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Yeadon Banks (Leeds)

Full name of case

Leeds Group plc v Leeds City Council and Secretary of State for Environment, Food and Rural Affairs and Douglas Jones (Court of Appeal, second judgment, 2 December 2011)

Case reference

[2011] EWCA Civ 1447
<http://tinyurl.com/85relnr>

Summary

In December 2010 Leeds Group, which owns 2.2 hectares known as Yeadon Banks, lost its claim in the Court of Appeal that Leeds City Council was wrong to register the land as a town green. However, the group was given permission to bring a second challenge in the Appeal Court on the grounds that the new definition of town and village greens, introduced by section 98 of the Countryside and Rights of Way Act 2000 (the 2000 act), is in breach of the Human Rights Act 1998 because of its retrospective effect in this and other cases. The appeal was rejected.

Issues considered

In December 2010 the Court of Appeal rejected claims from Leeds Group relating to the definition of 'neighbourhood' in subsection 22(1A) of the Commons Registration Act 1965 (the 1965 act), and the quality of the use evidence. However, the court gave permission to Mr George Laurence QC, acting for Leeds Group, to raise a new ground of appeal. This was that sections 98 and 103(2) of the 2000 act should be construed so as to postpone the operation of the amended definition of town or village green (TVG) to 30 November 2020 in any case, such as this one, where an applicant for a green relies on use which, up to 29 January 2001, would have been incapable of supporting such an application (ground 4A, retrospectivity).

The 2000 act was passed on 30 November 2000 and in accordance with the commencement provisions in section 103(2), section 98 came into force on 30 January 2001. The application to register Yeadon Banks as a TVG was made on 16 July 2004, so the 20-year period ran from 16 July 1984 to 16 July 2004.

Mr Laurence subsequently applied for permission to appeal on a second new ground, that an interpretation of section 98 giving it a retrospective effect would breach the appellant's right to the peaceful enjoyment of its land at Yeadon Banks, contrary to article 1 of the First Protocol (A1P1) to the European Convention on Human Rights (ground 4B, human rights).

Leeds City Council was not prepared to respond for financial reasons. The Secretary of State for Environment, Food and Rural Affairs applied for permission to be joined as an interested party. Open Spaces Society member Mr Doug Jones of Keep Yeadon Banks Green (KEYBAG), having secured funding from the society and others, also applied to be joined as an interested party.

Retrospectivity

Mr Laurence argued that, under section 22(1) of the 1965 act and prior to section 98 of the 2000 act coming into force, an application to register land as a TVG could not be based on use by inhabitants of a neighbourhood. The landowner could permit such use, knowing that it would not ripen into a legal right to have the land registered as a TVG.

Mr Laurence submitted that it would have been 'grotesquely unfair' for parliament to have recharacterised previously 'harmless' (to the landowner) acts of use by the inhabitants of a neighbourhood as 'harmful' (because from 30 January 2001, when section 98 of the 2000 act took effect, they were deemed capable of supporting an application to register land as a TVG). 'It was no answer to say that the landowner had acquiesced in the use for the previous 20 years. During the period when the use had no legal potential to harm the landowner he had had no reason to seek to prevent it.'

He gave an example of the potential unfairness. A small estate of 20 houses is built in 1980. By January 1981 all the houses are occupied and by the end of January 1981 a significant number of householders begin, and continue, to use an adjoining area for recreation. At that time the smallest administrative area known to the law was the parish (the 'locality' for the purposes of a class c TVG under the 1965 act) and the land was in one corner of the parish. The landowner does not object to the use because he knows that it can never lead to the land becoming a green. On 30 January 2001 an application is made to register the land as a TVG, using the definition from section 98 of the 2000 act, of which the landowner was unaware. So he 'discovers that the, legally innocuous, use by his neighbours over the previous 20 years has suddenly hardened into a legal right to have the land registered as a TVG'.

Mr Laurence argued that parliament cannot have intended to produce such unfairness, and that it could be avoided by reading section 98 so that if the use began before the section took effect, it came under the 1965 act definition, ie the qualifying use must be by 'a significant number of the inhabitants of any locality' rather than 'of any neighbourhood within the locality'.

