HOUSE OF LORDS SESSION 2005–06

[2006] UKHL 25

on appeal from[2005] EWCA Civ 175

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Oxfordshire County Council (Respondents) *v.* Oxford City Council (Appellants) and another (Respondent) (2005)
Oxfordshire County Council (Respondents) *v.* Oxford City Council (Respondents) and another (Appellant) (2005)
Oxfordshire County Council (Appellants) *v.* Oxford City Council and another (Respondents) (2005) (Conjoined Appeals)

Appellate Committee

Lord Hoffmann
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Baroness Hale of Richmond

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For Oxfordshire County Council
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Intervener
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HOUSE OF LORDS

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LORD HOFFMANN

My Lords,

The Trap Grounds

1. This appeal arises out of an application on 21 June 2002 by Miss Catherine Robinson, who lives in North Oxford, to register the Trap Grounds as a town or village green under the Commons Registration Act 1965. The site as it is today does not fit the traditional image of a town or village green. Mr Vivian Chapman, a member of the Bar expert in the law of commons and greens, described it in a report on the application which he wrote for the registration authority, the Oxfordshire County Council:

> "The Trap Grounds are nine acres of undeveloped land in North Oxford. They lie between the railway to the west and the Oxford Canal to the east. About one third…is permanently under water…This part…is usually called 'the reed beds'. [They] are inaccessible to ordinary walkers since access would require wading equipment. The other two thirds ['the scrubland']…are much drier and consist of some mature trees, numerous semi-mature trees and a great deal of high scrubby undergrowth, much of

> which is impenetrable by the hardiest walker.… The scrubland is noticeably less overgrown at the southern end and there is a pond and wet areas in the central eastern part of the scrubland. Throughout the dry parts of the scrubland there are piles of builders' rubble, up to about a yard high, which are mostly covered in moss and undergrowth. The Trap Grounds are approached from the east by a bridge…over the canal. From the bridge a track, known as Frog Lane, leads along the northern edge of the reed beds and gives access to a circular path around the scrubland. Off this circular path there are numerous small paths through the undergrowth. Some peter out after a few yards. Some lead to small glades and clearings. I estimate that a total of about 25% of the surface area of the scrubland is reasonably accessible to the hardy walker."

2. Not idyllic. But town and village greens are in theory survivals from the mediaeval past, established by immemorial local customs dating back to before the accession of Richard I in 1189. When counsel for the landowner in *Mounsey v Ismay* (1863) 1 H & C 729 protested that the fields on which the inhabitants of Carlisle claimed a custom of holding horse races in May were arable land, Martin B replied: "It must be assumed that the custom has existed since the time of Richard the First; and why may it not have been reasonable in the then state of the land?" The Trap Grounds no doubt looked very different before they were cut off, first by the 18th century canal and then by the 19th century railway, from the great north Oxford common of Port Meadow. In those days Frog Lane was called My Lady's Way and led across the Meadow to the nunnery at Godstow where Charles Dodgson and Alice Liddell picnicked and fair Rosamund, mistress of Henry II, lies buried.

Village greens

3. The traditional village green is a creation of the literature of sensibility in the late 18th century. The green at Auburn in Goldsmith's *The Deserted Village* (1770) is the best example; a place where:

> "toil, remitting, lent its turn to play,
> And all the village train, from labour free,
> Led up their sports beneath the spreading tree!
> While many a pastime circled in the shade,

> The young contending as the old survey'd;
> And many a gambol frolick'd o'er the ground,
> And sleights of art and feats of strength went round;
> And still, as each repeated pleasure tired,
> Succeeding sports the mirthful band inspired…"

4. No doubt there were, and perhaps are, village greens like that, but the law took a more prosaic view of the matter. It was not particularly concerned with the spreading tree and the ancient turf but simply with whether there was an immemorial custom for inhabitants of a parish, borough or similar locality to use the land for sports and pastimes. As Martin B said, the custom had in theory to date from before 1189, but such antiquity could be inferred from proof that the inhabitants had in fact used the land for such purposes for a long period in the past. The inference could be rebutted only by showing that it was impossible for such a custom to have existed in 1189.

5. The early cases do not use the term "village green". In *Abbot v Weekly* (1666) 1 Lev 176 a custom that "the inhabitants of the vill, time out of memory, & had used to dance there at all times of the year at their free will, for their recreation" was held to be a good custom. In *Fitch v Rawling* (1795) 2 H Bl 393 the custom was to use some land at Steeple Bumpstead in Essex for "all kinds of lawful games, sports and pastimes…at all seasonable times of the year." As *Halsbury's Laws* has said in successive editions (for example, 1st edn (1908), para 1247):

> "the essential characteristic of a town or village green is that by immemorial custom the inhabitants of the town, village, or parish should have acquired the right of playing lawful games thereon and enjoying it for purposes of recreation."

6. In *Mounsey v Ismay* (1863) 1 H & C 729 (horseracing on arable land on Kingsmoor, outside Carlisle), *Virgo v Harford* (unreported) 11 August 1892 (noted in Hunter, *The Preservation of Open Spaces* (1896) at pp 181-182) (football, rounders and cricket on 65 acres of open land on a hill outside Walton-in-Gordano in Somerset) and *Lancashire v Hunt* (1894) 10 TLR 310 (cricket and other games on 160 acres of Stockbridge Common Down) the courts upheld recreational customs on land which bore no resemblance to the village green at Auburn.

7. The first instance to which we were referred of the use of the term "village green" in a case or statute was in section 15 of the Inclosure Act 1845 (8 & 9 Vict c118), which provided that "no town green or village green shall be subject to be inclosed under this Act". The Act offered no definition and Mr Woolrych, in his notes on *The New Inclosure Act* (1846) said that the term did not refer to all the "grassy plains" on commons which were "known by the name of greens" but only to the "little patches" which "adjoin a town or hamlet and are used in the nature of easements by the inhabitants". There is no authority on the point but it seems likely that, on what would now be called a purposive construction, "town green or village green" would have been construed as Woolrych suggested, namely as any land upon which the local inhabitants enjoyed customary rights of recreation. The purpose of inclosure under the Act was after all to extinguish manorial rights of common over the land inclosed, so that it could be at the free disposal of the owner, but the Act did not extinguish customary rights: see *Forbes v Ecclesiastical Commissioners for England* (1872) LR 15 Eq 51. It was therefore logical to exclude land subject to customary recreational rights from the inclosure procedure.

8. The increase in the urban population in the 19th century made the preservation of open spaces a matter of great public concern. Near the large cities the traditional use of commons for depasturing animals declined and their principal use became the recreation of the people. This use was threatened by owners who recognised no interests in the land apart from those of a declining band of commoners and their own. The House of Commons *Select Committee on Open Spaces near the Metropolis* (1865) asked why long use of the commons by members of the public for recreation should not give rise to public rights. Why should Hampstead Heath not be the village green of London? The answer was that the law recognised only local customs. Rights of recreation could be established for the benefit of a parish or a town, but not for the public at large. London was too big. As Lord St Leonards LC said in *Dyce v Lady James Hay* (1852) 1 Macq 305, 309, a claim for all the Queen's subjects "to go at all times upon the…appellant's property…for the purpose of recreation" was:

> "a claim so large as to be entirely inconsistent with the right of property"

9. The Select Committee said in its Second Report that this rule was illogical: it appeared to "rest upon no very intelligible principle". But the judges and writers insisted on applying it strictly. In *Hammerton v*

Honey (1876) 24 WR 603 Sir George Jessel MR rejected a claim to rights of recreation over Stockwell Green on the ground (among others) that the evidence did not show that use of the green was confined to inhabitants of Stockwell:

> "If you allege a custom for certain persons to dance on a green, and you prove in support of that allegation, not only that some people danced, but that everybody else in the world who chose danced and played cricket, you have got beyond your custom." (p 604)

10. In the same year as *Hammerton v Honey* Mr Charles Elton of Lincoln's Inn wrote a pamphlet on the bill which became the Commons Act 1876 (39 & 40 Vict c 56), in which he said by way of riposte to those who held the same views as the Select Committee:

> "There have been some proposals of late years to extend the doctrine of village greens in a very curious way. It was thought that the commons and open fields around London might be secured as public greens by setting up a kind of national-local custom of rambling and playing at games – such as football and donkey-races, - and so the payment of compensation to private owners might be evaded by a legal fiction." (pp 16 - 17)

11. Mr Elton had written a sustained attack on the same heretical doctrine in his *Treatise on Commons and Waste Lands* (1868) at pp 281-301. The strictest application of the locality rule was in *Edwards v Jenkins* [1896] 1 Ch 308, in which Kekewich J held that the inhabitants of the contiguous Surrey parishes of Beddington, Carshalton and Mitcham could not have a customary right of recreation over land in Beddington. One parish, one custom. In *New Windsor Corpn v Mellor* [1975] Ch 380, 387 Lord Denning MR thought that Kekewich J had gone too far. "So long as the locality is certain, that is enough". But there is no doubt that the locality rule was the pinch-point through which many claims to customary rights of recreation failed to pass.

The Royal Commission

12. The Royal Commission on Common Land 1955-1958 (1958) (Cmnd 462) drew attention (in paragraph 19) to the deterioration in many town and village greens:

> "Unhappily, although many exquisite greens and small village commons do exist, reality all too frequently falls short of imagination. 'Too often, however,' it has been said 'village greens are neglected and become rank with unmown grass and weeds, or trodden bare, used as dumps for rubbish and disfigured with litter.' So far from being untouched, they may find the hand of the twentieth century lying heavy on them."

13. The Commission recommended (at paragraph 404) that "as the last reserve of uncommitted land in England and Wales, common land [an expression which the Commission used to embrace both commons and town and village greens] ought to be preserved in the public interest." The principal mechanism for preservation was to be a register, maintained by county and county borough councils, which would be a definitive record of all common land and town and village greens. Most of the report is about commons, but three of its references to town and village greens should be noted:

(a) There was to be a register of common rights (because "rights exercisable over [commons] … are as variable as their origin": paragraph 128) but no register of rights exercisable over greens. The purpose of greens was simply to "serve the needs of the local inhabitants for exercise and recreation in attractive surroundings": paragraph 368.

(b) Many village greens in fact originated not in customary rights but in allotments set aside for recreation in inclosure awards. The Commission said (paragraph 373) that there was "no advantage in perpetuating these distinctions" and that local authorities should be able to maintain such allotments as village greens.

(c) The Commission said that there were "probably very few villagers who will not know what they mean by 'their green' " and thought that such a claim would seldom be questioned: paragraph 369. But if it was challenged, "the burden of proof would in all probability put them to considerable difficulty and expense". This was presumably a reference to the rule that a

customary right for the inhabitants of a locality to use land for "lawful sports and pastimes" must have been exercised since before 1189.

14. In order to deal with these three points, the Commission proposed (in paragraph 403) a definition of a town or village green:

> "Any place which has been allotted for the exercise or recreation of the inhabitants of a parish or defined locality under the terms of any local Act or inclosure award, any place in which such inhabitants have a customary right to indulge in lawful sports and pastimes and in a rural parish any uninclosed open space which is wholly or mainly surrounded by houses or their curtilages and which has been continuously and openly used by the inhabitants for all or any such purposes during a period of at least 20 years without protest or permission from the owner of the fee simple or the lord of the manor."

15. Certain points about this proposed definition should be noted. First, there was to be a single concept of a village green, with a definition which could be satisfied in three different ways. Land allotted for recreation under the Enclosure Acts or similar statutes was to be assimilated to customary village greens. Secondly, customary village greens were defined simply as land in which the inhabitants of a parish or defined locality "have a customary right to indulge in lawful sports and pastimes". Following the earlier case law, there was no restriction by reference to the size or character of such land. Thirdly, the proposed third limb, allowing 20 years use as of right as an alternative to proof of custom since 1189, was to be confined to rural parishes and to land "wholly or mainly surrounded by houses or their curtilages". The Commission obviously felt some concern about allowing any land whatever to become a deemed village green after 20 years use by local inhabitants for sports and pastimes. They may have foreseen cases like *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 or, indeed, this case, and thought that such land should not become a village green merely because the owner had neglected it for over 20 years.

16. Besides relieving local inhabitants of the burden of proving immemorial custom, the Royal Commission wanted to encourage local authorities or parish councils to claim village greens rather than leaving it to individual initiative. So they recommended that if a local authority

or parish council formally claimed land as a town or village green, it should be provisionally registered and title should thereupon vest in the local authority. That would enable the local authority immediately to maintain the green as if it had been acquired under the Open Spaces Act 1906 and make by-laws for its management: paragraph 372. Anyone with an interest in the land could then object to the provisional registration and have the objection determined by a Commons Commissioner but otherwise it would become final.

The 1965 Act

17. The recommendations of the Royal Commission were largely, though not entirely, adopted in the 1965 Act. Section 1(1) provided for the registration of common land, town or village greens and rights of common. An application to register in proper form would be followed as of course by a provisional registration which would be publicly notified. If there were no objections, the provisional registration would become final. Otherwise, objections and disputes would be determined by Commons Commissioners and the provisional registrations confirmed or expunged accordingly. By section 4(6), applications for provisional registration had to be made before a prescribed date, which for most people was 2 January 1970. By section 1(2), after another prescribed date which, in the event, was 31 July 1970:

> "(a) no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered"

18. In *In re Turnworth Down, Dorset* [1978] Ch 251, 260-261, Oliver J suggested in passing that this simply meant that the land was not *deemed* to be a village green but did not exclude the possibility that it actually was. The same opinion was expressed by Pill LJ in *R v Suffolk County Council, Ex p Steed* (1996) 75 P & CR 102, 112-113. But this would not in my opinion be in accordance with the scheme of the Act. I think that the effect of non-registration was to extinguish such rights of recreation as may have existed by custom or statutory allotment and were registrable on the appointed day.

