

**Rights of access to publicly held land:
Statutory incompatibility in light of
*Newhaven, Ramblers and Lancashire***

**Tim Buley
Landmark Chambers**

Introduction



- Considerable amounts of land held by public bodies, including local authorities and others, in the United Kingdom which are unused
- Such land is often used informally by the public for public recreation whether that be ramblers or sports and pastimes
- Issues as to the extent to which such land is subject to the acquisition of public rights of access is therefore of considerable importance
- Long standing principle that public cannot acquire such rights where that would be “incompatible” with statutory purposes for which such land is held

Introduction (continued)



- Until *R (Newhaven Port) v East Sussex CC* [2015] AC 1547, and despite much case law in both the rights of way and village green fields, principle did not feature in case law and may have appeared to be in abeyance.
- Perhaps a misperception of *BTC v Westmorland CC* [1958] AC 126
- Now back with a vengeance in some recent cases:
 - *Newhaven* itself, in 2015
 - *Lancashire CC v SSEFRA* [2016] EWHC 1198 (Admin)
 - *R (NHS Property Services Ltd) v Surrey CC* [2016] 4 WLR 130
 - *Ramblers's Assoc v SSEFRA* [2017] EWHC 716 (Admin)

BTC v Westmorland, 1957



- House of Lords held, contrary to then orthodoxy, that there was no objection to the public acquiring a right of way over a railway *bridge* that was owned and operated by BTC
- Do not deny the principle that public rights will be prevented where incompatible with statutory basis on which land is held
- Matter of judgment for courts (now inspectors) to decide compatibility on facts of case
- Clear that principle of statutory incompatibility is preserved. Perhaps (wrongly) perceived as undermining its efficacy
- NB appears to have been decided on basis of common law rather than deemed dedication under s 1 HA 1932

Newhaven Port and Properties, 2015



- Could a “beach” within the boundaries of Newhaven Port be registered as a village green following 20 years use by local residents for lawful sports and pastimes?
- No doubt that residents had indeed used the beach for these purposes for the requisite period
- Registration governed by section 15 of the Commons Act 2006. Section 15 makes no reference to statutory incompatibility principle. Claimants argued that left no room for it to operate – section 15 requires registration where statutory criteria are met, no room for pre-existing common law principle
- Supreme Court disagreed

Newhaven Port and Properties, 2015 (2)



- Statutory context important. The Port created and regulated by Private Acts of Parliament specific to the Port itself
- Operator therefore given various powers and duties specific to this land, including a duty to ensure that the port was maintained and kept open to the public for navigation, a power to dredge the channel (including the beach), and so on
- On the face of it, and as the Supreme Court accepted, registration of a village green would directly interfere with these powers and duties. The “beach” could not be used for the Port purposes, or kept open to navigation, or dredged, because that would interfere with the public’s use of the land for sports and pastimes.

Newhaven Port and Properties, 2015 (3)



- Key passage:

93 *The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: “does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker ... and which is held for statutory purposes that are inconsistent with its registration as a town or village green?” In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one ...*

“Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed.”

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Lancashire, 2016 (CA 2017 judgment awaited)



- Land held by local authority, purportedly (subject to other ground of appeal in case) appropriated for educational purposes. Council argued that registration of a village green would be incompatible with use for those purposes given future intention to build a school
- Marked contrast with *Newhaven*, statutory purposes entirely general and not connected to this specific land

Lancashire, 2016 (2)



- Ouseley J held that no incompatibility arose. In particular:

79. ...[Third Question] *If the question is: can LCC carry out its educational functions if the public has the right to use Areas A-D for recreational purposes, the answer is yes. ...*

80. It is the third question which matters, in my judgment and, answered in the positive here, there is no statutory incompatibility. There is a spectrum of statutory bodies and statutory duties in relation to land which could be impeded by public rights of access for recreation. ... What is envisaged for a specific Act to be in conflict with the general Commons Act, and to override it by necessary implication, is that the statutory ownership of the land should bring specific statutory duties or functions in relation to that specific land which are prevented or hindered by its use for public recreation after registration. It is not enough that the duty could be performed on the land in question but could also be performed on other land, even if less conveniently. ...

NHS Property Services [2016]



- Only shortly afterwards, Gilbart J purported to follow *Lancashire* whilst in fact appearing to take a radically different approach. As in *Lancashire*, land held by NHS for entirely general purposes (providing healthcare services, not linked to land in particular).
- Held: incompatible
- Per Gilbart J:
128. ... What matters is whether, as a matter of statutory construction, the relevant statutory purpose is incompatible with registration.
...
130. There is nothing [in Lancashire] which suggests that the only relevant statutory powers are those specific to the piece of land in question.

Lancashire and NHS Properties: Court of Appeal



- Both cases heard together in very early October 2017
- Judgment still awaited (5 ½ months on)
- Largely common ground that *Lancashire* and *NHS Properties* cannot be reconciled, Court required to resolve difference of approach between them
- Watch this space!

Ramblers Association (2017)



- Facts relate to a level crossing
- Network Rail had argued that no capacity to dedicate route over railway; licence did not permit creation of new rights; trespass was a criminal offence
- Inspector refused to confirm the order on three grounds, two of which are of interest here:
 - Inspector incorrect that confirmation would conflict with NR's statutory duties
 - Inspector erred in relation to s.55 of the British Transport Commission Act 1949

Ramblers Association: Conflict with Statutory Duties



- Note different statutory context of section 31 Highways Act 1980.
- Unlike Commons Act 2006, section 31 is based on a (fictional) grant / dedication of a right of way by the landowner.
- Section 31(8) expressly preserves the *common law rule* that deemed dedication of a right of way cannot override any statutory incompatibility with the purposes for which a public body holds land.
- Not spelt out in judgment (and *Newhaven* not looked at), but question quite different.
 - Not whether some pre-existing duty trumps section 31 HA 1980
 - Rather, whether statutory duty would have made it unlawful for public body to dedicate a right of way

Ramblers Association: Conflict with Statutory Duties (2)



- Dove J upheld inspector.
- Relevant statutory purposes of Network Rail to run an efficient and safe railway network
- Question of fact whether “*there is any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker’s statutory duties*”.
- Big issue of judgment / fact here, quite unlike in either *Newhaven* or *Lancashire*. Arises from need to ensure that (notional) dedication was not *ultra vires*

Ramblers Association: Conflict with Statutory Duties (3)



- Main controversy is when that issue is to be determined.
- Dove J held that majority of House of Lords in *Westmorland* were of the view that question of statutory incompatibility fell to be determined as at the date that it was considered by the tribunal of fact, even if that was many years after the start or even end of the 20 year period.
- Undoubtedly a practical answer, and supported by *Westmorland* speeches.
- Perhaps harder to reconcile with principle, since may have been dedication may have been seen as perfectly compatible at time right of way otherwise created by section 31

Ramblers Association: s.55 of the British Transport Commission Act 1949



- The doctrine of illegality was a free-standing principle upon which the order could be defeated
- Notices saying “Passengers must not pass this point or cross the line” were sufficient to be a notice under s.55
- It was not necessary for the notices to mention trespass
- In balancing s.55 with s.31, the principles of s.31(1) had to give way to public safety (considering the decision *R (Best) v Chief Land Registrar* [2016] QB 23)

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