WHAT IS A VILLAGE GREEN?

1. At first blush, the notion that applications should be made in 2011 to have land recognised as a town or village green sounds hopelessly quaint. Maypole dancing, apple-dunking and croquet matches might feature on occasional bank holidays in the Cotswolds, but surely, it might be thought, these traditional past-times are no longer practised sufficiently to be of consequence in law. In a section of her judgment that was almost autobiographical, Baroness Hale appeared to anticipate such thinking in ***Oxfordshire County Council v. Oxford City Council and another*** [2006] UKHL 25:

   > "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..."

2. This was to depict the village green as a quintessential feature of village life in England and Wales and a stage for a much broader range of recreational activity than the words "village green" might suggest. This conception of the green as an area for general public recreation, including but not limited to traditional pursuits, is reflected in the current legal test. Whilst history tells us that the 'green' was born out of a functional need for open public space, whether for reasons of leisure or otherwise, the emphasis today is on the green as an area for play and recreation. Section 15(2) of the Commons Act 2006 (**"the 2006 Act"**) requires a registration authority to register land as a green where:

"(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and

(b) they continue to do so at the time of the application."

3. It is for the applicant to demonstrate that these criteria are satisfied on the balance of probabilities. If this is done, it is no small matter for the landowner affected as section 29 of the Commons Act 1876 and section 12 of the Inclosure Act 1857 provide that building on village greens in a nuisance.

4. This paper broadly examines how the courts have interpreted the statutory criteria in section 15(2). The criterion which tends to pose difficulty most often – that there has been user "as of right" – will be examined later in more detail by my colleague, Stephen Morgan. The purpose of this session is to set out the general legal framework.

"Significant number of the inhabitants"

5. The 2006 Act does not seek to define what constitutes a "significant number of the inhabitants of any locality... or of any neighbourhood", but in ***R (Alfred McAlpine Homes Ltd) v Staffordshire County Council*** [2002] EWHC 76 (Admin), Sullivan J held (emphasis added):

"71. Dealing firstly with the question of a significant number, **I do not accept the proposition that significant in the context of section 22(1) as amended means a considerable or a substantial number**. A neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to be properly described as a considerable or a substantial number. **In my judgment the inspector approached the matter correctly in saying that "significant", although imprecise, is an ordinary word in the English language and little help is to be gained from trying to define it in other language.** In addition, the inspector correctly concluded that, whether the evidence showed that a significant number of the inhabitants of any locality or of any neighbourhood within a locality had used the meadow for informal recreation was very much a matter of impression. It is necessary to ask the question: significant for what purpose? In my judgment the correct answer is provided by Mr Mynors on behalf of the council, when he submits that what matters is that the number of

people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers."

6. Accordingly, what constitutes a "significant" number of inhabitants has to be assessed in the context of the locality or neighbourhood which is cited in the application. What is "significant" cannot be defined with precision as the judgment turns on the circumstances of the particular case.

7. In practice, it is common for an application to be supported by pro forma questionnaires in which each local inhabitant supporting the application has recorded their recollection of which sports and pastimes have been carried out on the land, by whom and when. These often contain no more than ticks in boxes. However, it should not be assumed that the number of submitted questionnaires corresponds to the number of inhabitants who have used the land as claimed. Most entries record the sports and pastimes pursued on the land by members of a household generally, including children, and many will also contain observations as to the use of the land by others.

"Any locality"/"any neighbourhood within a locality"

8. An application may be made by the inhabitants of a "locality" or of "any neighbourhood within a locality". A "locality" must be some legally recognised administrative unit and not an arbitrary line on a map: ***R (Laing Homes) v Buckinghamshire CC*** [2003] PLR 60. It was held that the residents of three streets did not constitute a locality: ***Ministry of Defence v Wiltshire County Council*** [1995] 4 All ER 931.