19. On the other hand, by section 10, the registration of land as common land or as a town or village green was to be "conclusive evidence of the matters registered, as at the date of registration". So the

register was to be definitive, both positively and negatively: registration was conclusive evidence that on that date it was a town or village green and non-registration was conclusive evidence that it was not.

20. In its definition of a "town or village green" for the purposes of the Act, section 22 departed from the recommendation of the Royal Commission. The conclusive presumption arising from upwards of 20 years use was not confined to rural parishes or land surrounded by houses or their curtilages:

> "In this Act, unless the context otherwise requires … 'town or village green' means land [a] which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years."

(I have inserted into this definition the letters by which the alternative grounds upon which land may qualify for registration are usually designated).

21. The Act did not vest the ownership in all town and village greens in the local authority. If anyone could satisfy a Commons Commissioner that he was the owner of the soil, he would be registered as owner. It was only in cases in which no one could prove that he was owner that the land vested in the local authority, which became entitled to manage the green as if it was a public open space: see section 8(4).

New town or village greens

22. Section 13 provided for events happening after the register had become final:

> "Regulations under this Act shall provide for the amendment of the registers maintained under this Act where –

(a) any land registered under this Act ceases to be common land or a town or village green; or

(b) any land becomes common land or a town or village green; or

(c) any rights registered under this Act are apportioned, extinguished or released, or are varied or transferred in such circumstances as may be prescribed … ”

23. Pursuant to section 13, the Minister of Housing and Local Government made the Commons Registration (New Land) Regulations 1969 (SI 1969/1843) (“the New Land Regulations”). Regulation 3(1) provided for applications to register land which had become common land or a town or village green after 2 January 1970, the last date on which land which was already common land or a town or village green could have been originally registered. The notes appended to the Regulations gave examples of how land could become a town or village green after 2 January 1970. One was “by the actual use of the land by the local inhabitants for lawful sports and pastimes as of right for not less than 20 years.” The Regulations provided a simple procedure for such applications. There was a form of application to be sent to the registration authority, (regulation 3(7)), of which notice was required to be published, posted upon the land and sent to the land owner and other interested parties: regulation 5(4). Objections were to be sent to the applicant, who was to be given an opportunity to deal with the points which they raised and any grounds on which the registration authority considered that prima facie the application should be rejected. No procedure for adjudicating upon the applications and objections was prescribed.

Proof of user

24. The registration of village greens which had come into existence by virtue of 20 years user as of right was at first restricted by the decisions of Carnwath J and the Court of Appeal in *R v Suffolk County Council, Ex p Steed* (1995) 70 P & CR 487; 75 P & CR 102 which held that user “as of right” meant that the people indulging in sports and pastimes on the land must have believed that they were exercising a right claimed by the inhabitants of a particular locality. This requirement was, I think, intended to be, and was in practice, very difficult to satisfy. As in the case of the metropolitan commons in the Victorian era, people who went upon open land in urban areas for recreational purposes

tended to think (insofar as they thought about the matter at all) that they were exercising a general public right.

25. In *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, however, your Lordships' House rejected the requirement of a subjective state of mind by people using the land and thereafter, as Carnwath LJ observed in this case [2006] Ch. 43, 61 registration of new village greens became "an area of unusually vigorous legal activity". Once 20 years' user had been established, the only substantial hurdle which the applicant for registration had to overcome was, as it had been in the Victorian cases on customary greens, proof that the user had been by the inhabitants of a defined locality. This requirement was relaxed by the House in *Sunningwell* [2000] 1 AC 335, 357-358 only to the extent of saying that not all the users needed to be inhabitants of the locality in question. It was sufficient that the land was used "predominantly" by such inhabitants.

The amendment of section 22

26. Soon after the decision in the *Sunningwell* case, the question of town and village greens was raised in Parliament. This was in the debates on the bill which became the Countryside and Rights of Way Act 2000. No one voiced any concern about the construction which the House in its judicial capacity had given to the 1965 Act. On the contrary, the only question raised in debate was whether the locality rule did not make it too difficult to register new village greens. In your Lordships' House, Baroness Miller of Chilthorne Domer described the need for the users to be predominantly from the local community, defined by reference to a recognised ecclesiastical parish or local government area, as a "loophole" in the 1965 Act which "allows greens to be destroyed" (Hansard (HL Debates) 16 October 2000, col 865). The Government was sympathetic and introduced a suitable amendment which was adopted at the report stage (Hansard (HL Debates) 16 November 2000, col 513). This became section 98 of the 2000 Act, which amended section 22 by substituting a new third limb of the definition (class c):

> "(1A) Land falls within this subsection if it is land on which for not less than 20 years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either –

(a) continue to do so, or

(b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions."

No period has yet been prescribed under paragraph (b).

27. "Any neighbourhood within a locality" is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries. I should say at this point that I cannot agree with Sullivan J in *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2004] JPL 975 that the neighbourhood must be wholly within a single locality. That would introduce the kind of technicality which the amendment was clearly intended to abolish. The fact that the word "locality" when it first appears in subsection (1A) must mean a single locality is no reason why the context of "neighbourhood within a locality" should not lead to the conclusion that it means "within a locality or localities".

28. I mention for the sake of completeness that a new Commons Bill which repeals and replaces the 1965 Act is now before Parliament.

The Inquiry

29. I come next to the procedure which was followed in this particular case. Although the New Land Regulations do not prescribe any particular method of adjudication, registration authorities in difficult cases tend in practice to engage the services of a member of the Bar to conduct a non-statutory inquiry with a view to advising the authority on the facts and the law: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 348. This procedure is sanctioned by a number of judicial decisions and in *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2004] JPL 975, 986-987 Sullivan J decided that in some cases fairness would make an oral hearing not merely an option but a necessity. Mr Vivian Chapman, who had also been the inspector in the *Sunningwell* case, held an inquiry and produced a report. There was only one objector: the city council, as owner of the land.

30. Miss Robinson's original application had been to register the whole of the Trap Grounds, including the submerged reed beds. At the hearing she applied to amend the application to exclude the reed beds and a 10 metre strip on the west boundary of the scrubland, on which the county council wanted to build an access road to a new school to the south. Mr Chapman decided that he (or the registration authority in whose name he was acting) had power to allow an amendment but refused leave on the ground that the owner of the land (the city council) was entitled to have the status of the whole application land determined and not be faced with the possibility of a later application in respect of land which had been excluded.

31. The application form prescribed by the regulations contains the question (in Part 4): "On what date did the land become a town or village green?". Miss Robinson, apparently on the strength of a publication by the Open Spaces Society, *Getting Greens Registered* (paragraph 59) wrote "1 August 1990". This was calculated as 20 years after the period for original registration had expired. At the inquiry, however, it became clear that she was relying on the period of 20 years before the date of her application for registration on 21 June 2002 and Mr Chapman dealt with the application accordingly.

32. Mr Chapman found that the scrubland had been proved to have been used for lawful sports and pastimes for more than 20 years before the date of application and recommended to the county council that it should be registered as a village green. But the reed beds and Frog Lane had not been so used and should be excluded from the registration.

The county council's response

33. The county council then appears to have sought a second opinion on some of the legal points which had arisen. Mr George Laurence QC advised that the 20 year period could be any 20 year period ending after 1 August 1970 and before the date of the application and that an applicant must decide which period she wants to rely on. If she could not prove that it became a green by the date specified in the application, it must be rejected and she could not rely on evidence of use at a later date. He also advised that the authority could register part of the land specified in the application only if it was "not substantially different" from the application land.

34. Mr Chapman, sent this advice for comment, adhered to his recommendation. In his opinion, the relevant 20 year period was, even before the 2000 amendment, the period before the date of the application. Miss Robinson's answer to Part 4 of the form (1990) was therefore, in law, a mistake. But the mistake had caused no prejudice to the city council, which had agreed that 20 years before 2002 was the relevant period and had conducted its case accordingly. Mr Chapman also rejected the opinion that the authority could not register a part of the land specified in the application, saying that it must have power to register a smaller area. It would be pointless to require a new application.

Application for declarations and directions

35. In view of this conflicting advice, the registration authority applied to the court for directions. It decided that it should also ask for rulings and guidance on various other matters relevant to both whether the land should be registered and what the consequences of registration would be. As a result, Lightman J was faced with an application for 10 rulings:

(i) whether the relevant inhabitants had rights to indulge in lawful sports and pastimes on land which had become a class c town or village green;

(ii) whether land which had become a class c green fell within the scope of section 12 of the Inclosure Act 1857 (20 & 21 Vict c 31) and section 29 of the Commons Act 1876;

(iii) a ruling as to the meaning of the words 'continue to do so' in section 22 of the 1965 Act, as amended, for which purpose the court was asked to rule whether (in the absence of regulations made under the section), the lawful sports and pastimes had to continue to (a) the date of the application to register, or (b) the date of registration, or (c) some other, and if so what, date;

(iv) a ruling as to whether all applications for registration of land as a class c green made on or after 30 January 2001 automatically engaged (and engaged only) the amended definition in section 22 of the 1965 Act;

(v) a ruling as to whether the application might as a matter of law succeed on the basis that the land had become a green on 1 August 1990, or whether (subject to (vi) below) an application which specified in the application form a commencement date for the green that was earlier than the date immediately preceding the date of the application had to fail;

(vi) a ruling as to whether the [county council] had power to treat the application as if a different date (namely a date immediately preceding the date of the application) had been specified in the application as the commencement date for the green, and to determine the application on that basis;

(vii) a ruling as to whether, as a matter of law, it was open to the [county council] to permit the application to be amended so as to refer to some lesser area, and if so, according to what criteria;

(viii) a ruling as to whether, as a matter of law, it was open to the [county council] (without any such amendment being made) to accept the application in respect of, and to register as a green, part only of the land included in the application, and, if so, according to what criteria;

(ix) guidance as to how the [county council] had to approach the application in the light of (a) the evidence in relation to user of the main track and subsidiary tracks, and (b) the fact that some of the land was not reasonably accessible;

(x) guidance as to the relevance of the existence or potential for the existence of public rights of way."

(We are told that the requests for what became rulings (i) and (ii) were added during the hearing at first instance at the suggestion of the judge, who took the view that the answers would inform his approach to what became rulings (iv) and (v).)

36. Lightman J made declarations in response to each of these questions. Each of the parties appealed against one or more of these rulings and the Court of Appeal, in a judgment given by Carnwath LJ, allowed the appeal in respect of some of the declarations and dismissed it in respect of others. All parties appeal to your Lordships' House.

What is a village green?

37. In *R (Beresford) v Sunderland City* Council [2004] 1 AC 889, 917, para 92, my noble and learned friend Lord Walker of Gestingthorpe said that the registration of a 10 acre grass arena in an urban area as a town or village green "may be thought to stretch the concept of a town or village green close to, or even beyond, the limits which Parliament is likely to have intended." Others may also feel a visceral unease at the lack of resemblance between the land registered in that case (and sought to be registered in this one) and the "traditional" village green whose passing was lamented by Goldsmith in 1770. Perhaps, one might feel, the concept could be narrowed by importing into the definition some of the qualities which are associated with the ordinary use of the term defined – what might be called an "Auburn test", not expressly stated in the definition but implied from the choice of the words "town or village green".

38. My Lords, it is true that in construing a definition, one does not ignore the ordinary meaning of the word which Parliament has chosen to define. It is all part of the material available for use in the interpretative process. But there are several reasons why I think that it would be unwise for your Lordships, at any rate without full argument, to embark upon the process of introducing some elements of the traditional village green into the statutory definition.

39. First, your Lordships will observe that the question of whether the Trap Grounds failed, by reason of their current character, to qualify as land capable of becoming a town or village green was not among the 10 questions on which the parties sought rulings from the House. It was not discussed in any of the printed cases. Secondly, this is not surprising because there is no authority, either at common law or on earlier statutes which used the term "village green", in which such a restricted meaning was applied. Thirdly, any restriction derived from the ordinary meaning of "village green" must apply to all three limbs of the definition, but the Royal Commission plainly thought that all land with customary rights of recreation (such as Stockbridge Common Down) would fall within class b. Fourthly, Parliament must have been alerted to the width of the definition by the Royal Commission's proposed restriction for class c greens but chose to define them without restriction. Fifthly, even if Parliament had not noticed in 1965, the subsequent practice of the very learned Commons Commissioners and the courts would have shown how the definition operated. On 19 May 1977 Mr CA Settle QC, as Commons Commissioner, registered as falling

within the statutory definition some rocks at Llanbadrig, Ynys Mon, which had been used by the inhabitants of the locality to moor boats while engaged in the pastime of boating. On 24 May 1976 the Chief Commissioner Mr Squibb ordered registration of land which the local authority wanted to use for housing purposes but upon which there was a custom of having an annual Guy Fawkes bonfire. No doubt there are other examples in the archive of decisions of the Commons Commissioners. In *New Windsor Corporation v Mellor* [1975] Ch 380 the Court of Appeal confirmed the registration of a car park in Windsor as a customary (class b) green. Sixthly, Parliament in 2000 showed no unease at the way registration was operating. Seventhly, if Parliament thinks that the definition needs to be narrowed, it will have an immediate opportunity to do so. Eighthly, the terms of the proposed Auburn test would be inherently uncertain. To say that the registration authority will recognise a village green when it sees one seems inadequate.

40. My Lords, I therefore turn to the issues raised by the 10 points on which declarations or guidance were sought. They may be divided into four groups. The first concerns the 20 year period: when must it have ended? The original definition did not specify. The 2000 amendment says "and continuing" but does not say until when. The second group concerns the effect of registration. Do the local inhabitants obtain any rights and is a registered green protected by Victorian legislation enacted to prevent nuisance and encroachment on town and village greens? The third group raises some procedural questions about the form of applications and the powers and duties of the registration authority and the fourth group seeks guidance on the correct approach to certain kinds of evidence about user.

