The strange tale of Sunningwell glebe

Francis Bennion shows how rural sports and pastimes have cost Church of England clergy hundreds of thousands of pounds.

This article has a personal touch. It concerns Sunningwell, the rural village next to mine. From time immemorial until 1974 both villages were in Berkshire, but now they form part of Oxfordshire. At the heart of the village of Sunningwell is the ancient parish church of St. Leonard, which in 1996 celebrated its 750th anniversary. In the thirteenth century the early scientist and Franciscan friar Roger Bacon, known as *doctor mirabilis,* scanned the heavens from its tower with his primitive telescope. Adjoining the church is the glebe, formerly vested in the incumbent as part of the endowment of his benefice and now owned by the Oxford Diocesan Board of Finance ("the Board").

In a recent case about Sunningwell glebe, ***R v Oxfordshire County Council, ex p Sunningwell Parish Council*** [1999] 3 All ER 385 (which I shall refer to as ***Sunningwell***), the House of Lords changed the law. Its decision was solely embodied in an opinion by Lord Hoffmann, with which all the other participating Lords of Appeal concurred in formulaic (that is unreasoned) terms.

What does "as of right" mean?

Sunningwell laid down the legal meaning of the phrase "as of right", as used in the Commons Registration Act 1965 s. 22(1)(c). This authorises registration of an area as a town or village green if it has become land "on which the inhabitants of any locality have indulged in [lawful] sports and pastimes as of right for not less than twenty years". In this article I will not attempt to cover all the points dealt with by ***Sunningwell***. My object is to state and analyse the law the decision lays down as to this crucial phrase "as of right".

Sunningwell rejects a heresy that had crept into the law, namely that the state of mind of the users has anything to do with whether or not a use is "as of right". The heresy was exposed in a 1997 article by J. G. Riddall.[1] Lord Hoffmann acknowledged[2] that he was influenced by this article in holding that the use must be, in the ancient Latin phrase, ***nec vi, nec clam, nec precario.*** This he translated as "not by force, nor stealth, nor the licence of the owner". He went on to say-

> "The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right - in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period."[3]

[1] "A False Trail" by J. G. Riddall, (1997) 61 Conv. 199.
[2] P. 396.
[3] P. 391.

In the village green situation the feature that appears in early public use of the land is usually not the exertion of actual physical force but trespass without the use of force. Does such trespass equate to force in the *nec vi* sense? *Sunningwell* returns a negative answer. So the Sunningwell villager who openly, but without the owner's permission, moved off the unfenced public footpath which crosses the glebe in order to exercise his dog or fly his kite or pick blackberries (all acts proved to have been committed in *Sunningwell*) did so *nec vi, nec clam, nec precario*, even if he did so as a trespasser.

Sunningwell decides that even though he knew he was a trespasser, the villager's act is still relevant in assessing whether section 22(1)(c) applies. Lord Hoffmann said: "But user which is *apparently as of right* cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, *or even had private knowledge that it did not*".[4] This establishes that the state of knowledge of the user is irrelevant.

What then is meant by "user which is apparently as of right"? This is an obviously difficult concept. One is tempted to say it is a product of over-clever minds. Lord Hoffmann tells us it means user "in the manner that a person rightfully entitled would have used it".[5] In the case of an alleged town or village green such as that at Sunningwell, where the green is traversed by an unfenced public footpath, that presents a problem. Obviously there would be no discernible difference in the "manner" of various types of entrant. A trespassing entrant would move unhindered from the footpath into the field in precisely the same "manner" as a person having the owner's permission would, or as a person would if the alleged right actually existed. This, says Lord Hoffmann, does not matter. He asks us to imagine how an entrant would have acted if the claimed right actually existed. Then we must answer the question Is that the way the entrants upon whose acts the claim is based behaved? If so, their actions are relevant in determining whether the right is established.

