

6. Findings of Fact

I now proceed to make my findings of fact on the matters that were in dispute between the parties. It is convenient to make those findings by reference to distinct periods of time.

6.1. Before 1975

I find that before 1975 the application land was in use as agricultural land. It was used by the tenant farmers, the Sheppards, for dairy farming. The land was enclosed by stock proof fencing, albeit not in a very good state of repair. Some local people used the field as a short cut, and there was occasional trespass by local children. Entry to the field usually involved climbing fences or gates or pushing through hedges. The use of the field was no more than the trespass which is typically to be found on any grassy field adjoining a built up area. I am quite satisfied that there was no significant use of the application land for formal or informal recreation before 1975.

Indeed, the applicant (rightly in my view) did not rely on recreational use of the application land before 1975.

6.2. 1975-1989

I find that between 1975 and 1989, there were three distinct types of use of the School Field.

The first and main use was as a playing field for the local schools. The land was marked out with a football pitch in the winter and an athletics track in the summer. Games were played on the School Field by schoolchildren under the supervision and control of their schools.

The second use was for the holding of organised events such as the Cavalcade of Transport and local fetes. These events were held with the express permission of the headmaster and on payment of a fee.

The third use was for informal recreation by local people. After the departure of the Sheppards, the boundary hedges were no longer maintained and it was soon possible for local people to enter the School Field without using force and without climbing gates or fences. In particular, I find that there was an informal stile which later became an ungated opening at the north-west corner of the field. The field was not policed and I find that between 1975 and 1989 there was increasing use of the School Field by local people for informal recreation such as walking and children's play. I find that such users predominantly came from Netheravon although there was also some use by inhabitants of Fittleton and Haxton. I have found the issue of signs on the boundaries a hard one to resolve. Some witnesses gave positive evidence of a sign or signs. Other witnesses whom one would expect to have seen signs, gave evidence that they saw no signs. I think that the probability is that Wiltshire County Council did erect one or two signs around the field at some point between 1975 and

1989 but that they did not last very long. In my view, the signs probably said that the School Field was owned by Wiltshire County Council. I am not convinced that they said "Trespassers will be Prosecuted" or any other similar discouraging wording. The evidence of the witnesses was, to my mind, weak on the wording of the signs. I also bear in mind the county council's letter of 29th April 1988⁴¹ in which the county council wrote that it had allowed people to use the School Field until the new school was settled. This letter is inconsistent with the existence of discouraging notices. However, when the county council used the word "allowed" I do not think that it meant that informal recreational use by local people was permissive: rather it meant that it was tolerated. There is no evidence of any overt acts by the county council amounting to the grant of permission, express or implied, to local people to enjoy informal recreational use of the School Field⁴².

6.3. 1989-97

I find that there was a significant change in the use of the School Field for informal recreation after 1989. In 1989, the new school was built and a policy decision was taken by the school to control use of the School Field. The gaps in the boundaries were closed off with new fencing which was repaired as necessary. For a few years, efforts were made to keep the main entrance off the High Street locked when the school and village hall were not occupied.

The School Field continued to be used primarily as a school playing field and secondarily as a venue for organised local functions with the express consent of the headmaster and on payment of a fee. However, I find that acquiescence in informal use of the School Field for recreation by local people came to an end. The headmaster implemented and enforced a policy of allowing local children to play on the School Field only with permission and only while the school was occupied. Of course, that policy could not be policed 24 hours

⁴¹ Blue Bundle p 37

Field only with permission and only while the school was occupied. Of course, that policy could not be policed 24 hours a day 7 days a week, and local people could and no doubt occasionally did climb or break down the fences and gates and enter the School Field. After the policy of locking the High Street Gates was abandoned a few years after 1989, it was possible easily to enter the School Field from The High Street. There was a continuing problem of vandalism out of school hours, but vandalism is not a recreation. However, I am satisfied that after 1989, informal recreational use of the School Field was mostly permissive.

6.4. After 1997

After the new wire mesh fence was erected in 1997, the School Field was still used for school sports and games and for organised events with the permission of the school. It was no longer physically possible for people to enjoy informal recreation on the School Field without the permission of the school.

7. The Law

7.1. Commons Registration Act 1965

The Commons Registration Act 1965 introduced a scheme for registering commons and town or village greens. The scheme is contained in the 1965 Act and in regulations made under s 19 of the Act, of which the most important for present purposes are the Commons Registration (New Land) Regs 1969.

7.2. Green

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As in *R v Sunderland City Council ex p Beresford* [2001] 4 All ER 565

"Town or village green" was defined by s 22(1) of the 1965 Act as being "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 lawful sports and pastimes as of right for not less than 20 years".