The 20 Year Period

41. Section 22 as originally enacted said that land which the inhabitants of the locality have used for sports and pastimes "for not less than 20 years" was a village green. It did not specify when that period should end. In *New Windsor Corpn v Mellor* [1975] Ch 380 the Court of Appeal thought that it meant 20 years before the passing of the Act. In *Ministry of Defence v Wiltshire County Council* [1995] 4 All ER 931, 938 Harman J thought it meant 20 years before the date of the application for registration: see also *R v Norfolk County Council, Ex p Perry* (1996) 74 P & CR 1, 5 (Dyson J) and *Caerphilly County Borough Council v Gwinnutt* (unreported), 16 January 2002 (Judge Hywel Moseley). But Mr Edwards, who appeared for Miss Robinson

and Mr Laurence, who appeared for the registration authority, said that as the definition did not specify any terminal date, it meant any period of 20 years. On the expiry of a 20 year period of user, the land became a village green. If it had become a green before 1970 and had not been registered, it would be deemed by section 1(2)(a) not to have been a village green on the appointed day. But any 20 year period expiring after the appointed day would do.

42. The amended section 22, with the addition of the words "and…continue to do so", plainly cannot be satisfied by any period of 20 years. It must be a period continuing until a given date, although, as I shall explain, the precise date is controversial. So one might have thought that the question of whether one could have taken any 20 years under the old law was now academic. But Mr Edwards says that if the land became a green under the old law, it would have remained a green thereafter. Once a village green, always a village green. It could not be retrospectively deprived of that status by the amendment of the definition in 2000. Lightman J agreed: [2004] Ch 253, 283, paras 66-67.

43. In my opinion it is unnecessary to decide when the 20 year period under the old law would have expired because the argument that it would have "become a village green" is a misreading of sections 13 and 22 of the 1965 Act. Section 22 defines a village green for the purposes of the Act. When section 13 speaks of amendment of the register when land "becomes" a village green, it means that by reason of events which have happened after 1970, the land now satisfies the definition. That makes it registrable. But, because the register is conclusive, it does not become a village green until it has been registered. The Act was a Commons *Registration* Act, not an act to change the substantive law of commons and village greens, although, as Carnwath LJ pointed out, the effect of the conclusive presumption in section 10, read with section 22, may be to create rights in respect of land to which they would not have attached without registration. But one purpose of the Act was to enable buyers of land and other members of the public to ascertain from the register whether land was common land or a village green. It would defeat that purpose if unregistered greens could come into existence after the appointed day. I agree with Carnwath LJ's analysis [2006] Ch. 43, 72-73, para 100:

> "The 1965 Act created no new legal status, and no new rights or liabilities other than those resulting from the proper interpretation of section 10. Since that section only takes effect in relation to any particular land on

> registration, there is no legal basis for treating that land as having acquired village green status by virtue of an earlier period of qualifying use. The mere fact that it would at some earlier time have come within the statutory definition is irrelevant if it was not registered as such."

Continue until when?

44. Since 2001, then, the land must satisfy the definition as amended by the 2000 Act. The inhabitants must "continue" to use the land for sports and pastimes. Continue until when? Carnwath LJ said that user had to continue until the date of registration. But that would mean that any well-advised landowner, on receipt of an application to register, would erect barbed wire or take other steps to prevent the user from continuing, or at any rate continuing as of right. In *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2004] JPL 975, 991 Sullivan J said, accurately as it seems to me, that such a construction would make nonsense of the Act. Carnwath LJ [2006] Ch 43, 71, para 94 did not accept that his construction was "so obviously unreasonable or contrary to the legislative intention that it must be rejected." He gave three reasons for adopting it. First, the Secretary of State had power to prescribe a different period. But that seems to me neutral as to what the default position should be. Secondly, the history of the 1965 Act gives "no support for a broad interpretation of the provisions for new greens." That sounds like an attempt to refight the battle of Sunningwell green. Thirdly, a construction which made dedication of a new green in effect voluntary at the time of registration would "help to provide an answer to possible human rights objections." As I shall explain, I do not think that there are valid human rights objections. I would therefore reject the Court of Appeal's construction as irrational. In my opinion the correct date is that of the application. That appears to be assumed by clause 15(3)(b) of the Commons Bill now before Parliament.

Does registration create any rights?

45. Questions (i) and (ii), which raise the questions of whether the registration creates any rights and whether the registered land will be a town or village green for the purposes of the Victorian statutes, are not of immediate concern to the county council. Such questions will arise only once the land is registered and the county council is functus officio. I share the concern of my noble and learned friends Lord Scott of

Foscote and Baroness Hale of Richmond that the House should not make declarations of abstract propositions of law. But the interest of the city council in these questions is concrete in the most literal sense. They wish to build houses on the land. If registration creates no rights and the land does not fall within the Victorian statutes, they will be able to do so. If it does create rights or fall within the statutes, they will not be able to use the land in a way which wholly excludes the local inhabitants from using it for any sports or pastimes whatever. Accordingly, the city council have a real and immediate interest in having the question resolved and there is an appropriate contradictor, namely Miss Robinson. In the circumstances I consider that it would be a proper exercise of the House's discretion to answer questions (i) and (ii) and, as there has been no objection by anyone, I think that your Lordships should do so.

46. Section 1(1) of the 1965 Act provides that land which is a town or village green shall be registered. Section 3(1) says that there shall be a register of town or village greens and that regulations may require or authorise a registration authority to note on the register "such other information as may be prescribed". Section 10 provides that registration as a town or village green shall be "conclusive evidence of the matters registered." In the case of a town or village green, the registration states simply that the land is a green. No other information is prescribed.

47. What rights does registration create? In *New Windsor Corpn v Mellor* [1975] Ch 380, 392 Lord Denning MR said that registration "confers no rights in itself. All is left in the air." Lord Denning said that the explanation was that "Parliament intended to pass another statute dealing with these and other questions on common land and town or village greens." If there was delay passing such a statute, Lord Denning said he would be "tempted to infer" that Parliament intended that land registered as a town or village green should be available for sports or pastimes for the inhabitants. Browne LJ, at p 395, said he agreed that without further legislation, registration conferred no rights on the public.

48. It is by no means clear that Parliament contemplated further legislation about rights over village greens. Section 1(3)(b) contemplated further legislation on the vesting of unclaimed common land, but subsection (3)(a) appears to regard the provisions for the vesting of unclaimed town and village greens (section 8(4)) as sufficient. Section 15(3) contemplates further legislation affecting the exercise of rights of common, but there is no suggestion of further

legislation about rights over village greens. Nor does Hansard throw much further light on the question. There are several references to registration being a "first stage" and to a later measure "for the better management and improvement of common land" (2nd reading debate, 6 February 1965, col 90) but no indication of what might be done about village greens.

49. So one has to look at the provisions about greens in the 1965 Act like those of any other legislation, assuming that Parliament legislated for some practical purpose and was not sending Commons Commissioners round the country on a useless exercise. If the Act conferred no rights, then the registration would have been useless, except perhaps to geographers, because anyone asserting rights of recreation would still have to prove them in court. There would have been no point in the conclusive presumption in section 10. Another possibility is that registration conferred such rights as had been proved to support the registration but no more. So, for example, if land had been registered on the strength of a custom to have a bonfire on Guy Fawkes Day, registration would confer the right to have a bonfire but no other rights. But this too would make the registration virtually useless. Although the Act provides for the registration of rights of common, it makes no provision for the registration of rights of recreation. One cannot tell from the register whether the village green was registered on the basis of an annual bonfire, a weekly cricket match or daily football and rounders. So the establishment of an actual right to use a village green would require the inhabitants to go behind the registration and prove whatever had once satisfied the Commons Commissioner that the land should be registered.

50. In my view, the rational construction of section 10 is that land registered as a town or village green can be used generally for sports and pastimes. It seems to me that Parliament must have thought that if the land had to be kept available for one form of recreation, it would not matter a great deal to the owner whether it was used for others as well. This would be in accordance with the common law, under which proof of a custom to play one kind of game gave rise to a right to use the land for other games: see the *Sunningwell* case [2000] 1 AC 335, 357A-C.

51. This does not mean that the owner is altogether excluded from the land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants. There has to be give and take on both sides. *Fitch v Fitch* (1798) 2 Esp 543 was a sequel to *Fitch v Rawling* 2 H Bl 393, in which the custom of playing

cricket on land at Steeple Bumpstead had been established. The evidence was that the defendants had trampled the grass which the owner had mowed, thrown the hay about and mixed some of it with gravel. Heath J said:

> "The inhabitants have a right to take their amusement in a lawful way. It is supposed, because they have such a right, the plaintiff should not allow the grass to grow: there is no foundation in law for such a position. The rights of both parties are distinct, and may exist together. If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded."

52. The judge asked the jury to decide "whether the defendant had entered the close in the fair exercise of a right, or in an improper way" and the jury found for the plaintiff.

53. Mr George QC, who appeared for the city council, submitted that there was a general presumption against interference with property rights without clear words. (He also relied upon the Human Rights Act 1998, to which I shall return later). But the primary purpose of the 1965 Act, as applied to town and village greens, was not to create new rights which override those of the owner. It was to create a register of town and village greens which would include all land over which statutory or customary rights of recreation existed or probably existed. That would protect both the interests of the local inhabitants (so that public open spaces were not lost with the fading of memory) and also the interests of owners and buyers of land, who could clear their titles and rely upon the register, without being surprised by claims of public right of which they had been unaware. For this purpose, it was in my view a necessary implication that land conclusively presumed to be a village green should be subject to the rights which the statute treated as creating a village green, namely the right to indulge in sports and pastimes. This was the opinion of Pill LJ in *R v Suffolk County Council, Ex p Steed* 75 P & CR 102, 114-115, Dyson J in *R v Norfolk County Council, Ex p Perry* 74 P & CR 1, 7 and Lightman J in this case. I agree.

The Victorian statutes

54. Section 12 of the Inclosure Act 1857 recited that it was expedient to provide "summary means of preventing nuisances" on town and village greens and land allotted for recreation. Therefore:

> "If any person wilfully cause any injury or damage to any fence of any such town or village green or land, or wilfully and without lawful authority lead or drive any cattle or animal thereon, or wilfully lay any manure, soil, ashes, or rubbish, or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green or land, or to the interruption of the use or enjoyment thereof as a place for exercise and recreation, such person shall for every such offence, upon a summary conviction thereof [pay a fine]".

55. Further provision for the protection of town and village greens was made by section 29 of the Commons Act 1876:

> "An encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance, and if any person does any act in respect of which he is liable to pay damages or a penalty under section 12 of the Inclosure Act 1857, he may be summarily convicted thereof upon the information of any inhabitant of the parish in which such town or village green or recreation ground is situate, as well as upon the information of such persons as in the said section mentioned."

56. The first question is whether the effect of section 10 of the 1965 Act is to apply these statutes to land registered as a town or village green. I agree with Lightman J and the Court of Appeal that it does. There is no special definition of a town and village green in the 1857 or 1876 Acts which might suggest that when section 10 of the 1965 Act said that registration was to be conclusive evidence of the matters registered, and the matter registered was that the land was a village

green, Parliament did not intend that it should be a village green for the purposes of the 1857 and 1876 Acts.

57. There is virtually no authority on the effect of the Victorian legislation. The 1857 Act seems to have been aimed at nuisances (bringing on animals or dumping rubbish) and the 1876 Act at encroachments by fencing off or building on the green. But I do not think that either Act was intended to prevent the owner from using the land consistently with the rights of the inhabitants under the principle discussed in *Fitch v Fitch* (1798) 2 Esp 543. This was accepted by Sullivan J in *R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P & CR 573, 588. In that case the land was used for "low-level agricultural activities" such as taking a hay crop at the same time as it was being used by the inhabitants for sports and pastimes. No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so "as of right". But, with respect to the judge, I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purposes of section 22 if in practice they were not. Nor do I follow how the fact that, upon registration, the land would become subject to the 1857 and 1876 Acts can be relevant to the question of whether there has been the requisite user by local inhabitants for upwards of 20 years before the date of the application. I have a similar difficulty with paragraph 141 of the judgment of Judge Howarth in *Humphreys v Rochdale Metropolitan Borough Council* (unreported), 18 June 2004, in which he decided that acts of grazing and fertilising by the owner which, in his opinion, would have contravened the 1857 and 1876 Acts if the land had been a village green at the time, prevented the land from satisfying the section 22 definition.

Human rights

58. Mr George submitted that a system of prescription by which land could after 20 years user become subject to recreational rights and the Victorian statutes was inconsistent with the human right of an owner of land not to be "deprived of his possessions" except on the restricted grounds allowed by article 1 of the First Protocol to the Convention on Human Rights. Section 3 of the Human Rights Act 1998 therefore required the 1965 Act to be construed in a way which did not produce such an inconsistency. The way to achieve this result was to read section 10 as conferring no rights and as not applying the Victorian statutes.

59. Before a court has to resort to section 3, it must first decide that an ordinary reading of the statute would be inconsistent with Convention rights. But I do not think that the construction I have suggested would infringe any of a landowner's rights. (I ignore the fact that the city council is a public authority, since obviously the statute must have the same meaning whoever owns the land.) In support of this argument, Mr George relied principally upon the recent decision of the European Court of Human Rights in *J A Pye (Oxford) Ltd v United Kingdom* [2005] 3 EGLR 1. The court there held (by a majority of 4 to 3) that the extinction of an owner's title to registered land by adverse possession was a deprivation of property which could not be justified. But that case is readily distinguishable. The European Court stressed two matters: first, that the applicant's rights over the land were entirely extinguished and, secondly, that title was transferred by operation of law to another private individual. The first made it a "deprivation" and the second made it difficult to justify as a control of "the use of property" in the general interest. In the present case, first, the owner retains his title to the land and his right to use it in any way which does not prevent its use by the inhabitants for recreation and, secondly, the system of registration in the 1965 Act was introduced to preserve open spaces in the public interest.