Thus it makes no difference whether or not such an entrant was trespassing. If he was, it makes no difference whether he knew he was trespassing. Under *Sunningwell*, these factors do not matter. What does matter is the behaviour of the landowner. When the parish council applied to the county council for registration of the glebe as a town or village green within the meaning of section 22(1)(c), the county council decided to appoint an inspector to hold an unofficial fact-finding inquiry. The inspector appointed was a barrister, Mr Vivian Chapman, who delivered a written report to the county council on 26 September 1996. Lord Hoffmann relied on the following passage from the Chapman report-

> "It appears to me that recreational use of the glebe is based on three factors. First, the glebe is crossed by an unfenced footpath so that there is general public access to the land and nothing to prevent members of the public straying from the public footpath. Second, the glebe has been owned not by a private owner but by the rector and then the Board, *who have been tolerant of harmless public use of the land for informal recreation*. Third, the land has been used throughout for rough grazing so that informal public recreation on the land has not conflicted with its agricultural use *and has been tolerated by the tenant or grazier*."[6]

So *Sunningwell* decides that when land does become registrable as a town or village green under section 22(1)(c) this is because of the *acquiescence of the landowner*.[7]

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[4] P. 396 (emphasis supplied).
[5] *Bright v Walker* (1834) 1 Cm & R 211, *per* Parke B at 219 (149 ER 1057 at 1060); cited by Lord Hoffmann at p. 393.
[6] P. 398 (emphasis added). These findings are questioned below.
[7] *Per* Lord Hoffmann at p. 393.

A piece of codification

In my textbook *Statutory Interpretation*[8] I suggest the following: "In its judgment the court may usefully express its determination of the legal meaning of a relevant enactment in the form of an articulation of the unexpressed words of the enactment". Lord Justice Sedley said that "in interpreting and applying the law the judges create law in the many spaces not filled by Parliament".[9] The spaces are thus notionally *concretised* through the process of judicial interpretation. It improves the clarity of legal reasoning when judges openly accept this and expressly articulate what seems to them an appropriately enlarged version of those provisions which their judicial function has required them to concretise.

Lord Hoffmann did not think fit to provide an articulation of "as of right" as he now leaves it. As a former legislative draftsman I shall attempt to supply the deficiency. I suggest the following as a new section 22(1A) of the 1965 Act (codifying *Sunningwell*)-

> "(1A) For the purposes of subsection (1)(c) above, where any inhabitants (whether or not as trespassers) have indulged in sports and pastimes on the land in question ('the relevant acts') they shall be treated as having done so as of right if, and only if, the following conditions are met-
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> (a) the owner of the land or any person claiming under him ('the owner') did not make known that he objected to the relevant acts, and
> (b) they were not done by force, and
> (b) they were not done secretly, and
> (c) they were not done with the licence of the owner."

Whether anyone ignorant of the background would expect to find these four negative conditions supplying the legal meaning of the positive phrase "as of right" is doubtful. One can only put it down to history.

My new subsection (1A) is meant to work in this way. It applies to acts as they happen, so any acts that do not satisfy the four conditions are ruled out of the equation. If any relevant acts within the 20-year period are left as satisfying the conditions, the question whether the right has been established falls to be decided on the basis of whether these remaining acts are sufficient, having regard to any acts which did not satisfy the conditions, to constitute an effective public user over the relevant 20-year period. On this aspect, Lord Hoffmann cited the following dictum of Bowen LJ-

> ". . . nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others beside the owners, under the fear that their good nature may be misunderstood."[10]

Lord Hoffmann said[11] that here "[a] balance must be struck". The evidence will show either that the owner acquiesced in the user in question or that he did not. In his report Mr Chapman held that the matter is to be decided on a balance of probabilities, rather than on the criminal standard of proof, and the House of Lords did not dissent. No doubt that is what Lord Hoffmann meant by his reference to striking a balance. The other possible meaning, that the welfare of the owner must give way when on balance the public interest so requires, is

[8] Butterworths, 3rd edn, 1997, s. 179. A supplement to the third edition is to be issued in November 1999.
[9] 110 *Law Quarterly Review* (1994) p. 270 at 289.
[10] *Blount v Layard* [1891] 2 Ch 681n at 691, cited by Lord Hoffmann at pp. 398-399.
[11] At p. 399.

scarcely tenable. We do not yet have a general right to roam in our law, though that day may not be far off.

