High

The Facts in Brief

- The SC considered 2 conjoined appeals against decisions re the registration of land as TVGs under s15 CA 2006
- 1st appeal was re land adjacent to a primary school owned by Lancashire CC who objected to registration on basis that land was for educational purposes. The Inspector registered the land and the HCt. upheld the registration due to no stat. incompatibility
- 2nd appeal was re woodland adjoining a hospital held by the appellant NHS Co. (SSfH). LA (Surrey CC) registered the land but the HCt. quashed on grounds of stat. incompatibility.
- CoA considered the appeals together and upheld registrations in both cases.

The Issue

In which circumstances would statutory incompatibility defeat an application to register land as TVG where the land was held by the local authority for statutory purposes?

Newhaven

“In *R(Newhaven Port & Properties Ltd) v E Sussex CC* [2015] UKSC 7 ... this court held that the duty under section 15 of the Commons Act 2006 did not extend to an area held under the specific statutes relating to the Newhaven Harbour. We are asked to decide whether the same principle applies to land held by statutory authorities under more general statutes, relating respectively (in those two cases) to education and health services” (*Lancashire CC v SSEFRA* [2019] UKSC 58 [1])

The Decision – Statutory Incompatibility

- The balance between interests of landowner and those claiming TVG rights was to be respected [11].
- SC interpreted/applied the majority judgment in *Newhaven* where it was implicit that land held by LA in exercise of general statutory powers which were incompatible with use of the land as a TVG could not be registered as such [50].
- The *Newhaven* test was whether the land was acquired rather than used for stat. purposes [56].
- The reference in *Newhaven* to land “acquired by a statutory undertaker” did not limit it to such persons. Public authorities generally may enjoy the defence [56].
- “It would be a strong thing to find that Parliament intended to allow use of land held by a PA to be stymied by a general statute such as CA 2006” [61].
- The general public interest would in such cases be outweighed by the specific public interest in a given case. The balance in compulsory purchase is a good e.g. [63]

The Decision – Appropriateness of Registration

SC therefore held that:

- In both of these cases there was an incompatibility between the statutory purposes for which the land was held and its TVG use [55].
- The provisions of the CA 2006 Act were therefore inapplicable [65].
- In *Lancashire* TVG registration was incompatible with use of the land for (future) educational purposes [65].
- Likewise, in *Surrey*, registration was incompatible with NHS purposes [66].
- Incompatibility is to be judged by potential rather than actual conflict [66].

The Decision – 2 Dissenting Judgments

per Lady Arden

- That a PA held land for stat. purposes which were incompatible with TVG use was insufficient to make the land incapable of registration
- It had to be shown that the land was in fact being used under those powers, or that it was reasonably foreseeable that it would be so used, in a manner inconsistent with the public's right on registration as a TVG [77]

per Lord Wilson

- *Newhaven* marked an exception to the operation of s15. It was dangerous to interpret an exception too widely. Statutory powers to acquire and hold land for educational/health purposes could not be said to be incompatible with the general provisions of the Act, which permitted registration in this case [128], [132].

Comment

- The concept of statutory incompatibility is judge made, originating in the early 20th C.
- The issue is important given the extent of publicly held land used by locals for many years “as of right” (based on local (s1 CA 2006) rather than national registers)
- The principle may also affect other public/private rights, e.g. PROWs where relevant land is held for a statutory purposes
- The judicial pendulum has swung for and against TVG registration but here lies in favour of those who hold land for statutory purposes. See also Growth & Infrastructure Act 2013 and its introduction of “trigger events” which further reduced the scope of TVG registration.
- Public bodies are now well advised ensure their land assets are in order and the statutory purposes for holding those assets are clear. Might this lead to applications to de-register? (s16 CA 2006 – deregistration)
- Unanswered questions include re timing of statutory incompatibility, its operation on land owned by e.g. universities, academies, charities and the Church. Watch out for possible SC answers to some of these questions in *TWL* next year...