Questions of procedure

60. It will be remembered that these proceedings began because Mr Laurence and Mr Chapman disagreed over whether Miss Robinson should have been allowed to prove user for a period different from that specified in Part 4 of her application form. That particular question has been resolved by the answer which your Lordships have given to the question of substantive law, namely that the relevant definition was that specified in section 22 as amended in 2000 and that the only period upon which Miss Robinson could have relied was a period of upwards of 20 years ending with the date of her application. At the inquiry it was recognised, not least by the city council, that the statement on the application form that the land had become a green in 1990 was out of date and wrong and that it was best to ignore it.

61. There remain, however, more general questions about the power of the registration authority (acting by its inspector) to allow amendments to the application form and to register an area of land different from that originally claimed. It is clear from the New Land Regulations that the procedure for registration was intended to be relatively simple and informal. The persons interested in the land and

the inhabitants at large had to be given notice of the application and the applicant had to be given fair notice of any objections (whether from the land owner, third parties or the registration authority itself) and the opportunity to deal with them. Against this background, it seems to me that the registration authority should be guided by the general principle of being fair to the parties. It would be pointless to insist upon a fresh application (with a new application date) if no prejudice would be caused by an amendment, or if any prejudice could be prevented by an adjournment to allow the objectors to deal with points for which they had not prepared. I agree with the approach taken by Mr Chapman and the general remarks of Carnwath LJ [2006] Ch 43, 73-75. In case there should be any doubt, I add two footnotes. First, there is no rule that the amended application must be for substantially the same land as the original application. If it relates to a larger or different piece of land, the inspector or registration authority may well think that fairness requires republication of a new application. But the matter remains one for the exercise of their discretion. Secondly, the registration authority has no investigative duty which requires it to find evidence or reformulate the applicant's case. It is entitled to deal with the application and the evidence as presented by the parties.

62. I also agree with the Court of Appeal that the registration authority is entitled, without any amendment of the application, to register only that part of the subject premises which the applicant has proved to have been used for the necessary period. It is hard to see how this could cause prejudice to anyone. Again, I add that there is no rule that the lesser area must be substantially the same or bear any particular relationship to the area originally claimed.

Evidentiary matters

63. The statutory question is whether "a significant number" of the inhabitants of a locality or a neighborhood have "indulged in lawful sports and pastimes as of right". The question as to what is meant by "as of right" was considered by the House in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335. So was the question of what "sports and pastimes" may be taken into account. The present question concerns what counts as indulging in such sports and pastimes "on" the land: must the "significant number" of inhabitants have set their feet everywhere on the land and must such activity be exclusively referable to indulging in sports and pastimes rather than exercising or creating rights of way?

64. In the present case, Mr Chapman's findings of fact were that "the scrubland has been used throughout the 20 year period to a material extent for informal recreation by local people". This was established by the evidence and furthermore:

> "Standing back and applying common sense, it seems highly probable that such a disused and unprotected open area on the edge of a densely populated part of Oxford would be used by local people for dog walking, children's play and general informal recreation…The character of the scrubland has changed over the 20 year period in that it has become more overgrown with maturer vegetation. There have always been beaten tracks across the scrubland, but it has always been possible to leave the tracks and wander generally over the land, and many users have done so."

65. Mr Chapman dealt with the questions on which guidance was sought under questions (ix) and (x) at the end of his report. First, on the significance of footpath use:

> "The city council argues that the evidence of recreational user of the Trap Grounds amounts to user of defined routes for the purpose of passage and not to general recreational user of the whole site. With regard to Frog Lane, I consider that this is a good point. Frog Lane, according to the evidence, has predominantly been used as a route for access to and egress from the scrubland rather than for its own intrinsic recreational qualities. This is consistent with its history as a road to the nunnery and latterly to the breakers' yard. Its very name suggests that use has been as a right of way rather than as a town or village green. However, I do not consider that this analysis holds good for the scrubland itself. It is true that, at present, there is a main track which circles the scrubland. However, this track appears to be a relatively recent creation…Further, there is strong evidence that many users do not stay on the main track but wander onto subsidiary tracks and enter the various glades and clearings which are to be found within the scrubland. I do not consider that the user of the scrubland by local people can realistically be characterised as the exercise of a right of way along a defined route."

66. Secondly, Mr Chapman dealt with the inaccessibility of a good deal of the scrubland:

> "The city council argue that the scrubland is now so overgrown that the majority of it is inaccessible and that this in itself precludes registration as a green. As noted above, my estimate is that about 25% of the total area is reasonably accessible, the rest consisting of trees and scrub. In my view, the question whether land has become a town or village green cannot be determined by a mathematical assessment of the amount of the land which is open to recreation. …Where the recreational use is informal and consists of activities such as walking, with or without dogs, children's play, exploring and watching wild life, I do not see why much more densely vegetated land should not be capable of being subject to recreational rights, either by custom or prescription. In my view, it is necessary to look at the words of the statutory definition and to ask whether the scrubland, considered as a whole, is land which falls within that definition. In my view, the evidence proves that the recreational use of the scrubland is, and has been over the relevant 20 year period, sufficiently general and widespread, by way of use not only of the main track but also of minor tracks, glades and clearings, to amount to recreational use of the scrubland viewed as a whole."

67. This is not an application for judicial review of Mr Chapman's decision and your Lordships are not invited to express a view on whether, on the facts, he was entitled to reach the conclusions which he did. For my part, in the absence of an inspection or at least photographs of the site, I would be very reluctant to do so. If the area is in fact intersected with paths and clearings, the fact that these occupy only 25% of the land area would not in my view be inconsistent with a finding that there was recreational use of the scrubland as a whole. For example, the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flower beds, borders and shrubberies on which the public may not walk.

68. Instead, your Lordships are invited to provide guidance on the correct approach to the evidence. But I share with Carnwath LJ a reluctance to offer what would amount to the equivalent of a Planning Policy Statement from the Office of the Deputy Prime Minister.

Lightman J made a number of sensible suggestions about how such evidence might be evaluated and the judgments of Sullivan J likewise contain useful common sense observations; for example, on the significance of the activities of walkers and their dogs (*R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P & CR 573, 598-599). But any guidance offered by your Lordships will inevitably be construed as if it were a supplementary statute. There is a clear statutory question: have a significant number of the inhabitants of a locality or neighbourhood indulged in sports and pastimes on the relevant land for the requisite period? Every case depends upon its own facts and I think that it would be inappropriate for this House in effect to legislate to a degree of particularity which Parliament has avoided.

Disposal

69. I would therefore allow Miss Robinson's appeal against the rulings of the Court of Appeal on issues (i) and (iii) and restore the declarations of Lightman J to the effect that issue (i) registration would give rise to rights for the relevant inhabitants to indulge in lawful sports and pastimes on the land and issue (iii) for the purposes of section 22 as amended, the use for sports and pastimes has to continue until the date of the application. I would dismiss her appeal against ruling (iv) (that applications after 30 January 2001 had to satisfy the amended definition of a town or village green) and ruling (v) (that she could not succeed on the basis that the land had become a green on 1 August 1990). I would dismiss the city council's appeal against the ruling on issue (ii) (that the land on registration would be subject to the 1857 and 1876 Acts). I would dismiss the county council's appeal against the rulings on issues (vi) (that the registration authority could ignore the date specified on the application form as the date on which the land became a green); on issue (vii) (that the registration authority could allow the form to be amended) and issue (viii) (that the authority could, without amendment of the application, register a part of the land claimed). I would not answer questions (ix) and (x) further than indicated in this opinion.

LORD SCOTT OF FOSCOTE

My Lords,

Introduction

70. This is an unusual and difficult case, raising difficulties both of substantive law and of procedure. The difficulties all relate, in one way or another, to the effect of the Commons Registration Act 1965, as originally enacted and as amended by section 98 of the Countryside and Rights of Way Act 2000, and the 1989 Regulations made thereunder. I have had the great advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann and I very gratefully adopt his luminous exposition of the factual and legal background to the issues that arise on the appeals.

Town or village greens

71. There is, however, one important matter of background on which I would respectfully take issue with the view expressed by my noble and learned friend and concurred in by a majority of your Lordships. The issue is as to what would have been understood by Parliament and by the public generally prior to the enactment of the 1965 Act by the expression "town or village green" and, consequently, how the definition of "town or village green" in section 22(1) of the 1965 Act should be applied. The issue has not been addressed by counsel who have appeared on this appeal, but, nonetheless, I do not think your Lordships can avoid forming a view on it, as indeed my noble and learned friend has done, for the meaning to be attributed to the expression has a heavy bearing on the answers to be given to some of the questions that have arisen in this case.

72. Lord Hoffmann has concluded that the expression "town or village green" prior to the 1965 Act would have been regarded as applicable to any land that by long custom had become subject to the right for local inhabitants to use it for some form of recreation. Hence, section 15 of the Inclosure Act 1845:

> "no town or village green shall be subject to be inclosed under this Act …",

and section 12 of the Inclosure Act 1857 which says that:

> "If any person wilfully cause any injury or damage to any fence of any such town or village green … wilfully and without lawful authority lead or drive any cattle or animal thereon, or wilfully lay any manure, soil, ashes or rubbish or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green … or to the interruption of the use or enjoyment thereof as a place for exercise and recreation …"
>
> that person shall be guilty of an offence,

and section 29 of the Commons Act 1876:

> "an encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance …"

would apply to all such land whether or not the land answered to the normal understanding of what a town or village green was. In none of these Victorian Acts was the expression defined. In each of these Acts the meaning of the expression could not have been other than a meaning corresponding to that normal understanding. The *Concise Oxford Dictionary* 9th ed (1995) offers as one of the several possible meanings of the word "green" the following:

> "a piece of public or common grassy land (village green)".

This, I suggest, corresponds with what the normal understanding of the expression "town or village green" would have been and with the understanding of the expression that the legislators who passed the Victorian statutes to which I have referred would have had.

73. There are several old cases where a customary right to conduct a recreational activity was established over, or discussed in respect of, land to which these Victorian statutes could not possibly have been intended to apply.

(1) *Millechamp v Jordan* (1740) Willes 202, was a case in which the court accepted the possibility in law of a customary right to use a particular field for recreation but limited to "legal and reasonable times of year" so as not to allow the user to deprive the landowner of all profits of the land (nb the adjective "reasonable" appears in the note to *Bell v Wardell* (1740) Willes 202 but in a reference to the case by Kelly CB in *Hall v Nottingham* (1875) 1 Ex D 1, 3 the adjective "seasonable" is substituted").

(2) *Mounsey v Ismay* (1865) 4 H & C 486 was a trespass case. One of the defences was that the free men of the city of Carlisle had acquired by 20 years prescriptive user the right on Ascension Day each year to hold horse races on the land in question. The defence failed, Martin B holding that the right to have a race meeting could not be claimed under the Prescription Act 1832 (2 & 3 Wm 4 c71). But he said, *obiter* at 495, that it was "perfectly clear that such a right as is here set up can only exist by custom" and, at pp 498-499, that a customary right to run horse races would be "a lawful one at common law". The right to have a race meeting once a year on someone else's land could not possibly justify describing the land as a town or village green.

(3) Lord Hoffmann has referred in paragraph 6 of his opinion to *Virgo v Harford* (unreported) 11 August 1892 in which a customary recreational right to play various games on 65 acres of open land on a hill in Somerset was apparently upheld. The notion that this land would have been understood to be a town or village green seems to me absurd.

(4) *Lancashire v Hunt* (1894) 10 TLR 310 provides an equally (or more) extreme example of the point. The owner of Stockbridge Common Down in Hampshire applied for an injunction to prevent a local trainer from exercising and training his race horses over the 160 acres-odd of the common. The trainer claimed that he had a customary right to train his horses over the common. Wright J held that this customary right had not been established by the evidence but that the inhabitants of the borough did have the right to ride their horses for recreation over any part of the 160 acres. In a second action heard at the same time the owner of Stockbridge Common Down sought to restrain the inhabitants of Stockbridge from using the common for meetings, fêtes and cricket matches. Here, too, the defence was based on custom. It was said that the inhabitants had a customary right to use the downs for those

purposes. This defence prevailed. The reporter of the case made the following comment at p 312:

> "It will therefore be seen from Mr Justice Wright's decision in the two actions respectively that - (a) so long as that judgment stands the lord of the manor of Stockbridge will have in future a definite right to prevent racehorses from being trained on Stockbridge Common Down; but (b) that he will not, any more than formerly, be able to stop the inhabitants of Stockbridge using the common down as a recreation ground in the same way and for the same purposes as village greens are usually enjoyed by the villagers".

It is to be noticed that the reporter did not comment on the absurdity of referring to the 160 acres of downs as a village green. No one, in my respectful opinion, could have supposed that the references in the Victorian statutes to village greens were applicable to the 160 acre Stockbridge Common Down.

(5) In *Mercer v Denne* [1904] 2 Ch 534 a customary right for fishermen in the parish of Walmer to spread their nets to dry on the land of a private owner at all times seasonable for fishing was held by Farwell J to be a good and valid custom. The customary right claimed was not a right for recreational purposes but for the purposes of the fishermen's trade as fishermen. However, the principles applied by Farwell J to the question whether the custom claimed was a good one were the same principles as those which had been established in the customary recreational rights cases, many of which he cited.

