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Merton Green

Full name of case

BDW Trading Ltd (t/a Barratt Homes) v Spooner (representing the Merton Green Action Group) and another

Case reference

[2011] EWHC B7 (QB) (15 February 2011), case no OCF90671
www.bailii.org/ew/cases/EWHC/QB/2011/B7.html

Summary

Village green rights can be overridden by rights of development in certain circumstances, so that the protective provisions of section 12 of the Inclosure Act 1857 and 29 of the Commons Act 1876 do not apply to the land. The circumstances are that the land has been appropriated by a local authority under section 122 of the Local Government Act 1972 for planning purposes, notwithstanding that it is a common or village green.

Issues considered

The land consists of 12 hectares of open space in Caerwent, Monmouthshire. Outline planning permission for residential development was granted in June 2006.

In March 2007, Monmouthshire County Council (MCC) appropriated the land for planning purposes (ie approved its change of use from open space to development land). In October 2007 the claimants, Barratt Homes Ltd, bought the land from the council for £10.9 million. MCC granted full planning permission and in March 2010 Barratt began to build.

Meanwhile, in July 2008 the Merton Green Action Group, a member of the OSS, led by Anne-Marie Spooner, had written to Barratt Homes indicating its intention to apply to register the land as a village green. In July 2009 the group made the application. MCC held an inquiry in November 2010. There, Barratt Homes, the objector, contended that section 241 of the Town and Country Planning Act 1990 (TCPA) by which the land was appropriated for development, overrides section 15 of the Commons Act 2006, by which the land was registered as a green and thus protected by nineteenth-century legislation. Therefore, argued Barratt's QC Anthony Porten, any village green rights which might have accrued on the application land have been displaced by the objector's rights to develop the land in accordance with planning permission.

In January 2011, the inquiry inspector Sue Arnott recommended that the bulk of the land be registered, but because the registration process does not take account of the effect of appropriation, she could not rule on that matter.

In April 2010 Barratt Homes had offered to sell affordable housing units to a housing association, Melin Homes Ltd. In September 2010 Melin Homes refused to buy until the village green application had been defeated or Barratt Homes's contention that section 241 prevailed had been upheld in court. So in January 2011 shortly after the inspector's report was published, Barratt Homes went to the High Court for a declaration on the matter, before His Honour Judge Seys Llewellyn QC.

Section 122 of the Local Government Act 1972 gives the power of appropriation for planning purposes to a council such as MCC. By section 233 of the TCPA, where any land has been acquired or appropriated by the local authority, the authority may dispose of the land in order to secure its best use. Section 241 of the TCPA provides that 'notwithstanding anything in any enactment relating to land which is or forms part of a common [which includes ... any town or village green], open space [which includes any land used for the purposes of public recreation] or fuel or field garden allotment ... such land which had been acquired by a ... local authority ... may be used by any person in any manner in accordance with planning permission'. At the time of appropriation the land was open space but not registered as a green.

The action group argued among other things that there was nothing in section 241 to indicate that it applied to subsequent specific legislation, and there is nothing in the Commons Act 2006 to indicate that registration as a green must give way to the TCPA.

On the other hand the claimant argued that section 241 refers to 'any enactment' and does not state that it is restricted to enactments prior to it. If anything in the Commons Act 2006 was intended to take away the provision in the TCPA, it would have been spelled out.

The judge said that *Bennion on Statutory Interpretation* establishes that '(1) the courts presume that parliament does not intend an implied repeal of an earlier statute; (2) the presumption against implied repeal is stronger where modern precision drafting is used; (3) the presumption is also stronger the more weighty the enactment said to have been repealed; and (4) the presumption is subject to the well-recognised countervailing presumption that a general provision does not derogate from a special one'.

The judge considered that the TCPA provided 'the fundamental legislative architecture for planning use of land, with both general over-arching provisions, and highly detailed specific provision for individual areas'. The language of section 241 is entirely general, 'notwithstanding anything in any enactment', and the judge considered that 'it would be natural, if parliament intended this to refer only to prior or previous enactment, for the statute to say so expressly'.

In his opinion it was not sufficient to say that the 1990 act is of general application and that the Commons Act 2006 is specific or particular. 'In relation to village greens, s241 TCPA 1990 is specific in its prescription. In relation to village greens, it is the Commons Act 2006 which is the more general in application.'

He then checked against the Bennion tests and concluded: 'I see considerable force in the contention for the claimant that (1) the starting point here is to presume against repeal; (2) the presumption is stronger because the Commons Act 2006 is an example of modern precision drafting.' For (3) the claimant contended that the 'presumption is yet stronger because the TCPA is the principal act regulating the planning system for the whole of England and

Wales'. While the judge felt the proposition may be too simple, he adopted his earlier comments on this.

On (4), the judge considered it is the Commons Act 2006 which is the more general provision and the TCPA which is the more specific one.

However, Rhodri Williams QC, counsel for the action group had pointed out that section 15 does not apply where planning permission was granted before 23 June 2006 on the land and construction works were commenced before that date, and the land had or would thereby become permanently unusable by members of the public. Such land cannot be registered as a green under section 15. The action group argued that section 15 therefore made strictly limited and defined provision protecting a developer where construction was commenced before a defined date. The 2006 act could have made provision in terms of s241 TCPA but it did not do so, and this was a further indication that the 2006 act should prevail.

The judge considered that this did not necessarily mean that parliament, in protecting the position of the developer in section 15, intended to abrogate the provisions of s241. Alternatively, or additionally, 'parliamentary draftsmen may have had in contemplation that s241 did already make specific provision, and in wholly general terms, namely "notwithstanding anything in any enactment relating to land which is or forms part of a common, open space ... etc".' He considered it would be 'a little strange if parliament, having by s241 TCPA intended to allow development in the circumstances there set out, were without express reference to have abolished this by the passage of the 2006 act.'

However, he conceded that 'I was left with a faint and perhaps false impression that a more wide ranging consideration of this and other like statutes might have thrown further light on the proper solution to the question. For my part I have reached the clear conclusion in the light of my observations above that it is the provisions of section 241 TCPA which prevail and that the Commons Act 2006 has not expressly or impliedly abrogated the effect of those provisions.'

Commentary

It is unfortunate that, because of the risk of costs against it, the action group felt unable to appeal, to enable the 'more wide ranging consideration of this' to take place. For the present, where land has been appropriated by a local authority for planning purposes, it seems that a village green application may not succeed.

If the land is a registered green at the time of the appropriation, section 122 of the Local Government Act 1972 limits the appropriation to 250 square yards so these circumstances would not arise and any appropriation would have to be under section 229 TCPA, subject to the consent of the Secretary of State and provision of suitable exchange land or approval by both Houses of Parliament under section 19 of the Acquisition of Land Act 1981. In this case, although the land was arguably a green at the time of appropriation, it had not been recorded as such and therefore it can be argued that MCC was not aware that the land was a green. Section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876 only protect land which is registered as a green.

A similar case will no doubt return to the courts and we hope that we shall be able to assist those arguing against this worrying judgment.