The definition was amended as from 30th January 2001 by s 98 of the Countryside and Rights of Way Act 2000. The third limb of the definition was replaced by the following wording: "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 regulations have yet been made to implement para (b).

7.3. Recreational Allotments

The first limb of the definition refers to recreational allotments under Inclosure Acts and does not arise in the present case.

7.4. Customary Greens

The second limb of the definition refers to the traditional customary green. Proof of a custom requires proof of certainty of (a) the nature of the custom, (b) the locality in which the custom is alleged to exist and (c) the persons affected by the custom: *Halsbury's Laws of England 4th Ed Vol 12(1) paras 615-617*. A custom must also have an immemorial origin: *Halsbury para 618-619*. Certainty of locality

requires the locality to be some geographically defined area known to the law, such as a manor or parish: *Edwards v Jenkins* [1896] 1 Ch 308 at 311-313.

It was not suggested that the application land in the present case was a customary green.

7.5. Prescriptive Greens

The third limb of the definition introduced a type of green previously unknown to the law, i.e. a prescriptive green. It appears that it is in effect a customary green without immemorial origin. The definition has been considered by the House of Lords in *R v Oxfordshire CC ex p Sunningwell PC* [2000] 1 AC 335 which held (a) that the words "as of right" means "without force, secrecy or permission" (355H-356E) and (b) that "lawful sports and pastimes" includes informal recreation such as walking with or without dogs and playing with children (356E-357E). The certainty required for a custom is also required for a prescriptive green which must be "properly and strictly proved" *R v Suffolk CC ex p Steed* [1997] 1 EGLR 131 at p 134J-L. The "locality" must form some district known to the law and the relevant 20 year period is the 20 years immediately before the application : *Ministry of Defence v Wiltshire CC* [1995] 4 All ER 931 at p 937b-938h.

7.6. Burden and Standard of Proof

The burden of proof lies upon the person seeking registration, both on an original application: *West Anstey Common* [1985] 1 Ch 329 at p 341H-342C and on an amendment application under s 13 CRA 1965: *R v Suffolk CC ex p Steed* [1997] 1 EGLR 131 at p 134J-L. The standard of proof is the usual civil standard of the balance of probabilities.

7.7. Locality and Neighbourhood

Under the new definition, the applicants have to prove recreational user by a significant number of the inhabitants of any locality or of any neighbourhood within a locality.

Plainly, "locality" must still mean a geographically defined area known to the law because the word is also used in the unamended parts of the definition. In the present case, Netheravon is plainly a locality, being a parish, and the question of "neighbourhood" does not arise.

"Significant" is also a word with a variety of meanings according to the Shorter Oxford Dictionary, but none seem applicable. The word is clearly not used (a) in its mathematical sense, i.e. "to (so many) significant figures", nor (b) as "signifying something", since the "something" is unidentified, nor (c) "full of meaning", nor (d) "important, notable". Although the Shorter Oxford Dictionary does not give the definition, it could mean "not insignificant", i.e. not "small" or "trivial". I consider that the probable meaning is the number of users from the relevant locality or neighbourhood is not so small that user is "trivial or sporadic" and does not carry the outward appearance of user as of right: *R v Oxfordshire CC ex p Sunningwell* [2000] 1 AC 335 at p 357D. This, in my view, is connected with the principle that prescription is based on acquiescence and there can be no acquiescence unless the user is of sufficient intensity that the landowner knows or has the means of knowledge of it: *Diment v NH Foot Ltd* [1974] 2 All ER 786.

8. Mr Spencer's Legal Arguments

Mr Spencer put forward a number of very interesting and far reaching legal arguments⁴³, some of which are of considerable importance in this area of the law. Since I did not have the advantage of hearing contrary legal submissions from the objectors, I consider that it would be unwise of me to express my views on any legal issues which are unnecessary to my recommendation. In the event, I am able to make my recommendation without the need to resolve the correctness of any of Mr Spencer's legal submissions.

9. Conclusion

I conclude that the application fails for the simple reason that, whichever definition of town or village green applies in the present case, and however Mr Spencer's points of law are resolved, the applicant has failed to prove 20 years' use of the School Field for lawful sports and pastimes by local people "as of right". In my view, the only period during which there has been more than trivial or sporadic recreational use of the School Field as of right was between 1975 and 1989 when the School Field was not wholly fenced and informal recreation by local people was tolerated by Wiltshire County Council.

10. Recommendation

I recommend that the application should be rejected. The registration authority must give the applicant written reasons for rejection. I recommend that the reasons are stated to be "the reasons set out in the Inspector's Report dated 2nd January 2002".

⁴³ See p 106 of the Red Bundle and Mr Spencer's written Closing Speech.