74. These cases demonstrate, in my opinion, that a customary right for local inhabitants to use someone else's land, of whatever description, for a recreational purpose could be acquired, pre the 1965 Act, by evidence of user from time immemorial provided that the custom were sufficiently certain and were reasonable in itself. The custom would become, in effect, a local common law for the place to which the custom extended (see Tindal CJ in *Lockwood v Wood* (1844) 6 QB 50, 64 cited by Farwell J in *Mercer v Denne* [1904] 2 Ch 534, 551). The customary rights thus acquired might be limited by the nature of the user that had given rise to them. Thus, for example, the riding of horses over Stockbridge Common Down since time immemorial could not have given rise to a customary right to hold fêtes and play cricket matches on the common, and vice versa. A customary right for local inhabitants to

course hares over the stubble fields of the lord of the manor could, I imagine, have been acquired by an exercise of that right since time immemorial. But the right to course hares over the fields after they had been ploughed and planted or to enjoy other recreative activities over the fields could not have been thereby acquired.

75. Another way of making the same point is to observe that the residual rights of the landowner to make profitable use of the land subject to the customary rights must surely depend on the nature of the user that has created the rights. In some cases the landowner's residual rights might be negligible. In other cases the landowner's ability to use the land might be restricted only for a limited period of the year. All would depend on the nature of the customary right that had been established. And there would be many types of land over which customary rights of one sort or another might be established which no one could suppose would be subject to the various prohibitions imposed by the Victorian statutes on town and village greens.

76. It follows, in my opinion, that, pre the 1965 Act, the fact that a piece of land was subject to a customary right of recreation would not, by itself, have sufficed to allow the land to be described for legal purposes as a town or village green, eg for the purposes of the Victorian statutes. Something more would have been needed. There is, as Lord Hoffmann has said (para 7 of his opinion), no authority on the point but I am unable to accept that a purposive construction of the expression "town or village green" in the Victorian statutes would have led to the 160 acre Stockbridge Common Down, or a mountainside down which people skied in winter snow, or a dense wood in which people wandered to pick bluebells or search for mushrooms or for other dalliance, being so categorised.

77. In my opinion, the "something more" would have been a quality in the land in question that would have accorded with the normal understanding of the nature of a town or village green, namely, an area of land, consisting mainly of grass, either in or in reasonable proximity to a town or village and suitable for use by the local inhabitants for normal recreational activities.

78. The Report of the Royal Commission on Common Land 1955–1958 (1958) (Cmnd 462) makes some, not very many, references to town and village greens. Three of these are mentioned by Lord Hoffmann in paragraph 13 of his opinion. For my part I can see no

reason to suppose that the Commissioners had in mind anything other than greens as normally understood. Lord Hoffmann notes, in sub-paragraph (c), the Commissioners' comment that there were "probably very few villagers who will not know what they mean by 'their green'". I respectfully agree with this comment which, to my mind, goes to confirm that the Commissioners had in mind normal traditional town or village greens.

79. Section 22(1) of the 1965 Act defined "town or village green" as meaning:

> "land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years".

As Lord Hoffmann has observed, this definition brought together the two categories of land that, pre the Act, constituted land over which local inhabitants might be entitled to rights of exercise or recreation and then added a third, the so-called class (c), namely, land on which the inhabitants "have indulged in such sports and pastimes as of right for not less than 20 years". The important question for present purposes is whether this definition justifies classifying as a town or village green any land on which any form of lawful recreation is either the subject of a customary right or has been indulged in by the local inhabitants for at least 20 years. My instinctive reaction is to say that the definition was not intended to turn into a village green land subject to the exercise of customary rights that would not, pre the Act, have been regarded as a village green. The 160 acre Stockbridge Common Down was not, in my opinion, a town or village green before the enactment of the 1965 Act and did not become one afterwards. The landowner who owned arable land that, before the 1965 Act, had been subject to a customary right to course hares in the autumn would not after the enactment have found that he was the owner of a town or village green. And the addition of class (c) could not, in my opinion, have been intended to alter the status of land that had not previously been a town or village green or to turn into a town or village green land that had never previously been so regarded. The addition of class (c) was intended, in my opinion, in complete agreement on this point with Lord Hoffmann, to enable general recreational rights over town and village greens, as popularly understood, to be established without the necessity of proving user since

time immemorial. Proof of 20 years user as of right, a formula borrowed from the Prescription Acts, would do.

80. However, unfortunately, at least in my view, cases since 1965 have led to the registration as town or village greens of land that did not remotely correspond to a town or village green in the normally understood sense. Some of these cases have been referred to by Lord Hoffmann (para 39 of his opinion). There was a case in 1977 in which some rocks at Llanbadrig, Ynys Mon, which had for upwards of 20 years been used by the local inhabitants to moor their boats was registered as a town or village green. In a case in 1976 a piece of land in Barnet on which for at least the past 20 years a Guy Fawkes bonfire had been held as of right was registered. No other evidence of use of the land for sports and pastimes is mentioned in the short report of the Chief Commons Commissioner. But the land was known as "Bittacy Green" which certainly suggests such use and suggests that the nature of the land was consistent with it being a town or village green. If, however, all that had happened was that for the previous 20 years plus the local inhabitants had once a year as of right enjoyed a Guy Fawkes bonfire on the land, it does not seem to me that the statutory criteria were satisfied. And, in the course of counsels' submissions in the present appeal, reference was made to a quarry which, having been used for 20 years plus by the local inhabitants for recreational activities, was registered, in reliance on class (c), as a town or village green.

81. It is, in my opinion, an error in construction of section 22(1) to suppose that any land, whatever the degree of divergence between the character of the land and a town or village green as normally understood, can be registered as a town or village green either in reliance on class (b) or in reliance on class (c) of the statutory definition. I do not think the problem would ever arise in relation to class (a) for I imagine that any land allocated by an inclosure award for general exercise and recreational purposes, would have been already or would soon have become a predominantly grassy area.

82. In Bennion's *Statutory Interpretation*, 4th ed (2002), p 480, under the side-heading "Potency of the term defined", the author says this:

> "Whatever meaning may be expressly attached to a term, it is important to realise that its dictionary meaning is likely to exercise some influence over the way the definition will be understood by the court. It is impossible

> to cancel the ingrained emotion of a word merely by an announcement."

The author gives a number of examples from decided cases which illustrate, convincingly in my opinion, his point. The two cases which seem to me particularly pertinent are *British Amusement Catering Trades Association v Westminster City Council* [1989] AC 147, where Lord Griffiths, at p 157, construed the term "cinematograph exhibition" as excluding video games because the use of the term immediately brought to mind a film show, and *Delaney v. Staples* [1992] 1 AC 687, in which Lord Browne-Wilkinson in construing the definition of "wages" in the Wages Act 1986 said, at p 692, that "it is important to approach such definition bearing in mind the normal meaning of that word".

83. My Lords, I would apply the same approach to construction of the definition of "town or village green" in section 22(1) of the 1965 Act, or, for that matter, to construction of "town or village green" in the Victorian statutes to which I have referred. I do not believe it can be correct to insist on a literal application of the section 22(1) definition so as to apply it to land that no one would recognise as a town or village green.

The rights of user over town and village greens

84. The dispute between the parties as to whether there are any, and if so what, rights of user over class (c) town and village greens would fall away if the literal construction of section 22(1) were set aside and, as I would regard it, a more sensible construction, based upon the normally understood characteristics of a town or village green, were adopted instead. It is relevant to notice that the class (c) addition to the previous means by which land may have become a town or village green was based upon the language of prescription. Prescriptive user for the requisite period entitles the prescriber, or the general public if public rights of way are being obtained, to a right commensurate with the prescriptive user. Prescriptive user of a path on foot may give a right of way on foot, prescriptive user of the path with a horse may lead to a bridleway, or with vehicles to a right of way with vehicles. It is a basic principle of prescriptive use that the user "as of right" that has continued for the requisite period becomes a user "of right". There seems to me every reason to suppose that the 20 years user contemplated by section 22(1) was intended to lead to the same consequence as prescriptive user,

namely, the acquisition of rights commensurate with the nature of the user. This would match up class (c) with class (b), where the user that had created the customary right would become the permitted user pursuant to that customary right.

85. It is only if the literal construction of section 22(1) preferred by a majority of your Lordships is adopted that the "rights" issue becomes difficult. If it is correct that any 20 year "as of right" recreational use of any type of land justifies categorising the land as a town or village green, then it becomes necessary to ask what rights are thereby created over the town or village green? Why should a landowner's tolerance of a yearly Guy Fawkes bonfire on his land lead to the local public acquiring much broader, and more intrusive, rights over the land, rights that the landowner might well not have tolerated? But if there has been general recreational use of a parcel of mainly open grassy land that has continued as of right for 20 years plus, no problem arises. Mr Edwards, counsel for Miss Robinson, said that one single type of activity would not suffice to qualify land as a town or village green. But I would go further. The reference in section 22(1) to "lawful sports and pastimes" is, in my opinion, a reference of generality. If, throughout the 20 year period the land were used for whatever lawful sports and pastimes the users chose, the requisite generality would be present. A management problem might arise if a new sport began to be played posing problems for other users of the land. User for the new sport might be unlawful if it presented unacceptable dangers to other users of the green but it would not necessarily be unlawful vis-à-vis the landowner. He could complain only if his residual rights in respect of the green were interfered with but, if the green were the typical town or village green, those rights would be likely to be negligible.

Human rights

86. The implications of article 1 of the First Protocol to the European Convention on Human Rights and the Human Rights Act 1988 to the acquisition by land of town and village green status under class (c) of section 22(1) were raised by Mr George QC on behalf of the City Council. He referred your Lordships to the recent decision of the Strasbourg court in *J A Pye (Oxford) Ltd v. United Kingdom* [2005] 3 EGLR I. A loss by a landowner of rights over his land brought about by the operation of a statutory prescription provision and the expiry of the relevant prescriptive period would, I feel bound to accept, prima facie engage his article 1 of the First Protocol right "to the peaceful enjoyment of his possessions". But, in my opinion, notwithstanding the

Strasbourg court's decision in *Pye*, and having taken account of that decision (see section 2(1)(a) of the 1998 Act), the operation of the statutory prescriptive provision in section 22(1) brings about a deprivation of the landowner's rights that is, in the judgment of Parliament, in the public interest. The purpose of the statutory prescriptive provisions in our domestic law is, as Lord Hoffmann put it in the *Sunningwell* case [2000] 1 AC 335, 349, to "prevent the disturbance of long-established de facto enjoyment". Who could doubt that that is in the public interest?

87. If, however, as I understand to be your Lordships' view, land can become a town or village green under class (c), or for that matter under class (b), on account of some long standing but limited recreational use (eg yearly Guy Fawkes bonfires) and then, after registration as a town or village green under the 1965 Act, the local public thereby become entitled to use the land for any "lawful sports and pastimes", it is easy to see that the fact of registration may seriously limit the ability of the landowner to continue to enjoy the land in the manner in which he had enjoyed it during the prescriptive period. The public interest in thus increasing the rights of the local public over and above their "long established de facto enjoyment" and correspondingly reducing the residual rights of the landowner is hard to discern. So if it is right that a limited recreational use can qualify the land, upon registration, for use for any and all "lawful sports and pastimes" (see section 22(1)), a potentially serious problem regarding the landowner's article 1 of the First Protocol rights could, in my opinion, arise.

88. There is a further point about human rights where, as in the present case, the landowner is a local authority, to which I should draw attention. The City Council acquired the land from St John's College and, I imagine, sections 122 and 123 of the Local Government Act 1972 apply to the land. Section 122(2A) (added by amendment under the Local Government, Planning and Land Act 1980) allows a local authority owner of "open space" land, which includes land "used for the purposes of public recreation", to appropriate the land to other uses. And section 123(2A) gives a local authority power to dispose of the open space land provided certain specified statutory procedures are followed (see the general discussion on these provisions in paragraphs 27 and 28 of the opinion I gave in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, 900).

89. The question whether these statutory powers allow a local authority such as the City Council to appropriate open space land for

housing use and then to dispose of the land free from any recreational rights of the local inhabitants whether or not the land has been registered as a town or village green remains for judicial decision. The purpose of the statutory powers I have referred to would, in relation to open space land that had been registered under the 1965 Act, be pointless if the local authority could not do so. It seems to me arguable that these statutory powers do enable local authorities to use town and village greens for housing purposes and to remove the land from the clutch of the 1857 and 1876 Victorian statutes as well as from the 1965 Act. The relevance of all this for present purposes is that if the City Council does have power under the 1972 Act to dispose of the Trap Grounds for housing purposes whether or not the land in question is a town or village green, the City Council would suffer no obvious detriment if the Trap Grounds were to be registered as a town or village green and any potential human rights point based upon that registration would evaporate.

