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## **West Beach, Newhaven, East Sussex**

### **Full name of case**

R (on the application of Newhaven Port and Properties Limited) (Appellant) v East Sussex County Council and another (Respondents) (Supreme Court 25 February 2015)

Neutral Citation No

[2015] UKSC 7

<http://www.bailii.org/uk/cases/UKSC/2015/7.html>

### **Summary**

The Supreme Court has reversed the decision of the Court of Appeal ([2013 EWCA civ 276] <http://www.oss.org.uk/wp-content/uploads/2012/02/West-Beach-Newhaven-2013.pdf>) and ruled that the land at West Beach, Newhaven cannot be registered as a village green. Newhaven Port and Properties Ltd (NPP) argued that its statutory role as a port authority and the powers it has to issue by-laws governing the area of its operations (including the beach) under section 58 of the 1878 Newhaven Act were incompatible with registration of the beach as a village green.

### **Issues Considered**

#### **Statutory incompatibility**

The Supreme Court said that the Commons Act 2006 could not have applied to NPP's land because, as a port authority, it had powers to develop that land for use as a port. Those powers predate the Act and the Act did not expressly vary the legislative regime in respect of NPP's powers.

The Court considered whether section 15 of the 2006 Act applied to land which had 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. The question is one of statutory construction, and in general a later provision does not depart from an earlier specific one. The 2006 Act did not explicitly repeal the legislation under which the port authority operated. Registration of the beach as a town or village green would make it a criminal offence to damage the green or interrupt its use as a place for exercise and recreation. The court found that registration would clearly be incompatible with the use of the harbour as a working port.

### **Implied licence to use the foreshore (beach)**

NPP argued that the public enjoyed an implied licence to use the foreshore and that use was not 'as of right' (ie without secrecy, force or permission). The court did not determine this issue as it considered that it was not necessary to do so for the purposes of deciding the appeal.

There are three possible reasons for the legal basis of the public's use of the foreshore for bathing.

- 1 There exists a general common law right to use the foreshore.
- 2 The owner of the foreshore is presumed to permit members of the public to use the foreshore until the owner revokes the implied permission.
- 3 No such right exists and members of the public who use the foreshore are trespassers.

The court said that it was best to proceed on the assumption that, so far as the general law is concerned, the public used the beach for bathing 'as of right' not 'by right'.

### **Implied licence from by-laws**

Under section 58 of the 1978 Newhaven Act the Southern Railway Company regulated the docks and passed by-laws, banning games and pastimes that might 'obstruct or impede the use of the harbour'. There was no evidence of any signs publicising these by-laws. The court considered whether a conditional ban on an activity in fact sanctions that activity, and whether the mere existence of the by-law amounted to its having been published to the general public. The court answered yes to both considerations and found that the by-laws restricted where people could go but by implication gave permission to go into other areas. The existence of by-laws was interpreted as permission having been given for use of the land and so no prescriptive rights could be established. The court concluded that it

is not always necessary for a landowner to show that the public had it drawn to its attention that its use of the land was permitted in order for its use to be 'by right'. In this case there existed a public right for the public to go onto the land and use it for recreational purposes. The court found that the recreational use was 'by right' and not 'as of right'.

### **Conclusion**

The Supreme Court upheld two of the three issues and found that the public had, as a result of the by-laws, an implied licence (permission) to use the land 'by right' not 'as of right'. It concluded that the Commons Act 2006 cannot operate in respect of the beach by reason of statutory incompatibility. Therefore the land cannot be registered as a village green.