I should add that the above suggested codification is not intended to dispose of all possible queries in a particular factual situation. It will need to be construed, like all brief legislative formulations, in the light of relevant case law. I would however say that the first condition (paragraph (a)) would be met if the land owner maintained a fresh-looking notice announcing the old wooden lie that trespassers will be prosecuted, or words to that effect.

What happened in Sunningwell

Rightly or wrongly (I suggest wrongly), the facts as found in the Chapman report were exclusively relied on by the House of Lords as the basis for the decision to order registration of the Sunningwell glebe as a town or village green. In his report Mr Chapman had advised the county council not to proceed with registration because he did not consider this was justified on the law as it was then understood.[12] He was of course quite right on that point.

Mr Chapman found that there was abundant evidence of use of the glebe for informal recreation (which Lord Hoffmann confirmed amounted in law to "lawful sports and pastimes") throughout the 20-year period in question, and that this evidence was not seriously challenged by the glebe's owner, the Board. The Chapman report included the following finding-

> "The applicant's witnesses gave evidence that they never asked permission to use the glebe for informal recreation and were never challenged in their open use of the land. A long time ago, there may have been a sign saying: 'Trespassers will be prosecuted' but it has not been seen for much more than 20 years . . ."

As mentioned above, Mr Chapman went on to say that the Board and their tenants had been tolerant of harmless public use of the land for informal recreation. However all this conflicts with a letter which I am assured by the solicitors for the Board was submitted to the Chapman inquiry. It was written by Mr J. W. Greening MBE, the grazing tenant of the glebe for almost the first half of the relevant 20-year period, and included the following passage-

> "I understand that some members of the local community are alleging that this land is a village green. I cannot believe that this is the case. I clearly recall that, during much of the time that I was tenant, there was a notice near the entrance to the glebe field which said 'Private - trespassers will be prosecuted'. I know that, as a matter of law, trespassers cannot be prosecuted, but I did make it my business to stop people from time to time who it seemed to me were trespassing on the land. For example, on one occasion I went round to see a man in the village whom I had seen riding his horse around the fields."

I am told that in the proceedings before the Appellate Committee this letter was drawn to the attention of Lord Hoffmann and his colleagues. The letter shows the danger of relying on the findings of an unofficial inquiry conducted on the basis that the law was otherwise than what it was afterwards held to be.

The Chapman report runs through the evidence of various witnesses, but those cited all speak in favour of the parish council's case for registration. The report says that counsel for the

[12] The leading case was the Court of Appeal decision in ***R v Suffolk County Council, ex p Steed*** (1996) P & C 102, which held that the law required an honest belief by the inhabitants (the 'subjective element') in their right to use the land. This was overruled by ***Sunningwell.***

Board called two witnesses only, but gives no indication of what their evidence was. Mr Greening did not give oral evidence, apparently because he did not then wish to appear to be taking sides. After the report appeared the Board might well have wished to object to the one-sided presentation of the evidence, but they had no call to do so. Mr Chapman had come down in their favour on the law. It would have seemed churlish to stir things by questioning the factual basis of the Chapman report. Sometimes to its cost, the Church of England still dislikes appearing churlish.

So was it right for the House of Lords to order registration solely on the basis of the facts found in the one-sided Chapman report, ignoring Mr Greening's letter to the contrary? Certainly Mr Greening thinks it was not right. He is very angry about it, and writes letters to the local papers saying so. It was one of his letters that first drew my attention to the circumstances outlined in this article. I respectfully agree with him that it was not right. A miscarriage of justice has occurred.