90. In the light of the matters I have been discussing it is interesting to look again at the facts of the *Bittacy Green* case. It appears from the Decision of the Chief Commons Commissioner, Mr George Squibb QC, that the piece of land on which the annual Guy Fawkes bonfire had been held was a relatively small part of a larger parcel of land that had been acquired in 1952 by Hendon Borough Council, the predecessor of the London Borough of Barnet. Mr Squibb records, in the second page of his decision, that:

> "In 1970 the Council was minded to cease to use the land for the purposes of public walks and pleasure ground and to appropriate it for housing purposes. Since the land was an 'open space', as defined in section 22(1) of the Town and Country Planning Act 1962, because it was used for the purposes of public recreation, it was necessary to make an appropriation order, confirmed by the Secretary of State for the Environment, under section 73 of that Act. This order, the London Borough of Barnet (Sanders Lane Housing Area) Appropriation Order 1970, provided that other land should be provided in exchange and that the appropriated land should be discharged from the rights, trusts and incidents to which it was previously subject.
>
> The 1970 Order did not, however, apply to all the land comprised in the register unit. There was excluded from it a triangle of land, which still remains open and outside the curtileges of the houses which have been built on the remainder. In my view, the effect of this Order was to

> discharge the part of the land used for housing from the right to indulge in lawful sports and pastimes on it …"

The function of the court

91. There is one final problem, a procedural problem, that I want to mention before turning to the ten specific issues on which the County Council seek rulings and guidance. The problem arises out of the nature of some of the relief sought. The background to the commencement of the proceedings can be shortly stated. Miss Robinson, a resident in North Oxford, applied to register the Trap Grounds as a town or village green on the ground that "local residents had used it for lawful pastimes as of right (without obstruction, permission, stealth or force) for an unbroken period of 20 years …" and continued to do so. The City Council, the landowner, objected to the application. They want to use the Trap Grounds, or some part, for housing development. The County Council appointed Mr Vivian Chapman to enquire into the facts relevant to Miss Robinson's application and to advise them. Mr Chapman duly conducted a non-statutory inquiry and having done so presented the County Council with a detailed report advising that a part of the Trap Grounds qualified for registration and should be registered as a town or village green. But the County Council then received advice from another expert in this field, Mr George Laurence QC, their counsel on this appeal, which in some important respects conflicted with the advice given by Mr Chapman in his report. The County Council then commenced these proceedings in order to obtain rulings on the several points regarding the effect of the 1965 Act, as amended, and the 1969 Regulations made thereunder, that Miss Robinson's application and the conflicting advice they had received appeared to them to raise.

92. Paragraphs (i) to (viii), inclusive, of the relief sought under the County Council's re-amended CPR Part 8 claim form sought rulings on legal issues. Paragraphs (ix) and (x) sought guidance on certain factual matters relevant to Miss Robinson's application. The paragraphs are set out in paragraph 35 of Lord Hoffmann's opinion. It will be apparent that what was sought from the High Court was a fairly comprehensive essay on the legal effect of the 1965 Act, as amended, and the 1969 Regulations. The proceedings did not constitute a judicial review application attacking any part of Mr Chapman's report, although it would, in my opinion, have been open to the City Council to have sought leave to make such an application. The County Council could have formed its own view about the conflicting advice it had received from Mr Chapman and Mr Laurence, have dealt with Miss Robinson's

application accordingly and have left it to the contestants, Miss Robinson and the City Council, to attack, if so advised, the manner in which the application had been dealt with or the decision that had been reached, or both. If that course had been taken by the County Council the issues for decision by the High Court, and on appeal by the Court of Appeal and this House, would have been formulated by the attack or attacks in question. The High Court would not have been presented, nor would the Court of Appeal or your Lordships, with the examination paper that these proceedings have set. I do not wish to be over-critical of the County Council's disinclination to come to a decision on Miss Robinson's application until all the legal issues which seemed to them to arise had been judicially resolved, but I do wonder whether all the 10 paragraphs of declaratory relief sought in this case can be brought within the legitimate boundaries of the courts' jurisdiction to grant such relief.

93. Lord Diplock said in *Gouriet v Union of Post Office Workers* [1978] AC 435, 501 that:

> "the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."

In Zamir and Woolf's *The Declaratory Judgment*, 2nd ed, at para 3.007, the author, Lord Woolf, refers to the *Royal College of Nursing* case [1981] AC 800 and the *Gillick* case [1986] AC 112 as providing "good examples of courts being prepared to grant declarations at the extreme end of their supervisory jurisdiction". In the former case the issue was whether a circular issued by the Department of Health and Social Security had mis-stated the law regarding termination of pregnancy by medical induction. The well-known *Gillick* case involved an allegation that a departmental circular about the legality of prescribing contraceptives for girls under the age of 16 was erroneous in law. In both these cases the issue for decision was clearly defined.

94. In the great majority of cases about registration of town or village greens to which your Lordships have been referred the case has come before the court on an application for judicial review of a decision on registration already taken by the registration authority (see eg the *Sunningwell* case [2000] 1 AC 335, the *Beresford* case [2004] 1 AC 889,

Ex p Steed 70 P & CR 487, the *Alfred McAlpine Homes* case [2002] 2 PLR 1, the *Laing Homes* case [2004] 1 P & CR 573 and the *Cheltenham Builders* case [2004] JPL 975). The only town or village green registration case previous to the present case that came before the court for a ruling before any decision had been taken by the registration authority that I have been able to discover is *Caerphilly County Borough Council v. Gwinnutt* (unreported), a case in 2002 decided by Judge Moseley. The applicant borough council was the registration authority but had an interest in the land in question being developed as an industrial estate. The council took the view, very understandably, that this interest made it inappropriate for it to discharge the quasi-judicial function of deciding whether to accede to the application to register the land as a town or village green. So it made an application asking the court to determine the issue as to registration. Judge Moseley commented in his judgment that the procedure adopted had "received the implicit endorsement" of this House in *Hampshire County Council v Milburn* [1991] 1 AC 325, but he was plainly puzzled about the legitimacy of asking the court to decide an issue that the applicant council had a statutory duty to decide. He said this, in paragraph 8 of his judgment:

> "In those circumstances what is the function of the court? In my judgment it can (1) determine any issue of law or construction submitted to it. Its determination on that issue must necessarily be final because there is only one correct answer to any such question, being the answer which the court provides and (2) provide guidance to the council as registration authority on the basis of the facts presented to it for its consideration. That guidance however in my view cannot possibly be final because after judgment the council may take into account other information available to it when it finally disposes of the application."

95. It seems to me likely that the County Council's procedure in the present case, asking for various rulings on points of law and for guidance as to the approach it should take to some of the facts, was borrowed from the cited passage from Judge Moseley's judgment. Be that as it may, I do not think the *Caerphilly* case, where the council had, in effect, recused themselves and had no alternative but to ask the court to decide the registration issue, should be regarded as a precedent of general application.

96. Lightman J in the present case, referring to the procedure the County Council had adopted, drew comfort, as Judge Moseley had done,

from *Milburn's* case. In *Milburn's* case the owner of two parcels of land which, with other land, had been registered as common land, had applied for the land to be removed from the register. The issue was whether certain conveyancing transactions had had the result in law that the two parcels had ceased to be common land. The county council, as registration authority, asked the court to determine whether they should accede to the deregistration application. Millett J, at first instance, made a declaration that they should. In a leap-frog appeal this House allowed the appeal and held that they should not. There was no attention paid, either in the arguments of counsel or in the opinion delivered by Lord Templeman, concurred in by the other members of the Appellate Committee, to the propriety of the procedure that had been adopted. Nor, in my opinion, need there have been, for the sole issue in the case was the legal effect of the conveyancing transactions which were said to have deprived the parcels of land of their character as common land.

97. I would accept that if there is an issue of law that needs to be decided before a decision can be made on a registration, or deregistration, application, the registration authority can refer the issue of law to the court for a ruling. And the court may, if in its discretion it thinks it right to do so, make a declaration accordingly. But the propriety of a registration authority asking the court to give a ruling on an issue of law in which it has no interest as registration authority or in any commercial respect and that does not need to be decided in order for a decision to be reached on a pending registration, or deregistration, application seems to me to be highly dubious. Each of the first five of the declaratory rulings sought by the County Council in the present case raises an issue of substantive law. The propriety of the County Council asking the court to give these rulings depends, in my opinion, on the rulings being necessary for a decision to be taken by the County Council on Miss Robinson's registration application. The rulings sought by paragraphs (i) and (ii) cannot, in my opinion, pass this test. (At the end of para 35 above Lord Hoffmann has explained the circumstances in which those rulings came to be added to the County Council's original list.)

98. The criteria for registration of land as a class (c) town or village green, as set out in the 1965 Act in its original form and as amended, direct attention to the user of the land. The criteria do not require any investigation into what rights of user the inhabitants of the relevant neighbourhood or locality will have after registration. There is no present issue regarding the post-registration rights and such future issue as may arise, if and when registration takes place, will be an issue between the relevant inhabitants, of whom Miss Robinson will be one,

and the City Council. The County Council would not be a necessary party to litigation instituted to resolve the issue.

99. The same point applies, even more strongly, to the ruling sought by paragraph (ii). Whether the Victorian statutes, to which I have already referred, apply to a class (c) town or village green has no conceivable relevance to the registration issue. It was, in my respectful opinion, impermissible for the County Council to ask the court to give what is, in effect, an advisory opinion on an issue that has not yet arisen and, if and when it does arise, will not concern the County Council in its registration authority role or in any other capacity.

100. The rulings sought in paragraphs (iii), (iv) and (v), on the other hand, do relate to issues of law that can be represented as necessary to be resolved on Miss Robinson's registration application.

101. Paragraphs (vi), (vii) and (viii) relate to procedural issues that have arisen and that the County Council, as registration authority, needs to deal with before reaching a decision on the registration application.

102. As to paragraphs (ix) and (x), which seek the court's guidance as to how the County Council should deal with certain factual matters, it seems to me quite inappropriate for the County Council to seek, or for the court to give, "guidance" of this sort. The County Council, as registration authority, must make up its mind how to deal with the facts thrown up by Mr Chapman's report. They have a quasi-judicial role under the 1965 Act and must discharge it to the best of their ability. Trustees, if they do not know what to do, can ask the court to tell them or, alternatively, they can surrender their discretion to the court and ask the court to exercise it for them. The County Council's procedure in the present case in seeking the paragraphs (ix) and (x) guidance, and Lightman J's response, seem to me, if I may respectfully say so, to be assimilating the County Council's role as registration authority to that of trustees. I would, for my part, deprecate this.

103. For the reasons I have endeavoured to explain Lightman J should, in my opinion, have declined to entertain the County Council's requests made in paragraphs (i), (ii), (ix) and (x) and, for the same reasons, the Court of Appeal should, in my opinion, have set aside the declaratory relief granted by the judge under these paragraphs. What should your Lordships now do? My noble and learned friend Lord Hoffmann has

said, in paragraph 45 of his opinion, that because the City Council want to build houses on the Trap Grounds, or to sell the land for housing development purposes, they (the City Council) have "a real and immediate interest" in obtaining answers to the questions raised in paragraphs (i) and (ii), namely, whether registration of the Trap Grounds as a class c town or village green would create rights to enable the local inhabitants to use the land for lawful sports and pastimes and would subject the land to the various prohibitions imposed by the Victorian statutes on town and village greens. My noble and learned friend has concluded that in these circumstances it would be a proper exercise of the House's discretion to entertain the request for rulings under paragraphs (i) and (ii). Moreover Lightman J at first instance and Carnwath LJ in the Court of Appeal have supported their respective rulings with careful argument and the correctness of them has been debated before your Lordships. My Lords, there seems to me, if I may respectfully say so, a good deal of force in the view that in these circumstances the House should give answers to the questions raised by these two paragraphs. But, having regard to the cogent arguments put forward by my noble and learned friend Baroness Hale of Richmond, whose opinion I have had the advantage of reading in draft, and having regard also to the opinion of this House expressed by Lord Diplock in *Gouriet* [1978] AC 435, 501(cited in paragraph 93 above), the answers should be limited to those that are strictly necessary and that are not in any way dependent on facts not yet known or not in evidence. On that footing I must now deal with the 10 paragraphs of relief sought under the County Council's re-amended Part 8 claim form.

The 10 Issues

104. Issue (i). Paragraph (i) asks whether the "relevant inhabitants had rights to indulge in lawful sports and pastimes on land which had become a class c town or village green". The point of this question is that it has been contended that a class c registration simply settles the status of the land (see section 10 of the 1965 Act) and that the local inhabitants do not thereby obtain any rights of recreation over the land. The obtaining of these rights, it was contended, was intended by Parliament when enacting the 1965 Act to await further legislation which would confer the requisite rights, legislation that is still being awaited. If these contentions are right, the registration of the Trap Grounds as a class c town and village green would confer no rights on Miss Robinson and the other local inhabitants. The development of the Trap Grounds for housing purposes would interfere with no rights that Miss Robinson and the others can claim. My Lords I am in full agreement with what Lord Hoffmann has said about these contentions in

paragraphs 47, 48 and 49 of his opinion. I agree that the effect of registration under the 1965 Act of a class c town or village green is to confer on the local inhabitants rights of recreation over the land and I agree that a declaration so stating could, in the particular circumstances of this litigation, properly be made, or upheld, by your Lordships.

105. But I do not agree that registration can authorise local inhabitants to enjoy recreative user of the land that is different in kind from the 20 years user that has satisfied the statutory criteria for registration or that would diminish the ability of the landowner to continue to use the land in the manner in which he has been able to use the land during that 20 year period. I do not accept that a tolerant landowner who has allowed the local inhabitants to use his grass field for an annual 5 November bonfire for upwards of 20 years must, after registration, suffer his field to be used throughout the year for all or any lawful sports and pastimes with the consequential loss of any meaningful residual use that he could continue to make of the field. I do not understand how anyone can suppose that that is what Parliament had in mind in 1965. And if registration of land as a class c town and village green were to bring about a diminution of the landowner's property rights, not simply by establishing the local inhabitants' right to go on doing what they had been doing for the last 20 years but by depriving the landowner of the right to go on doing what he had been doing for the last 20 years, there would, in my opinion, be a very real question as to the compatibility of such a legal regime with the landowner's rights under article 1 of the First Protocol to the Convention.

