Landmark CHAMBERS

Footpaths, commons and village greens: recent cases and practical points

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R (Roxlena Ltd) v Cumbria CC [2017] EWHC 2651 (Admin)

- 30 November 2017 High Court Judgment
- Making of order to add 34 footpaths and a bridleway
- Reliance in application 2 on user evidence forms from application 1
- Foot and mouth disease outbreaks

Meaning of "discovery" in s.53(3)(c) WCA 1981

Reliance in application 2 on user evidence forms from application 1

- Discussed at [82]-[96]
- CCC did not "discover" the content of the UEFs when application 2 was made
- Nevertheless, applicant 2 was entitled to rely upon applicant 1's evidence as was CCC

Foot and mouth disease outbreaks

- Highways Act 1980 s.31(1)
- "…without interruption…"
- Government advice in November 2012 Advice Note, paragraph 9:

  "…it does not seem that the temporary cessation of use of ways solely because of the implementation of measures under the Foot and Mouth Disease Order 1983 could be classified as an 'interruption' under section 31(1)…"

Advice Note advice Rejected in *Roxlena* at [73]

- "Use or non-use is a question of fact; the cause of any non-use is not the issue."

Open Spaces Society deeply troubled

- Sought amendment of Advice Note;
- PINS has declined to amend (8 December 2017 letter);
- Landowner likely to object to made order on basis of Judge's *obiter* remarks (making of order upheld on other grounds)

"Discovery" long after the event

- Rudston, Boynton and Grindale
- Order adding BOAT in East Riding of Yorkshire
- Confirmed by Order Decision of 23 January 2018
  (most recent on PINS website: Order Ref 3172864)

Application relying upon Inclosure Award of 1844

- "…there shall at all times for ever hereafter be one other common and public carriage road or King's Highway…"
- Evidence "discovered" in the sense of the Council considering evidence previously unknown to them

Weller v Ealing LBC
"Warren Farm"

- Appeal Decisions of 19 September 2017
  (FPS/A5270/14A/1 & 2)

- Metropolitan Open Land: proposed site of new QPRFC training ground

Locked gates and holes in fences

- "…no reasonable person would conclude that by placing a locked gate across a route the landowner was displaying an intention to dedicate it as a public right of way, unless there was also a sign or some other indication that they were invited to climb the gate…"

- "…even if the hole in the fence at Point B was not repaired after 1993, it would have still been clear to users that the hole had been forcibly made and that the landowner had not intended to provide public access at that point unless there had been some sign or other indication of an intention to dedicate a public right of way…"

St John's College, Cambridge [2017] PTSR 1353

- High Court Judgment, 12 July 2017
- "The case raises, apparently for the first time, the question whether the correction of defective applications to ensure that they are duly made under the 2006 Act is limited to one occasion only."

One correction or two?

- Application under s.15 Commons Act 2006 to register land in Cambridge as a town or village green;
- Unfortunate series of procedural wrinkles;
- 17 witness statements submitted with application

Duly made v merits

- CCC said only 7 user forms demonstrated 20 years or more user – said insufficient – application returned – re-submission of application, with more evidence, invited
- CCC wrong to return the application: duly made v merits
- Government guidance “misleading”

…and so it went on

- Application re-submitted – more evidence provided – issues as to date stamping – issue as to validity of application – protracted correspondence – College objecting to CCC jurisdiction – CCC accepting jurisdiction – judicial review claim

The upshot

- Court finding that CCC entitled to offer applicant opportunity to correct application for second time
- Paragraphs 51-54 of October 2013 DEFRA Guidance amended: see Annex to Judgment

TW Logistics Ltd v Essex CC [2017] Ch 310

- High Court, 8 February 2017
- Quayside of port of Mistley in Essex

De-registration application

- Land registered as TVG;
- Application to rectify TVG register by de-registration of all or part of the registered land – s.14 Commons Registration Act 1965

"lawful sport or pastime"

- Inspector's findings:
  - "crabbing"
  - "swan feeding"
  - "parking on the land and then sitting in a car to enjoy the view or eat a sandwich"

A miscellany of points

- [31]: scope of de-registration hearings – *de novo;*
- [116]-[117]: permissive swan feeding – no effect on other lawful sports and pastimes;
- [160] and [199]: sensible co-existence;
- [218]: general walking and wandering, with or without dogs

Littlejohns v Devon CC [2016] QB 1092

- Court of Appeal
- Land registered as common land under Commons Registration Act 1965
- Effect of s.1(2)(b)
- Interplay with Commons Act 2006

An unfortunate oversight…

- Registration of common land in 1967 and 1968 – 1968 notice of intention to register rights of common – no subsequent formal application – therefore rights never registered – continued grazing until outbreak of foot and mouth disease in 2001 – herds slaughtered

The 2010 application…

- Reliance upon Commons Act 2006 – 2010 application to amend register of common land by registration of right to graze cattle and sheep – reliance upon long period of grazing – entitlement to payments under Stewardship/Wildlife Enhancement scheme if application successful – payments to graziers to forego or reduce grazing

The upshot

- After 31 July 1970:

- No unregistered rights of common could be exercised over land registered as a common; no effective, exercisable, right of common could be granted over such land; no right of common over land registered as common land could be acquired by prescription after that date

Singh v Cardiff CC [2017] EWHC 1499 (QB)

- High Court, 23 June 2017
- Pub, pub, rugby club - man walks along footpath in early hours – man ceases to be on footpath – ends up in brook overnight – serious and life-changing injuries

The claims

- Breach of s.41 HA 1980 duty to maintain footpath;
- Breach of s.2 of Occupiers' Liability Act 1957;
- Common law negligence

The facts

- Footpath constructed about 1987 – leads to footbridge – footpath c.2m wide – concrete edging units – one concrete edging unit missing – cracked and uneven edging units – depression where footpath shifted – drop down to ground adjacent to footpath – wing wall – vertical drop from wing wall to river bed – no railings – lamppost not working

The mechanics of the incident

- Claimant voluntarily left footpath – stood on ground adjacent to footpath – lost his balance – fell backwards and slid down slope on his back, feet first

The upshot

- s.41: alleged defects did not cause the injury – no trip or slip – broken and uneven edging units not in state of disrepair giving rise to breach – very low risk of tripping – footpath wide enough and edging units not designed to be walked on – depression in footpath not in breach of s.41 – not a pothole or tripping hazard – s.58 defence not made out, if engaged

- s.2 OLA: duty to take such care as is reasonable in all the circumstances to see that a visitor will be reasonably safe in using the land for the purposes for which he is invited or permitted to be there

- Persons invited or permitted to be on the adjacent land for purposes reasonably incidental to the use of the footpath;

- Footpath sufficiently wide – relatively few occasions when people had to leave footpath – obvious brook and steep drop into it – system of reporting faults with lights – periodic checks of the lights

- Negligence: guard rails on footbridge, but not besides the footpath – no breach of duty of care by not erecting guard rails or fencing

- All the claims failed
- No damages awarded
- 70% contributory negligence even if CCC liable