9. The alternative test of "any neighbourhood within a locality" is designed to circumvent the rigidity of requiring a recognised administrative unit to be identified. Nevertheless, a "neighbourhood" must still have a sufficient degree of cohesiveness: ***R (Cheltenham Builders Ltd) v South Gloucestershire District Council*** [2003] EWHC 2803 (Admin). This was accepted by the House of Lords in ***Oxfordshire County Council v. Oxford City Council and another*** [2006] UKHL 25, with the caveat that their Lordships did not agree with the High Court that a

neighbourhood must be within a single locality: para. 27. This opens the door to an application in a respect of a neighbourhood that crosses the boundaries of two or more administrative units, if it is otherwise sufficiently cohesive.

10. Should the decision-maker disagree with the applicant as to what should be identified as the "locality" or "neighbourhood", it is strongly arguable that it is within its discretion to substitute its own judgment on this question, provided that this is on the basis of the evidence presented in support of the application and the parties have been given an opportunity to comment on the proposed substitution. For example, the decision-maker might conclude that the inhabited area relied upon in support of the application would be better described as a 'neighbourhood' rather than a 'locality'. Such substitution seems consistent with the established practice of registering as a village green a smaller area of land than that applied for, on the basis that only this is warranted by the evidence.

11. However, the question for the decision-making is not ultimately whether the locality or neighbourhood may be 'better' defined, but whether the definition relied upon by the applicant is sufficiently coherent that the application should not fail on this limb alone.

"As of right"

12. As I have already indicated, this particular element of the test will be covered in more detail by my colleague, Stephen Morgan. For the purposes of this overview, it is sufficient to note that user "as of right" is user that has been carried out *nec vi* (without force)*, nec clam* (without secrecy) and *nec precario* (with permission).

13. The House of Lords considered the meaning of the words "as of right" in ***R v. Oxfordshire County Council, ex parte Sunningwell Parish Council*** [2000] 1 A.C. 335. In that case, the church authorities were owners of land on which they had obtained planning permission to build some houses. The parish council argued that inhabitants of the locality had indulged in sports and pastimes on the land as of right for not less than 20 years. The House of Lords considered whether user was precluded from being "as of right" if the users knew that no such right

existed. Lord Hoffmann, giving the leading judgment (with which all their Lordships agreed), held that the subjective belief of the user was irrelevant in matters of prescription:

> "To require an inquiry into the subjective state of mind of the users of the road would be contrary to the whole English theory of prescription, which, as I hope I have demonstrated, **depends upon evidence of acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose, the actual state of mind of the road user is plainly irrelevant.** […]
>
> […] In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use a footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years' user, it is almost inevitable that user in the earlier years will have been without any very confident belief in the existence of a legal right. But that does not mean that it must be ignored."

14. It follows that the guiding principle when asking whether there has been user "as of right" is whether the landowner has acquiesced – in other words, tolerated without protest – the use of his land by local people for recreation. The posting of signs prohibiting access onto the land is the clearest signal of an absence of acquiescence on the part of the landowner, and is usually sufficient to defeat an application.

15. However, any communication or action on the part of the landowner needs to be sufficiently clear and specific. For example, it is unlikely to be sufficient for the landowner simply to refer to a planning permission that he might have obtained for the application land during the relevant 20-year period as evidence that he is not acquiescing in its use for recreation. It is sometimes argued by objectors that because notification of a particular planning application to develop the land was sent to local people during the relevant period, that this was sufficient to advise them that the land was not abandoned but was merely awaiting development. However, as Lord Hoffmann held in the ***Sunningwell*** case, the question is not whether the user was pursued by local people *believing* that the land had been abandoned or that it was otherwise theirs rightfully to enjoy. The correct question in law is whether there is sufficient evidence that the

landowner has acquiesced in the use of his land by local people for recreation so as to give rise to a prescriptive right. It would seem entirely possible for a landowner to have all sorts of ambitions and plans to develop his land, and might have even have secured planning permission to do so, while at the same acquiescing in its use by others in the meantime for recreational purposes. These two states of mind are not mutually exclusive of the other. The existence of a planning permission might indicate that an owner has ambitions for his land, but it is not determinative of his attitude as to how his land is used until that permission is implemented. As is well known, there is no obligation to implement any planning permission granted: unimplemented permissions abound in our planning system.

