

In the Matter of
An Application to Register
Thrupp and Bullfield Lakes, Radley, Abingdon, Oxfordshire
As a New Town or Village Green

FURTHER REPORT
of Mr. VIVIAN CHAPMAN Q.C.
10th. December 2007

Oxfordshire County Council,
Chief Executive's Office,
Legal Services,
County Hall,
Oxford OX1 1ND
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Introductory

[1] On 13th October 2007, I delivered my Report on this case to Oxfordshire County Council as registration authority under the Commons Registration Act 1965. The relevant Council committee was due to consider whether to accept the recommendation in my Report on 26th November 2007. On 22nd November 2007, the applicant's solicitors supplied the Council with a copy of the Opinion dated 20th November 2007 of Mr. George Laurence Q.C. Mr. Laurence's Opinion requested that I should reconsider certain aspects of my Report.

[2] I advised the Council to postpone its decision whether to accept the recommendation in my Report until I had had an opportunity to give full consideration to Mr. Laurence's Opinion. I also advised the Council that the objectors should be supplied with a copy of Mr. Laurence's Opinion and given an opportunity to comment on it.

[3] I have now received the written comments of the objectors. The comments were settled by their counsel, Mr. Mynors, and were dated 6th December 2007.

[4] I have also received two Notes dated 6th. December 2007 from the applicant, Mrs. Cartmell, one dealing with factual matters in my Report and the other dealing with Mr. Laurence's Opinion. I have not thought it necessary to invite the objectors' comments on these Notes.

[5] The Opinion of Mr. Laurence Q.C., who is an acknowledged expert in this field, is entitled to the highest respect. It is only right that I should reconsider my Report in the light of that Opinion. In doing so, I have been greatly assisted by the submissions of Mr. Mynors. I also think it right to give due consideration to the points raised by Mrs. Cartmell in her Notes.

Mr. Laurence's Opinion

[6] Mr Laurence's Opinion is very closely reasoned. However, it appears to me that there are two important central themes in the Opinion:

- The first theme deals with the interrelationship between (a) use of part of the application land in the nature of use as a public footpath and (b) such general recreational use of part of the application land as to give rise to registrability of that part as a new green
- The second theme deals with the question whether, in considering if parts (as opposed to the whole) of the application land are registrable as new greens, I would have reached a different conclusion if I had broken down and considered the application land in different parts from those which were considered in my Report.

Public Footpath

[7] This is a case where, apart from the BOAT running along the extreme S end of the application land, the tracks within the application land are not shown as public rights of way on the definitive map and statement. They might or might not be public rights of way under Highways Act 1980 s. 31. Neither side at the public inquiry specifically addressed the question whether the tracks were already public rights of way. The issue is that on which guidance was given by Lightman J in his judgment at first instance in the *Oxfordshire* case. Mr Laurence accepts¹ that I correctly summarised that guidance in para [305] of my Report. The core question is whether the user would have appeared to a reasonable landowner as the exercise of a right of way over a defined route or referable to a right to enjoy recreation over the whole of a wider area of land. It seems to me that the application of this test is a matter of fact, degree and impression. Mr Laurence makes the criticism that I analysed the position on the footing that the tracks were already public rights of way². With respect, I do not think that this criticism is justified. On rereading my Report, it seems to me that I set out the guidance of Lightman J. at para. [305] and then applied it.

[8] In the Trap Grounds case, I had a thorough accompanied site view of the application land. There was a main circular track around the scrubland, but the whole of the scrubland was pierced by sufficient minor tracks, glades and clearings as to give the perception that the scrubland as a whole had been used by local people for informal recreation.

[9] In the Radley Lakes case, I had the benefit of an equally thorough accompanied site view on 19th March 2007 as well as hearing the evidence of numerous witnesses and studying numerous photographs that were produced to the public inquiry. Mr Laurence accepts that my recommendation that the lakes themselves are not registrable as new greens cannot be faulted³. The view I formed (and still hold) was that the perception of the reasonable landowner would have been that user of the application land surrounding the lakes by local people was in the

¹ Opinion para. 20
² Opinion para. 23
³ Opinion para. 3

nature of a right of way over the defined tracks around the lakes rather than being in the nature of a right to enjoy recreation over a wider area.

