

- VILLAGE GREEN UPDATE -

THE BARRATT HOMES' CASE

At my seminar in Southampton on 18/03/2011 the 'Barratt Homes' case was mentioned to me by some of those attending but as the case is only recent it had passed me by completely. After the seminar, however, I found a transcript of the judgment online and I think that it might be useful if I dealt with the headline points of the case in a note, not only for the benefit of those who attended my seminar on 18/03/2011, but also for those who will be attending my next seminar on TVGs in Bristol on 25/03/2011.

The case is *BDW Trading Ltd (t/a Barratt Homes) v Spooner (representing the Merton Green Action Group & Melin Homes Ltd [2011] EWHC B7*.

- 1) The case was heard in Cardiff by His Honour Judge Llewellyn QC, sitting as an additional judge of the High Court, and a reserved judgment was handed down on 15/02/2011.
- 2) The case involved land in Monmouthshire which had the benefit of planning permission for residential development under a grant obtained on 20/06/2007 following an appropriation of the land for planning purposes in March 2007. The land was subsequently purchased from Monmouthshire County Council by Barratt Homes on 15/10/2007 for £10.9m and, following approval of reserved matters, actual development commenced in March 2010.
- 3) In the meantime, application had been made on 24/07/2009 to register the land as a TVG. This was later followed by a non-statutory inquiry in November 2010 and the inspector's report recommending registration was issued on 7/01/2011. The application has not yet been determined by the registration authority.
- 4) The situation then is that development is already under way and the question is whether it can continue after registration. Specifically the issue was whether TVG status would be trumped by the provisions of section 241(1) TCPA 1990 which overrides any statutory restrictions on the use of public open space, common land (which will include TVGs) and fuel or field garden allotments, where the land has been acquired or appropriated by a local authority for planning purposes provided that the use is either by the Secretary of State or is in accordance with planning permission.
- 5) It was not disputed in the case (a) that the land in question had been properly appropriated under section 122 LGA 1972 and (b) that the authority had properly disposed of the land under section 233 TCPA 1990, namely as land which had been acquired or appropriated for planning purposes and which was for the time being held by them for such purposes and where sale was necessary to secure the best

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use of the land or to secure the erection, construction or carrying out on it of any buildings or works appearing to the authority to be needed for the proper planning of the area.

6) The judge considered the relevant framework under the CA 2006 and the recent decision of the Supreme Court in *Lewis v Redcar and Cleveland Borough Council* [2010] 2 AC 70 insofar as it concerned the post registration rights of landowners and local inhabitants whose rights would henceforth predominate, in that an owner's previous (or intended) use of his land would be restricted if it prevented use of the land by locals for lawful sports and pastimes.

7) The supporters for registration argued:

7.1 - that the effect of a TVG registration has already been determined by the Supreme Court in *Redcar*;

7.2 - that there is nothing in section 241 to indicate that it would displace specific legislation passed later on in respect of village greens;

7.3 - there is nothing in the CA 2006 to suggest that its provisions are overridden by those of section 241;

7.4 - that section 15(4) CA 2006 itself (relating to the 5 year period of grace in which to bring applications to register) specifically allows an application for registration to be made and to succeed unless a strictly defined prior planning permission has been granted and implemented before 23/06/2006 (which did not happen in this case - *ergo* following the coming into force of the CA 2006 on 6/09/2007 in relation to Wales, the open space in this case became vulnerable to an application to register made under section 15 CA 2006);

8) Barratt Homes argued:

8.1 - that the provisions of section 241 are entirely general - referring to 'any enactment' - in other words, the section does not limit its use to enactments prior to the 1990 Act;

8.2 - the CA 2006 relates to village greens and there is nothing in that Act which disapplies section 241;

8.3 - the Act of 2006 does not satisfy the requirements for the doctrine of implied repeal in relation to section 241 (there is a presumption that Parliament does not intend an implied repeal of an earlier statute);

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8.4 - there is no reported authority pointing to the fact that the CA 2006 should prevail in these circumstances - in fact *Redcar* was not even dealing with the potential application of section 241;

9) It was the view of the judge:

9.1 - that in looking at the legislation '*as a whole, or in the round*', he said that he did '*not discern a positive re-evaluation of the balance between the public interest in development of land appropriated by a principal authority for given planning purposes so long as planning permission has been granted and the public interest in individuals being able to use for recreational purposes land which has been the subject of registration as a village green*';

9.2 - that section 241 is quite specific in the provision which it makes in respect of land which is or forms part of an open space whereas it is the CA 2006 which is the more general of the two Acts; the presumption *against* an implied repeal is stronger where there is more precision in the drafting as there clearly is in the case of section 241; moreover the presumption against repeal is also strengthened by the fact that the CA 2006 is itself an example of modern, precision drafting;

9.3 - that section 241 is entirely general and that if Parliament had intended it to refer only to prior enactments it would have said so expressly;

9.4 - a TVG registration would still be effective to protect the rights of locals in any case involving a general entitlement to a builder to develop simply by reason of the grant of planning permission - it would, however, only be pointless to register if the circumstances were such that section 241 did apply (namely where a local authority had acquired or appropriated the land for planning purposes and planning permission had then been granted);

9.5 - there is nothing inconsistent in an enactment which enables local inhabitants to use a registered green for lawful sports and pastimes and section 241 in the circumstances where land has been appropriated for planning purposes and the owner wishes to use it for any purpose for which planning permission has been granted, in which event the Victorian statutes are overridden by reason of section 241;

9.6 - the fact that section 15(4) CA made provision for a strictly defined prior planning permission was irrelevant in that it only applied to a case where, because of works carried out, the land would have been unusable as a TVG by a given date, and it did not follow that Parliament necessarily intended to abrogate the provisions of section 241 where they applied;

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9.7 - that it is for Parliament to strike a balance between the respective public and private interests which are involved in this case, but that in his judgment section 241 prevailed over the CA 2006;

10) It is indeed remarkable that the provisions of the CA 2006 should be emasculated in any case where section 241 applies, in view of the recent jurisprudence in this area of the law, most notably, of course, in the Supreme Court. The CA 2006 was intended to make it easier to register land as a TVG and preventing the use of land for recreation would defeat the objectives of the Act and render registration pointless. Moreover, the CA 2006 is the sole Act dealing with TVGs and there is a compelling argument that it should be taken to be the expression of Parliament's will in relation to such matters and that this lends itself to an implied repeal of section 241.

11) The landowner succeeded on what was plainly a technicality. The technicality in this instance should be compared with the argument being advanced by the landowner in the *Leeds* case (where a hearing on this issue is pending) where the landowner is looking to argue that section 22(1A) CRA 1965 should be interpreted as not taking away the vested rights of an owner in so far as the applicant relies on acts of user taking place before the introduction of the concept of *neighbourhood* usage in 2001. What the landowner is saying here is that the criteria for *neighbourhood*-based TVGs under section 22(1A) did not have retrospective application - which would mean in practice the postponement in the ability of the inhabitants of any *neighbourhood* to rely on 20 years user until 2021. It is the view of the writer that the landowner is *unlikely* to succeed on this point and that a similar outcome is likely in the event that the section 241 issue is taken to appeal.

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