Lord Justice Sullivan observed that the practical consequences of reading the 2000 act in this way 'would be that no application to register land as a TVG based on use by a significant number of the inhabitants of a neighbourhood could be made until a period of 20 years had elapsed after the passing of the 2000 act'. He considered it 'inconceivable that parliament in enacting the 2000 act intended to bring about such an absurd result ... it is common ground that parliament's intention in enacting section 98 was to remove the evidential difficulty posed by the need for uses to be predominantly from an administrative area known to the law (a locality).

It was in order to plug this “loophole” which “allows greens to be destroyed” that the 2000 act was passed [he was quoting Lord Hoffmann in the Trap Grounds judgment]...Any construction of the 2000 act which preserved the “loophole” for a period of 20 years after enactment would be manifestly contrary to parliament’s intention.’

He continued: ‘If parliament had wished to delay the coming into force of the new “neighbourhood” limb, and/or to make any transitional provisions consequent upon its coming into force’, section 98 would have been omitted from subsection 103(2) [provisions of the 2000 act which come into force two months after the passing of the act] and it would have been left as one of the remaining provisions to be dealt with by statutory instrument.

Lord Justice Sullivan dismissed Mr Laurence’s hypothetical scenario. Not only was it extreme because the whole 20-year period expired on 30 January 2001 and the application was made on that day (and since the Sunningwell judgment in 1999 all landowners had been put on notice that those using their land for recreational purposes may well be asserting a public right to do so) but also it was very different from the situation at Yeadon Banks where the appellant had a period of just over three and a half years from 30 November 2000 in which it could have taken action to prevent the use continuing. ‘There is no suggestion that the appellant was lulled into a false sense of security because it believed that the “ample and open recreational use” that was being made of its land by a “significant number of local inhabitants” could not ripen into a legal right because the use was not by the inhabitants of a locality’.

He concluded that (a) sections 98 and 103(2) of the 2000 act ‘are clear and unambiguous’; (b) even if they were ambiguous, ‘the proposition that parliament intended to defer the operation of one element of the new policy, the new neighbourhood limb, for a period of 20 years after enactment, is absurd’; (c) ‘if the impact of the new policy as a whole ... is considered it was prospective, not retrospective, in its effect when enacted on 30 November 2000’; (d) if there was an element of retrospectivity, ‘there was no real likelihood of unfairness to landowners’.

Human rights

Lord Justice Sullivan dismissed this ground because it added nothing of substance to ground 4A. However Lady Justice Arden expanded on this. She said: ‘the sole question to be answered under A1P1 in this case is: has a fair balance been struck by the relevant measure between the rights of the individual owner of land and the state?’ She considered the period of two months between the enactment of the 2000 act and its coming into operation to be ‘very short’. Moreover, the period would vary, depending on when the 20-year period of use was completed. This ‘makes the clause potentially unfairly discriminatory as between different landowners’. She continued: ‘On the other hand, there are factors going in the other direction. The change in the law came in by way of amendment to an existing regime permitting locality-based claims. Landowners, therefore, must be taken to already have been on notice that recreational use of a site could give rise to an application for registration as a TVG.’

She concluded that ‘There was no need for parliament to provide for any special procedure in this case because what the landowner had to do to stop use was relatively simple. The landowner had to bar entry by members of the public or to put up sufficient notices to make it clear that use was without permission....I am satisfied that, in the particular circumstances of this case, which were regarded by parliament as urgently requiring a legislative solution, the period of two months was sufficient to enable a fair balance to be struck.’

The court therefore dismissed the appeal on both grounds. At the time of writing (30 December 2011) the appellants have sought leave to appeal to the Supreme Court.

Conclusion

The court has upheld the registration of Yeadon Banks as a green, dismissing claims that it should not be registered because the 20-year period of use straddled the introduction of the new regime for registering greens under the 2000 act. The court also dismissed the claim that registering Yeadon Banks was contrary to the European Convention on Human Rights.