



11 December 2019

PRESS SUMMARY

R (on the application of Lancashire County Council) (Appellant) v Secretary of State for the Environment, Food and Rural Affairs and another (Respondents)

R (on the application of NHS Property Services Ltd) (Appellant) v Surrey County Council and another (Respondents) [2019] UKSC 58

On appeal from [2018] EWCA Civ 721

JUSTICES: Lord Wilson, Lord Carnwath, Lady Black, Lady Arden, Lord Sales

BACKGROUND TO THE APPEAL

The issue in the two appeals relates to the circumstances in which statutory incompatibility will defeat an application by a member of the public to register land as a town or village green (“a green”) under the Commons Act 2006 (“the Act”) where the land is held by a public authority for statutory purposes.

At issue in the first appeal is land, divided into five areas, adjacent to Moorside Primary School in Lancaster and owned by Lancashire County Council (“LCC”). A local resident applied to register the land as a green based on 20 years’ qualifying use. LCC objected on the basis that the land was acquired and remains appropriated for education purposes under LCC’s statutory powers as education authority. An inspector appointed by the Secretary of State determined that four of the five areas should be registered. She was not satisfied that the land was in fact acquired and held for education purposes and, even if it had been, there was no good statutory incompatibility defence available to LCC. The inspector’s determination was upheld by Ouseley J in the High Court on LCC’s application for judicial review.

The second appeal concerns a site at Leach Grove Wood in Leatherhead owned by NHS Property Services Ltd (“the NHS”). An application was made to register the site as a green, relying on use over a period of 20 years. An inspector recommended refusal of registration, but the registration authority, Surrey County Council (“SCC”), did not accept this and registered the land. On the NHS’s application for judicial review in the High Court, Gilbert J distinguished the judgment of Ouseley J and quashed the registration on the basis that SCC had failed properly to consider statutory incompatibility.

The appeals were heard together by the Court of Appeal, which upheld the decision to register in both cases. LCC and the NHS appealed to the Supreme Court.

JUDGMENT

By a majority, the Supreme Court allows the appeals in both cases. Lord Carnwath and Lord Sales give the majority judgment, with which Lady Black agrees. Lady Arden gives a partly dissenting judgment and Lord Wilson gives a dissenting judgment.

REASONS FOR THE JUDGMENT

The inspector’s finding in the Lancaster case that the land was not acquired and held pursuant to statutory education purposes was inconsistent with the evidence and irrational [33]-[34]. Therefore the central issue in both the cases under appeal is the interpretation and application of the statutory

incompatibility ground of decision identified in the majority judgment in the Supreme Court in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] UKSC 7 (“*Newhaven*”) [43].

The majority’s opinion is that *Newhaven* authoritatively interpreted the Act to mean that where land is acquired and held for defined statutory purposes by a public authority, the Act does not enable the public to acquire rights over that land by registering it as a green where such registration would be incompatible with those statutory purposes [48]. Here there is an incompatibility between the statutory purposes for which the land is held and use of that land as a green and therefore the Act is not applicable [55].

The test set out in *Newhaven* is not whether the land has been allocated by statute for particular purposes, but rather whether it has been acquired by the public authority pursuant to its statutory powers and is held for the purposes of those powers, where those purposes are incompatible with registration of the land as a green [56]. The reference to acquisition by both voluntary sale and compulsory purchase is significant, since acquisition by voluntary sale will typically involve the exercise of general statutory powers rather than specific statutory provisions framed by reference to the land itself [57]. This construction of the Act is unsurprising; there is no indication that the general provisions in the Act regarding registration as a green were intended to have the effect of preventing use of land held by a public authority for specific public purposes defined in statute [61]. This general point can be made with particular force in relation to land held pursuant to the exercise of statutory compulsory purchase powers, since such powers are created for use in circumstances where there is an especially strong public interest that land should be used for particular purposes, such as is capable of justifying compelling a land-owner to sell their land against their wishes [63].

Applying the Act as interpreted in *Newhaven*, LCC and the NHS can show that there is statutory incompatibility in each case. In the Lancaster case, the rights claimed pursuant to the registration of the land as a green are incompatible with the use of the relevant areas for education purposes, including for example use of them as playing fields or for constructing new school buildings. LCC does not need to show they are currently being used for such purposes, only that they are held for such statutory purposes [65]. Similar points apply in the Surrey case: the issue of incompatibility has to be decided by reference to the statutory purposes for which the land is held, not by reference to how the land happens to be used at a particular point in time [66].

Lady Arden disagrees with the reasoning of the majority. She would have allowed the appeals save that she would have dismissed the appeal in relation to two of the areas of the Lancashire site and remitted the matter to the registration authority in the Surrey appeal [122]. In her view, the fact that a public authority holds land for statutory purposes that are incompatible with the use of the land as a green is not of itself sufficient to make the land incapable of being registered. It must be shown that the land is in fact being, or that it is reasonably foreseeable that it will be, used pursuant to those powers in a manner inconsistent with the public’s rights on registration as a green [77].

Lord Wilson dissents from the majority and would have dismissed both appeals [123]. The Act’s reach is substantially reduced if land held by public authorities for specified statutory purposes is to be immune from registration as a green that could theoretically be incompatible with those purposes [126]. *Newhaven* was concerned with statutes that conferred specific duties in relation to particular land. Those specific duties were incompatible with the general provision in the Act which therefore had to give way [131]. In contrast, the present cases involve statutory provisions that confer general powers to acquire and hold unspecified land for education and health purposes and these cannot be said to be incompatible with the provision in the Act [132].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>