[10] I infer from Mr. Laurence's Opinion that he has not viewed the application land. Certainly, he does not say that he has. Much of his analysis is based on Plan B attached to his Opinion. It is important to appreciate that Plan B attached to Mr Laurence's Opinion was not an agreed plan at the public inquiry. It was produced on behalf of the applicant. It is a very useful plan but it did not purport to be an accurately surveyed plan. It was diagrammatic in nature. The areas of the lakeside banks shown coloured green on Plan B are not grassy banks used for recreation. They are largely narrow, overgrown and inaccessible. The points coloured yellow and numbered 1-32 on that plan are illustrative of the fact that there are some points on each bank where it is possible to walk a few feet down to the water. It was not suggested that they (or indeed the tracks themselves) are shown to scale on Plan B. It is generally only on these yellow points that user by local people has spilled out from the tracks down to the waterside. My perception is (and I think that of the reasonable landowner would be) that it is the tracks which dominate and generate the use of the application land by local people and that the limited places where it is possible to step down to the lakeside are ancillary to the use of the tracks as a circular route around the lakes.

[11] Mr. Laurence is critical of *Dyce v Hay*⁴ and I am sympathetic to many of his criticisms. However, it seems to me that it does support the limited proposition in support of which I cited it at para. [304] of my Report.

[12] Having carefully read and thought about Mr. Laurence's advice on the issue of the relationship between public footpath and TVG user, I think that I adopted the right test in accordance with the guidance of Lightman J and properly applied that test to the facts of this case.

Different Parts of Application Land

[13] I now turn to consider the various alternative parts of the application land put forward by Mr. Laurence as candidates for registration as a new TVG.

Area 1

[14] Area 1 consists of

- the E bank of Thrupp Lake W of the BOAT and S of Sandles,
- the S bank of Thrupp Lake to the N of the track along the isthmus where it runs N of Bullfield Lake, and
- the triangle of application land at the SE corner of Thrupp Lake.

[15] I find it impossible to perceive Area 1 as a distinct part of the application land qualifying for registration as a new green.

[16] The E bank of Thrupp Lake is described in para. [248] of my Report. It is a very narrow strip of land (perhaps 2-3 metres wide) which slopes steeply down from

⁴ Opinion paras. 14-16

the BOAT to the lakeside and is mostly overgrown and inaccessible. There are 3 or 4 places where it is possible to walk down to the waterside from the BOAT. I think that it is impossible to perceive the E bank as a linear green. The few places where it is possible to step off the BOAT down to the lakeside are in my view to be regarded as ancillary to use of the BOAT.

[17] The isthmus is described in para. [257] of my Report. It is a very narrow strip of land along which there runs a well defined (although very wet) track. The track is lined on each side by a very narrow strip of land which is mostly overgrown and inaccessible but through which there are a few openings to the waterside of the two lakes. I find it impossible to perceive the strip of land N of the isthmus track as a linear green. I think that the only realistic perception of the use of the isthmus is of use of the track as a walking route and that the places where it is possible to step to the waterside are ancillary to that use.

[18] The triangle of land at the SE corner of Thrupp Lake is a small piece of overgrown land across which it is possible to walk to and from the isthmus track and down to the lakeside. I would not regard this piece of land as “substantial”⁵. There was some evidence of swimming from the SE corner of Thrupp Lake before the start of the 20 year period and there was some evidence that it was used by the Dockar-Drysdale and the Plyers for launching boats onto Thrupp Lake. I do not consider that there was evidence to satisfy me on the balance of probabilities that this land was used for recreation by a significant number of local people as opposed to being used as a route from the BOAT to the isthmus.

[19] Thus, whether one considers the three elements of Area 1 separately or collectively, I do not consider that it has been established that they qualify for registration as a new green.

Area 2

[20] Area 2 consists of the N, E and S banks of Bullfield Lake within the track D-E-F-G.

[21] The N bank of Bullfield Lake is the S side of the isthmus track and is not materially different from the N side of the isthmus track. The same considerations apply as to the N side discussed in para [17] above.

[22] I described the E bank of Bullfield Lake in para. [258] of my Report. It is of much the same character as the other lakeside banks (except for the Sandles garden), i.e. largely overgrown immediately beside the water with a few places where it is possible to walk down to the lakeside.

[23] I described the S bank of Bullfield Lake in para. [259] of my Report. It is of similar character to the E bank, although it is somewhat wider.

[24] Mr. Laurence also invites me to consider:

⁵ Opinion para. 8

- Area 2 plus track D-E-F-G (which composite area I will call “Area 2A”)⁶
- Area 2A plus what Mr. Laurence calls discarded strips (i) and (ii) (which composite area I will call “Area 2B”)⁷.

[25] In my view, it is impossible to regard the N bank of Bullfield Lake (with or without the track D-E) as a linear green. Its character is that of a track with a narrow overgrown strip of land between the track and the lakeside. There are a few places where it is possible to step from the track to the waterside. I find it impossible to perceive the strip of land S of the isthmus track as a linear green or part of a linear green (including or excluding the track itself). I think that the only realistic perception of the use of the isthmus is of use of the track as a walking route and that the places where it is possible to step through the undergrowth to the waterside are ancillary to that use.