106. While, therefore, I agree with Lord Hoffmann that registration of the Trap Grounds as a class c town or village green would entitle the local inhabitants to recreative rights of user over it, those rights would, in my opinion, be commensurate with the nature of the user that had led to that result and would not necessarily extend to the right to use the land for all or any lawful sports or pastimes. For instance, clay pigeon shooting is a popular lawful sport or pastime. Would clay pigeon shooting be permissible on the Trap Grounds if registration took place? It presumably would be if clay pigeon shooting had taken place reasonably regularly over the 20 year period. Or what about archery contests? Those walking their dogs would have to be warned to keep out of the way. In my opinion any sort of declaration that went beyond the very limited form of declaration to which I have referred at the end of paragraph 104 above would be a misuse of the discretionary power to give declaratory relief. It would not settle any current issue. If, after registration, some recreative activity were to take place on the land to which the City Council or some local inhabitants objected, there would

be an issue for decision and a declaration settling the issue could be made. These proceedings are not the proper occasion for settling issues that have not yet arisen.

107. Issue (ii). Paragraph (ii) asks whether land which has become a class c town or village green falls within the scope of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876. The answer depends on which approach to construction of section 22(1) is right. If the approach I have advocated were to be accepted, the meaning of "town or village green" in those Acts would be no different from the meaning of "town or village green" in the 1965 Act. The only difference would be the additional, class c, means by which land might become a town or village green. In that case a class c green would, in my opinion, fall within the scope of the two sections. But, since a majority of your Lordships favour the literal construction of section 22(1), land is capable of becoming registered as a town or village green notwithstanding that it is not land to which either of the two sections has been or would have been at any time applied eg arable land over which customary recreative rights are enjoyed or the rocks at Llanbadrig, Ynys Mon, to which local inhabitants moor their boats (see Lord Hoffmann's opinion, paragraph 39). An "always speaking" approach to the construction of statutory provisions is only permissible if there can be a reasonable certainty that the legislative intendment underlying the statutory provision would envelop the new situation that had developed (see *Victor Chandler International Ltd v Customs & Excise Comrs* [2000] 1 WLR 1296, 1304, para 32). How can that certainty be present in relation to class c if the literal approach to construction is adopted? An arable field may become a town or village green and ploughing of the field by the landowner would then be barred by section 29 of the 1876 Act. The manuring of the field, too, would be barred by section 12 of the 1857 Act. The notion that this would have intended by the legislature cannot, I respectfully suggest, be maintained.

108. As to the propriety of your Lordships making a declaration on this issue, a declaration that the Trap Grounds would, on registration, become subject to the two Victorian statutes will not settle the question whether the City Council's housing development intentions for the land will be frustrated. That question will not be answered until the scope of a local authority's statutory powers to appropriate open space land to housing purposes and its ability then to sell the land for housing development free from town or village green restraints has been judicially determined. That being so, I can see no good reason why the House should, in relation to issue (ii), depart from the practice endorsed and recommended by Lord Diplock in *Gouriet* [1978] AC 435, 501.

109. Issue (iii). Paragraph (iii) seeks a ruling as to the meaning to be attributed to the words "continue to do so" in section 22 of the 1965 Act, as amended. This issue is addressed by Lord Hoffmann in paragraph 44 of his opinion with which, with one slight qualification, I am in complete agreement. I agree that the amendment introduced by the 2000 Act does not require that the user of the land for sports and pastimes continues until registration and, I agree that, prima facie, the user must continue up to the date when the registration application is made. If, however, 20 years appropriate user having passed and while the user is still continuing the landowner bars the user, a more or less immediate application to register the land in response to the landowner's action would, in my opinion, suffice. But if the barring of the user were not responded to reasonably promptly, the continuance criterion introduced by the 2000 Act would not be able to be satisfied. My reason for this slight qualification is that an applicant for registration is quite likely, before making the application, to attempt to stir up neighbourhood support or to obtain suitable evidence from local inhabitants. The landowner is quite likely to hear of this and a race to see who could act first, the landowner in barring the use of the land or the applicant in making the application, would not be satisfactory. The requirement of continuance needs, I think, to be approached in a commonsense fashion. Has the previous public user fallen into disuse is, in my opinion, the right question to be asked.

110. Issues (iv) and (v). I agree with Lord Hoffmann for the reasons he has given in paragraph 43 of his opinion that the amended section 22 applies to all registration applications made after the 2000 Act came into effect and that the land in question becomes a town or village green on registration

111. Issues (vi), (vii) and (viii). These questions are dealt with by Lord Hoffmann in paragraphs 59, 60 and 61 of his opinion and I am in entire agreement with his answers to the questions raised and his reasons for them. I would like, particularly, to emphasise my agreement that a registration authority should be guided by the general principle of being fair to those whose interests may be affected by its decision.

112. And, finally, there is the guidance sought by issues (ix) and (x) in relation to the factual matters referred to. I would, for my part, for the reasons I have given, prefer to express no view at all on these factual matters. It is for the County Council to weigh the evidence, consider whether it satisfies the criteria for registration of the Trap Grounds as a town or village green prescribed by section 22(1) of the 1965 Act,

correctly construed, and come to a decision accordingly. If the City Council or Miss Robinson wish to challenge the decision on any points of law, they may then do so.

Disposal

113. For the reasons I have given:

(1) On issue (i) I would allow Miss Robinson's appeal against the ruling of the Court of Appeal but set aside the declaration of Lightman J and make the limited declaration referred to in paragraph 104 above.
(2) On issue (ii) I would allow the City Council's appeal against the ruling of Lightman J, concurred in by the Court of Appeal, and decline to answer the question posed.
(3) On issue (iii) I would allow Miss Robinson's appeal against the ruling of the Court of Appeal and restore Lightman J's declaration but with the addition to the declaration of the words "and so that if an application is made or legal proceedings are commenced reasonably promptly after and in response to action taken by the landowner or others to obstruct the continued indulgence as of right by the relevant inhabitants in lawful sports and pastimes, the said indulgence shall be taken to have continued to the date of the application or the commencement of the legal proceedings".
(4) On issues (iv) and (v) I would dismiss Miss Robinson's appeal against the Court of Appeal's ruling (allowing the City Council's appeal against Lightman J's ruling on these issues).
(5) On issues (vi), (vii) and (viii) I would dismiss the County Council's appeal.
(6) I would not answer issues (ix) and (x) and would set aside the "guidance" declarations made by Lightman J.

LORD RODGER OF EARLSFERRY

My Lords,

114. I have had the advantage of considering the speeches of my noble and learned friends in draft. For the reasons Lord Hoffmann gives, I would dispose of the appeal as he proposes. I also have sympathy with

the reservations about the nature of the relief sought which my noble and learned friends, Lord Scott of Foscote and Baroness Hale, have expressed, but, like Lord Hoffmann, I would answer questions (i) and (ii). I simply wish to add a short comment on one particular aspect of the case.

115. Before doing so, I should confess that, like Lord Walker, my feeling at the end of the hearing of the appeal was that it would be desirable, if reasonably possible, to interpret the definition of "town or village green" in section 22 of the Commons Registration Act 1965 ("section 22") in a manner that would confine its application in the case of village greens to areas which were, more recognisably, the kinds of area which readily come to mind when the expression is used – in other words to "traditional" village greens. But the terms of the definition in section 22 present a formidable obstacle to such an approach, an obstacle which it would be legitimate to surmount only if the House could be satisfied that it was necessary to do so in order to give effect to the intention of Parliament. Despite Lord Scott's arguments, having studied the speech of Lord Hoffmann, I cannot actually be sure that Parliament intended the provision to have this narrower scope. Moreover, the potentially wide implications of the definition became apparent, at the latest, in the decision of the House in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 in June 1999. It is striking that, when subsequently amending the definition by enacting section 98 of the Countryside and Rights of Way Act 2000 ("section 98"), Parliament did not use the opportunity to restrict its scope in this way. At present there is a Bill before Parliament dealing with some of the same subject matter. Again, it contains no measure to narrow the definition in section 22 so as to limit it to more "traditional" village greens. But if, having taken account of your Lordships' speeches in the present appeal, Parliament wished to change the definition in this way, a suitable amendment could doubtless be introduced.

116. My Lords, for the reasons given by Lord Hoffmann, I am satisfied that an area does not become a village green unless and until it is registered. It follows that I would reject Mr Edwards' submission that, before section 22 was amended by section 98, an area of ground on which the inhabitants of a locality had indulged in sports and pastimes as of right for 20 years or more had ipso facto become a village green. The position was, rather, that once that period had elapsed it was open to an interested party to apply to have the register of town and village greens amended to include an entry for the area in question. The applicant would not have needed to show that the inhabitants were

continuing to indulge in the sports and pastimes when the application was made.

117. Section 98 came into force on 30 January 2001, two months after the 2000 Act received the royal assent: section 103(2). As the House now holds, under the amended version of section 22, anyone applying to have the register amended had to show either (a) that the inhabitants continued to indulge in the sports and pastimes at the date of his application or (b) that they had ceased to do so for not more than a prescribed period. Since no period has ever been prescribed for the purposes of para (b), the operative paragraph is (a).

118. Miss Robinson lodged her application after 30 January 2001 but on the basis that the area had become a village green in 1990. Her counsel, Mr Edwards, contended, however, that the amendment to section 22 did not apply "retrospectively" and so, where the period of 20 years had been completed before section 22 was amended, an applicant still did not need to prove that the inhabitants were continuing to indulge in the sports and pastimes at the date of the application. An applicant such as Miss Robinson could rely on section 22 in its unamended form.

119. Although the issue was presented as one of the retrospective effect of section 98 of the 2000 Act, that is to ignore its true nature. I refer to, without repeating, the lengthy observations on this topic in my speech in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816. Put shortly, there is nothing in the 2000 Act to rebut the powerful presumption that section 98 ought not to be understood as affecting the substantive law in relation to events taking place before it came into force: *Wainwright v Home Office* [2002] QB 1334, 1345, para 27 per Lord Woolf CJ. In any event, despite the language he used, that was not really the point Mr Edwards was making. The true question raised by his submission is whether section 98 applied generally or applied only to situations which arose after it came into force, with the result that the unamended version of section 22 continued to apply to other cases. If section 98 applied generally, then the amended version of section 22 applied, for the future, to situations which were already underway when it came into force.

120. In effect, Mr Edwards was arguing that section 98 did not apply generally but applied only to situations where the relevant activities of the inhabitants occurred after 30 January 2001. Accordingly, for an

indefinite period of decades or more into the future, in making an application based on activities before that date, an interested party could rely on the unamended version of section 22. Down all those decades, as he accepted, two different systems would operate in parallel, one which required the applicant to prove the continuation of the sports and pastimes and one which did not. I would reject the submission.

121. First, there is nothing in section 98 or in any other provision of the 2000 Act to limit its application in this way. Moreover, Mr Edwards' interpretation would mean that Parliament had chosen to postpone the operation of the amendment indefinitely in what might well be a significant number of cases. He did not advance, and I am unable to see, any reason why Parliament would have intended that the new policy which it was enacting should not apply to all applications made after section 98 came into force. Indeed, the administrative and other complications of operating two different systems afford powerful reasons for supposing that Parliament would have intended that there should be only one.

122. The position might have been different if it could be said that the amendment to section 22 prejudicially affected a vested right of the applicant. But, by the time the amendment to section 22 took effect, the applicant had not applied to have the register amended. Like others in a similar position, she simply had a right to apply which she had not yet exercised. And, since the purpose of legislation is to alter the existing legal situation, there is no presumption that it will not alter rights which individuals have, but have not exercised. Cf *Abbott v Minister for Lands* [1895] AC 425, 431, per Lord Herschell LC. On the contrary, like everyone else, those interested in having the register of village greens amended ran the risk that sooner or later Parliament might intervene to change the law regarding such applications. That, and nothing more, is what happened when Parliament enacted section 98 and amended section 22: applicants found that they now had to meet an additional requirement before they could have the register amended. No question of vested rights arises.

123. I am accordingly satisfied that section 98 applied generally and that the amended version of section 22 applied to situations which were already underway when section 98 came into force, including situations where an application was made after that date on the basis of the inhabitants' activities before that date. Therefore the amended version of section 22 applied to Miss Robinson's application. It is unnecessary to express any view on the rather different issue of applications which

had been made but which had not been determined when section 98 came into force.

LORD WALKER OF GESTINGTHORPE

My Lords,

124. I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I am in full agreement with his opinion and I would dispose of the appeal as he proposes. I add a few words of my own on the question of "what is a village green?" discussed in paras 37-40 of Lord Hoffmann's opinion.

125. In *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, 917, para 92, I expressed some unease at a result which appeared to stretch the concept of a town or village green close to the limit of what Parliament is likely to have intended. I have felt a similar, but rather stronger, sense of unease about the prospect of the recognition as a town or village green of all or part of the land to which Miss Robinson's application relates – an over-grown, rubble-strewn, semi-submerged area, sandwiched between the canal and the railway in north-west Oxford.

126. This intuitive feeling gets some support from legal principle in that a town or village green has traditionally been classified as a sub-set of a larger class, that is land over which inhabitants of a neighbourhood enjoy customary rights, sometimes recreational, sometimes non-recreational (as in *Mercer v Denne* [1904] 2 Ch 534 (Farwell J), [1905] 2 Ch 538) (Court of Appeal).

127. In *Lancashire v Hunt* (1894) 10 TLR 310 (Wright J), 11 TLR 49 (Court of Appeal), the case about "a cricket match or fete" held on Stockbridge Common Down, counsel argued (at p 311), not that the down was a village green, but that there was a right to use the down "*in the same way as* villagers had a right to enjoy and use a village green" (emphasis supplied) and Wright J is reported (at p 312) as having accepted that submission. The Court of Appeal dismissed the appeal without comment on this aspect of the case. Other customary rights hover on the verge of recreation, such as a right for parishioners (but not

the general public) to walk across parkland to attend the parish church (*Brocklebank v Thompson* [1903] 2 Ch 344). The construction of the statute proposed by Lord Hoffmann would, as he recognises (para 49), put all customary recreational rights into a single one-size-fits-all category.