A final twist

There is a final twist to this strange tale of Sunningwell glebe. The parish council could never have afforded out of its own resources to pursue litigation ending in the House of Lords. So how was it managed? Why because the parish council were financed by the Countryside Agency, a government quango.[13] In fairness I showed the Agency a draft of this article and asked why they took up the case. They answered that it was for four reasons: (1) it was the view of leading experts that the decision of the Court of Appeal on the meaning of "as of right" was unduly restrictive; (2) the meaning of that term goes to the heart of green registration law and is central to the law on claiming public rights of way through long use; (3) the Agency is uniquely placed to support legal actions with this degree of national importance; and (4) it is a core part of the Agency's remit to improve opportunities for public enjoyment of the countryside.

As a result of this state-financed intervention, the Board (a part of the Church of England) are deprived of substantial funds. I am informed that in effect these are taken from the Diocesan Stipend Fund, which pays the salaries of clergy in the Oxfordshire diocese. But for ***Sunningwell*** the Board could have carried out its project (for which it had planning permission) of selling to a developer, for the erection of two houses, land amounting to less than a twentieth of the ten-acre glebe. I am told this would have realised for the Board a sum of between £150,000 and £200,000.

Other losses of the Board arise from the fact that they were ordered by the House of Lords to pay the costs incurred by the parish council in the Divisional Court, the Court of Appeal and the House of Lords. This was despite two factors telling against such an order. One is that the law was indisputably on the side of the Board until changed by the House of Lords at the very last hurdle. The other is that the Board was not an active party to the proceedings until the final House of Lords stage. (It was forced to join in then because no other party was concerned to defend its interests.) The overall legal costs will run into a considerable sum, and the total loss caused to the Board by the Agency's intervention is likely to amount to several hundred thousand pounds.

Before the prohibition on maintenance of actions was abolished recently this financial support by the Countryside Agency would not have been lawful. Perhaps the old rule had merit after all. Lord Denning described maintenance as "improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just claim or excuse".[14] The policy

[13] This year the name was changed from "the Countryside Commission".
[14] *Re Trepca Mines Ltd (Application of Radomir Nicola Pachitch (Pasic))* [1963] Ch 199 at 219.

underlying the prohibition of maintenance was thus described by Fletcher Moulton LJ: "It is directed against wanton and officious intermeddling with the disputes of others in which [the maintainer] has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse".[15] Of this passage Millett LJ recently said-

> 'The language and the policy which it describes are redolent of the ethos of an earlier age when litigation was regarded as an evil and recourse to law was discouraged. It rings oddly in our ears today when access to justice is regarded as a fundamental human right which ought to be readily available to all.'[16]

The Church authorities would be inclined to think Lord Denning was right and Millett LJ wrong, at least in this instance.

A remedy?

I suggested above that it was not right for the House of Lords to order registration solely on the basis of the facts found in the one-sided Chapman report, ignoring Mr Greening's letter to the contrary. Can anything be done by the Board to remedy this miscarriage of justice? There seem to be two possibilities.

The first possibility is for the Board to petition the House of Lords to set aside the decision in *Sunningwell* under the principle that the House, as the ultimate court of appeal "have power to correct any injustice caused by an earlier order of this House".[17]

The second possibility is for the Board to take the case to Strasbourg on the ground that the decision in *Sunningwell* (including the costs order) infringes two of the articles of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms. These are art. 6 (right to a fair trial) and art. 9 (freedom to manifest religious belief in worship, teaching, practice and observance).

I have not space to go into the question whether either of these courses would be likely to end in success for the Board.

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[15] *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1014. The dictum was approved by Lord Mustill in *Giles v Thompson* [1994] 1 AC 142 at 161.
[16] *Thai Trading Co (a firm) v Taylor* [1998] 3 All ER 65 at 69.
[17] *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [1999] 1 All ER 577, per Lord Browne-Wilkinson at 585.