[26] As for the E bank of Bullfield Lake from point E-17, the land between the track and the lakeside is overgrown and I do not think that there was any significant use of that land for recreation or access to the lakeside. Nor was there any evidence of significant use of discarded strip (i) for recreation. It is to be noted that there is a somewhat dilapidated wire fence between discarded strip (i) and the BOAT and is not suggested that there is any material access to discarded strip (i) from the BOAT between points 5 and 6. I cannot perceive use of the E bank of Bullfield Lake between points E-17 as other than essentially use of the track as a walking route.

[27] I think that the strongest candidate for registration as a new green out of the whole of the application land is Area 2B to the S of Bullfield Lake, i.e. roughly from point 17-25 on Plan B. The immediate lakeside is largely overgrown except for a few access points. However, the area of dry land is a little wider than the other banks, there are a few more open grassy areas and there are two tracks between points 17 and 22. Entry point 6 has been open and popular throughout the 20 year period. Also, this area was remote from the activities of Curtis, the landowner. When preparing my Report, my views fluctuated about the registrability of this parcel of the application land. However, on consideration of the totality of the evidence, including what I saw on the site view, and on applying the guidance of Lightman J. I eventually reached the conclusion (to which I adhere on reconsideration) that the reasonable landowner would perceive the use of this part of the land as referable to the exercise of a right of way along a defined route or routes rather than a right to enjoy recreation over the whole of the land. I would reach the same conclusion whether I considered Area 2, 2A or 2B.

[28] I therefore conclude that neither Areas 2, 2A or 2B nor any part of any of these areas qualifies for registration as a new green.

Area 3

[29] Area 3 is the W bank of Thrupp Lake E of the track that runs along that bank. I described the W bank of Thrupp Lake in paras. [249] – [252] of my Report. Area 3 itself is a fairly narrow strip of land between the track and the lake. It contains the E

⁶ Opinion para. 24(2)

⁷ Opinion para. 26

side of the avenue of trees that lines the track. It is largely overgrown but there are a number of places where it is possible to walk a few steps down to the waterside from the track. These are indicated diagrammatically on Plan B. I find it impossible to regard Area 3 as being in the nature of a linear green used generally for recreational purposes. The access points to the lakeside appear to me to be ancillary to and dependant on the use of the track along the W bank of Thrupp Lake.

[30] Mr. Laurence also asks me to consider Area 3 plus the adjoining track⁸. I will call this area “Area 3A”. In my view the predominant perception of Area 3A is of land which is the site of a lakeside track, notwithstanding that there are some places where users of the track can walk down to the waterside.

[31] Finally, Mr. Laurence asks me to consider Area 3A plus discarded strip (iii)⁹. I will call the combined area “Area 3B”. Discarded strip (iii) contains the W side of the avenue of trees which lines the track along the W bank of Thrupp Lake. There was no evidence of any specific recreational use of discarded strip (iii). I do not therefore think that it adds anything to Area 3A. I should add that I am not convinced that the depiction of the W boundary of the application land on Plan B corresponds with the plan attached to the application. If anything, I think that the application plan probably includes a little more land to the W of the track. However, there was no evidence of any specific recreational use of this land.

General Overview of Mr. Laurence’s Opinion

[32] With great respect to Mr. Laurence QC, I consider that he has put undue weight on Plan B and has incorrectly inferred that the green areas between the lakeside tracks and the lakes are areas of significant size which have been generally used for informal recreation by local people. In fact, inspection of the site discloses a quite different picture. These areas are mostly quite narrow and are not generally available for and used for recreation. On the contrary, they are predominantly overgrown and there are relatively few places where it is possible to walk the very short distance off the track down to the waterside.

[33] It is an interesting and instructive exercise to consider the various alternative areas that Mr. Laurence QC has put forward as candidates for registration. However, having done so, I remain of the view that the applicant has failed to prove that any of them are registrable as new greens.

Mrs Cartmell’s Notes

[34] I now turn to consider Mrs. Cartmell’s Notes of 6th December 2007. The first deals with factual and evidential matters. The second deals with legal issues.

First Note

[35] Mrs. Cartmell objects to my finding that she has exaggerated the frequency of her visits to the lakes before the present campaign started. However, it appears to me

⁸ Opinion para. 24(2)
⁹ Opinion para. 26

that this was a reasonable finding based on her evidence of monthly visits to the lakes between 1983 and 1993 and yet her failure to remember the draining and refilling of Thrupp Lake over a 3-4 month period in 1991/92.