128. Nevertheless the cumulative force of the eight points set out in paragraph 39 of Lord Hoffmann's opinion appears to me to be irresistible. In enacting the Commons Registration Act 1965 Parliament deliberately chose not to adopt the narrower definition proposed by the Royal Commission. In enacting the Countryside and Rights of Way Act 2000 Parliament (while amending the statutory definition in other respects) did not consider it appropriate to narrow its scope by reference to the area or character of the land in question. Parliament now has the opportunity to re-visit this topic again if it thinks fit. It is not for your Lordships' House to intervene in the legislative process.

BARONESS HALE OF RICHMOND

My Lords,

129. Town and village greens are not just picturesque reminders of a by-gone age. They are a very present amenity to the communities they serve. The village green in Scorton, in the North Riding of Yorkshire, is a perfect example. Most of it is contained within a three foot high old stone wall and raised to the level of the top of that wall, thus giving it a character all its own. It is surrounded by the old village houses, including the former vicarage, the two remaining pubs, the shop, the village institute, and the 18th century building which was until recently the old grammar school. It was and is the centre of the community. Both villagers and grammar school boys played cricket there in the summer; archery contests were held there; a bonfire was built for Guy Fawkes' Day; the fair and other events of Scorton feast were held there every August; and all the villagers could walk and play games upon it. It is just the sort of place that the Royal Commission had in mind when it proposed the definition of a town or village green quoted by my noble and learned friend, Lord Hoffmann, in paragraph 14 of his opinion.

130. But how much should our answers to the examination paper which we have been set by the parties be influenced by that image? That

has emerged as an important issue between us. So too has the propriety of the examination paper itself.

131. I confess that it did not occur to me during the hearing (to which I came rather later than your lordships); but having now had the benefit of reading in draft the opinion of my noble and learned friend Lord Scott of Foscote, I share his misgivings about the propriety of our being asked, still less of our answering, some of the questions on the examination paper. These are private law proceedings, not an application for judicial review in which a declaration is sought as to the legality of the actions of a public body. The declaratory jurisdiction has been expanded considerably in recent decades, as we from the Family Division are very well aware: see the judgment of Sir Thomas Bingham MR in *In re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1. Nevertheless, it remains a discretionary jurisdiction to make "binding declarations of right". As Lord Diplock famously said in *Gouriet v Union of Post Office Workers* [1978] AC 435, 501:

> "But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."

Since then, but not without some misgivings, the jurisdiction has been extended to enable the courts to declare whether or not a proposed course of action, such as the sterilisation of, or the withdrawal of artificial nutrition and hydration from, a person who lacks the capacity to decide it for himself will be lawful. In the leading case of *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 82, Lord Goff of Chieveley, after quoting from the speech of Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, 448, said this:

> "indeed there is authority in the English cases that a declaration will not be granted where the question under consideration is not a real question, nor where the person seeking the declaration has no real interest in it, nor where the declaration is sought without proper argument . . . In the present case, however, none of these objections exists. Here the declaration sought does indeed raise a real question; it is far from being hypothetical or academic.

> The plaintiff has a proper interest in the outcome, so that it can properly be said that she is seeking relief . . . The matter has been fully argued in court . . . I wish to add that no question arises in the present case regarding future rights: the declaration asked relates to the plaintiff's position as matters stand at present."

132. These proceedings were launched by the registration authority because of a difference of opinion between the inspector they had appointed to conduct an inquiry into Miss Robinson's application to register the Trap Grounds as a town green and their own legal adviser. Could Miss Robinson be allowed to amend her application, either to claim that the land had become a town green on a different date from that first stated or to reduce the area of land to be registered? Even if she could not amend her application, could the registration authority nevertheless adopt a different date or register a different area?

133. On one view, the better course would have been for the registration authority to take a decision, following whichever advice seemed best to them. Whichever party was aggrieved, Miss Robinson or the Oxford City Council, would be left to apply for judicial review. Leave would have been required and the issues would have been confined to those raised by the authority's decision. But the authority clearly did have an immediate interest in knowing what their powers were. There was nothing hypothetical or academic about the issues. There were opposing parties who also took different views on these matters, so that they could be properly argued. This could therefore be seen as a proper case for seeking an advisory opinion from the court, tied specifically to the issues relating to the powers of the registration authority in the circumstances which had arisen.

134. But this does not apply to issues (i) and (ii). Both are entirely hypothetical. They are pure questions of law, not related to any existing set of facts. Issue (i) is asking the court "whether the relevant inhabitants have rights to indulge in lawful sports and pastimes on land which has become a [new] green". It is not even asking the more precise question: if the Trap Grounds are registered as a town green, will Miss Robinson and other local inhabitants be entitled to continue to walk their dogs and/or conduct other lawful sports and pastimes and/or clear some land so that they can play football and other games (which would, I imagine, horrify Miss Robinson more than the city council) without let or hindrance from the city council? Issue (ii) is asking whether land which has become a new green falls within the scope of section 12 of the

Inclosure Act 1857 and section 29 of the Commons Act 1876. It is not even asking the more precise question: if the whole of the Trap Grounds (apart from the reed beds) are registered as a town green, will it be a criminal offence to construct an access route to the new school?

135. The county council as registration authority have no interest in the answers to those questions (although as education authority they would have an interest in a more precisely formulated version of the second). Miss Robinson and Oxford City Council do have an interest, in that their legal positions may in future be affected by the answers. The Government and the public at large have an interest, in the sense that they might have preferences, for any number of policy and other reasons, for the answers to be one way or another. But the court has a discretion whether or not to make a declaration. I question whether any of these are good enough reasons for a court to make general declarations as to the future legal position, in advance of any actual set of facts raising a precise question upon which the court may make a "binding declaration of right".

136. Unlike academic textbook writers and examiners, the courts do not decide legal questions in a vacuum. They know that, while hard cases may indeed make bad law, the particular facts of the case before them do cast a particularly bright light upon the legal issues and may throw up important questions which no rehearsal of the legal arguments in the abstract can ever do. Why, after all, do the best legal examination papers require candidates to answer problems based upon a precise, though imaginary set of facts? Because that is the way in which our case law has developed over the centuries. It is only legislators who make legal rulings in general and without reference to a specific set of facts. Yet this is exactly what our legislators have so far declined to do on questions (i) and (ii). They have an immediate opportunity, in the Commons Bill currently before Parliament, to fill in those two important gaps. Both raise important policy issues of a kind which courts should not have to resolve by reference to legal rather than policy arguments. Above all, if we give an answer to these questions, it will be taken as binding – not only on the parties before us now but on all future parties before any future court, including a criminal court, because the way in which we state the law will be binding upon the judges who decide those cases.

137. My lords, as an academic lawyer and examiner of students, I would see nothing wrong in essaying an answer to those questions, secure in the knowledge that if I turned out to have overlooked some

important consideration which emerged in a later case, a court could and would ignore my views. As a judge, I see every objection to answering those questions. The fact that all parties and all courts have so far proceeded on the basis that we both can and should answer them does not to my mind outweigh the formidable objections to our doing so. Their efforts will be more than rewarded by our answers to the other questions on the examination paper. I would therefore set aside "rulings" (i) and (ii) made by the Court of Appeal in paragraph 117 of the judgment of Carnwath LJ and declarations (i) and (ii) made by Lightman J and put nothing in their place.

138. The other declarations and "rulings" are different. For what it is worth, I would have agreed with Lightman J, supported by counsel for Miss Robinson and the Secretary of State for the Environment, Food and Rural Affairs, on the effect of events occurring after 31 July 1970 and before 31 January 2001. As I understand that your lordships take a different view, I shall state my reasons briefly.

139. After 31 July 1970, by virtue of section 1(2)(a) of the Commons Registration Act 1965, "no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered". At that date, the definition of a "town or village green" in section 22(1) of the 1965 Act contained three categories: (a) land "which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality"; (b) land "on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes"; and (c) land "on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years."

140. Clearly, once the axe had fallen in 1970, there could be no more class (b) greens. By definition, such customary rights must have existed since time whereof the memory of man knoweth not the contrary, and so the land must have been registrable then. Whether or not the Trap Grounds had previously been part of Port Meadow became totally irrelevant. But there could be new class (a) and (c) greens. Indeed, land which had previously been a class (b) green but had been left off the register might subsequently become a green once more by virtue of statute or, more probably, 20 years' continuing exercise of what had previously been the local inhabitants' customary rights (as has happened with the ancient town green in Richmond, North Yorkshire). Section 98 of the Countryside and Rights of Way Act 2000 altered the definition of a class (c) green in three ways: the use had to be by a "significant

number" of local inhabitants; but they could be inhabitants of any locality "or a neighbourhood within a locality"; and, relevantly for present purposes, they had to "continue" to use the land in that way. That amendment came into force after the expiry of two months from Royal Assent on 30 November 2000, but there were no transitional provisions governing the earlier position.

141. Section 13 of the Commons Registration Act 1965 requires that Regulations are made to provide for the amendment of registers where "(b) any land *becomes* common land or a town or village green" (my emphasis). It could have said "where (b) any land becomes registrable as a village green" but it does not. Elsewhere in section 13 itself there is a reference to "matters capable of being registered under this Act". When different expressions are used in the same statute, let alone in the same section, it is usually assumed that they have different meanings. This is reinforced by section 1, which first envisages in section 1(1) that land already "*is* common land or a town or village green" (my emphasis) and requires that it be registered, and then provides in section 1(2)(a) for the effect of failure to register any "land capable of being registered". Obviously, land could (before the axe fell) *be* a town or village green without being registered as such. I see no reason why land could not later *become* a village green without being registered as such. Section 10 provides that the register is conclusive evidence of the matters registered. It does not say anything about matters which are not registered. Section 1(2)(a) does that. But section 1(2)(a) cannot apply to land which became a green after the axe fell: otherwise there could be no new greens at all. (Some might have considered this a good thing, because then the register would be conclusive for all land and all time, which land lawyers and conveyancers like; but we must beware of translating the principles of other registration schemes relating to land into this one.) Parliament quite clearly envisaged the creation of new greens, however tiresome they may have turned out to be. There is no other provision in the Act catering for the effect of non-registration.

142. If that is right, then land might become a new green at any time after the axe fell. 20 years after the axe expired on 31 July 1990, so it is not surprising that 1 August 1990 was the date claimed in the application. Nothing in the 2000 Act provided that land which had already become a new green should cease to be such when the new definition came into force; nothing in the 2000 Act provided that land which had already become registrable as a new green should cease to be so registrable when the new definition came into force. Left to myself, therefore, I would have concluded that there is a short period of time,

from 1990 to 2001, when land might become a new green and remain registrable as such even though the required use was not still continuing.

143. Be that as it may, I entirely agree, for the reasons given by my noble and learned friend Lord Hoffmann, that the use need continue no longer than the date of the application for registration as a green. I would have liked to agree that it need continue no longer than when it is first put in issue, either by the landowner in some way challenging the inhabitants' right so to use the hand, or by the inhabitants taking some steps to assert their right. But the Act is all about registration. Its main provisions deal with the requirement to register, the process of registration, the effect of registration, and in the case of old greens and commons, the effect of non-registration. In that context, it is difficult to read the words "and continuing" as continuing until some date entirely divorced from the registration process. This is reinforced by the express power (in section 22(1A)(b)) to make provision for land where the use has ceased some time previously. If, as I understand counsel's argument, the Secretary of State would prefer an earlier date than the date of application, he has only to provide accordingly.

144. I also entirely agree that the registration authority may allow amendments or deal with an application in accordance with the evidence before them, provided always that they have given every person who might wish to object (or who otherwise has a legitimate interest in the process) a fair opportunity to consider what is proposed and make representations about it.

145. The final issue was not on the examination paper at all, but it is relevant to the guidance requested on the actual facts of this case – in particular to whether scrubland, 75% of which is inaccessible to the local inhabitants who might wish to use it for lawful sports and pastimes, can possibly qualify as a town or village green. Indeed, it seems that it is that very inaccessibility, and the habitat it provides for wildlife, which makes Miss Robinson so anxious to preserve the Trap Grounds in their present state. Is there some essence of the very expression "town or village green" which would preclude or at least militate strongly against the registration of such land as a green? My lords, we have not been asked this question and any view which we express upon it would, I believe, be obiter dictum. I myself have considerable sympathy for the views expressed by my noble and learned friend, Lord Scott of Foscote. The very powerful points made by my noble and learned friend Lord Hoffmann in paragraph 39 of his opinion depend to a large extent on events since the 1965 Act was passed rather

than on the meaning of the phrase at the time when it was enacted. I believe that it would be much better for us to leave this issue to be properly fought out on another day, whether in answer to whatever decision Oxfordshire County Council make in relation to the Trap Grounds or elsewhere.

146. There are major policy considerations underlying many of the issues raised by this and similar cases: between preserving local amenities of whatever kind for the benefit of the local people and permitting the appropriate development of land, in particular to meet the needs of local people for somewhere to live. Consideration needs to be given to how and in what circumstances land can cease to be a town or village green (as also envisaged in section 13 of the 1965 Act) as well as to how and in what circumstances it can become one. Parliament may not choose to deal with these on this occasion but sooner or later it may have to do so.

147. In the meantime, I would make no ruling or declaration on issues (i) and (ii), make the declaration proposed by my noble and learned friend Lord Hoffmann on issue (iii), restore the declarations made by Lightman J on issues (iv) and (v), and agree with the rulings of the Court of Appeal on issues (vi), (vii) and (viii). I too would not answer questions (ix) and (x) even to the extent indicated by my noble and learned friend, Lord Hoffmann.