"Lawful sports and pastimes"

16. This expression was also considered by the House of Lords in the ***Sunningwell*** case. Lord Hoffmann explained that "sports and pastimes" are a single composite class. Provided an activity can properly be called a sport *or* pastime, it falls within the composite class. It is difficult to conceive of any lawful recreational activity that would not fall within this very broad class. For example, it was expressly held in ***Sunningwell*** that dog-walking and playing with children are forms of modern recreation that would satisfy the description [at 357A-D]. Other activities that are commonly relied upon include kite-flying, fruit-picking and football.

17. It is important to distinguish the use of footpaths from user for sports or pastimes. In ***Oxfordshire County Council v. Oxford City Council*** [2004] EWHC 12, Lightman J stated that where the public have walked over defined tracks, this will usually only go as far as to establish public rights of way, unless the user has been wider in scope or the tracks are of such character that user of them could not have given rise to a presumption of dedication at common law as a public highway.

18. Not every part of the application land must have been used for particular sport or pastime for that particular activity to be relevant. The question is whether the land as a whole has been used for recreation for the relevant period, taking all qualifying activities into account.

"At least 20 years"

19. Under section 15(2) of the 2006 Act, the user of the land as of right must have been carried out for at least 20 years up to the date of the application. It is not necessary to show that the land has been permanently in use for recreational purposes, or that there was physical evidence of such use on the land after users had left (for example, the presence of play equipment). No such permanent level of activity needs to be shown. The test is whether the user has been sufficient to indicate the assertion of user as of right. User which is "so trivial and sporadic as not to carry the outward appearance of user as of right" is not sufficient: ***Sunningwell*** at 375D-E. This echoes the observation made by Buckley J in ***White v Taylor (No. 2)*** (1969) 1 Ch 160 at 192:

    > "... But the user must be shown to have been of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and of a right of the measure of the right claimed."

20. The requirement that user must continue up to the date of application [s. 15(2)(b)] is qualified in two scenarios:
    (1) By virtue of section 15(3) of the 2006 Act, where the user has ceased before the application is made, but after section 15 has come into force (in England, 6 April 2007; in Wales, 6 September 2007), then provided the period between the cessation of the user and the making of the application is not more than 2 years, the user is deemed to have continued until the date of the application.
    (2) By virtue of section 15(4), where the user ceased before section 15 came into force, an application must be made within 5 years. The right to apply within this 5-year period does not arise where, before 23 June 2006, construction works have been carried out with planning permission and the land has become permanently unusable: section 15(5).

21. The practical significance of sections 15(3) and 15(4) is that any sign erected by a landowner to bring user as of right to an end at the times identified would have no effect. For example, by virtue of section 15(3), a prohibitory sign which was erected in June 2008, after section 15 came

into force, would not cause an application made in May 2009 to fail because the period between the cessation of the user as of right and the making of the application is not more than 2 years.

22. Similarly, by virtue of section 15(4), a prohibitory sign erected in April 2006 would have no effect in respect of an application made in May 2009 because the sign would have been erected before section 15 came into force, and less than five years before the date of the application.

Conclusion

23. This overview of the relevant legal framework suggests that the application of all but one of the statutory criteria in section 15(2) of the 2006 Act does not pose substantial difficulty. In ***Oxfordshire County Council v. Oxford City Council***, Lord Hoffmann described the "neighbourhood within a locality" criterion as drafted with deliberate imprecision, but the same could equally be said of the need to make an application in respect of a "significant number of inhabitants" and "lawful sports and pastimes". These are not high hurdles for applicants. Indeed, case law and practice confirm that the vast majority of cases will turn on the more difficult criterion of user "as of right", the ambiguity of which the courts have sought to overcome by falling back on the principle of acquiescence that underlies the law of prescription. However, as we shall learn in the course of today's seminar, how this principle should play out in individual cases is still the subject of considerable debate.

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(With many thanks to Gwion Lewis, Landmark Chambers)

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