[36] Mrs Cartmell objects to my description of Mr. Faulkner as a rather unsatisfactory witness. She says that he was nervous and may not be very articulate. I do not recall him as being inarticulate. Nor do I recall him as being obviously nervous, although I accept that he might well have been. However, my description of him as not being a very satisfactory witness arose from the inconsistencies in his evidence which I pointed out in paras [75] – [76] of my Report. In view of those inconsistencies, I consider that my comment was justified.

[37] Mrs. Cartmell says that I was wrong in para. [3] of my Report to say that npower had applied for planning permission to fill Bullfield Lake as well as Thrupp Lake with PFA. I had got the impression during the public inquiry that the application covered both lakes. I was not shown the planning application and I accept that I may be wrong on that point. However, I do not think that the point has any bearing on the question whether the application land has become a registrable new green.

[38] Mrs Cartmell says that I was wrong in saying that the sign “Private. Danger. Deep Water. J Curtis & Sons” in the SW sector of the application land was beside Bullfield Lake and referable to Bullfield Lake. Rather, she says that the sign was beside Thrupp Lake and referable to Thrupp Lake. I accept that I may have misunderstood the evidence of Mr. Thomas on this point. See paras. [194] & [256] of my Report. However, I mentioned the sign in the context of a discussion of whether Bullfield Lake was registrable as a new green, and it is now accepted by Mr. Laurence QC that it is not.

[39] Mrs. Cartmell points out that in para. [4] of my Report I referred to Thrupp Lane as Thrupp Road and that in para. [18] of my Report I referred to Mr Boddington as Mr. Bonnington. I am sorry for these errors, but they do not affect my conclusions on any material issue.

[40] Mrs. Cartmell refers to the evidence of Dr. Crowley concerning a stile beside the gate in the SW corner of the application land. There was no stile or alternative access visible on my site view. My recollection is that there were a number of witnesses who spoke of gaining pedestrian access at the SW corner by climbing through the gate, squeezing around the side of it, or going through or over the boundary close to the SW gate. I do not doubt that the gate did not prevent access at the SW corner of the application land by any determined pedestrian. However, the overall impression that I obtained was that there was no obviously legitimate alternative pedestrian entrance to the application land at the SW corner and that the gate had the deterrent effect mentioned in para. [260] of my Report.

[41] Mrs. Cartmell suggests that Thrupp Lake looks uninviting for swimming because the trees around the lake have recently been cut down by npower. This was not the reason why I thought that the lake was uninviting for swimming. In my view, the lake is uninviting for swimming because the water looks cold and murky and the bottom looks weedy.

[42] Finally, Mrs. Cartmell suggests that the configuration of the SW sector of the application land had not changed over the relevant 20 year period, except to a minor extent. In para. [319] of my Report, I said that I was not satisfied that the configuration of this part of the application land had been the same throughout the relevant 20 year period. I think that the various photographs put in evidence speak for themselves in appearing to show that there has been some change in the configuration of this land. I consider that the comment in my Report was justified.

[43] Having considered all Mrs. Cartmell's factual points, I cannot see anything in them which would alter the conclusions in my Report.

Second Note

[44] For the most part, Mrs Cartmell's second Note is a discussion of the points raised in the Opinion of Mr. George Laurence QC. I have considered those points above.

[45] Mrs Cartmell is particularly concerned to understand how the Radley Lakes case can be distinguished from the Trap Grounds case. I have specifically addressed this issue above in my consideration of Mr. Laurence's Opinion.

[46] Mrs. Cartmell does however raise a legal issue not covered by Mr. Laurence's Opinion. She asks me to advise whether the registration authority could, without *Wednesbury* unreasonableness, differ from my conclusions and recommendations. I do not think that this a question capable of a simple "yes" or "no" answer. As a matter of law, the decision whether to accept or reject the application, wholly or in part, is the decision of the registration authority and the registration authority is not bound by my recommendations. The registration authority is therefore free in law to reject my recommendations and to make its own decision. Whether a decision to reject my recommendations would be *Wednesbury* unreasonable depends on the reasons of the registration authority for differing from my conclusions and recommendations. If they are good reasons, the registration authority would not be *Wednesbury* unreasonable. If they are bad reasons, they would be *Wednesbury* unreasonable. I do not think it is possible to say more than this in advance of the decision of the registration authority. In particular, I do not think that it is possible to say that, simply because some of the issues in this case are matters of fact, degree and impression, the registration authority is free to differ from my findings on those issues without risk of *Wednesbury* unreasonableness.

Conclusion

[47] Having carefully considered the Opinion of Mr. George Laurence Q.C. and the two Notes of Mrs. Cartmell, I do not wish to alter the conclusions and recommendations contained in my Report.

Vivian Chapman Q.C.
10th December 2007
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