



25 February 2015

PRESS SUMMARY

R (on the application of Newhaven Port and Properties Limited) (Appellant) v East Sussex County Council and another (Respondents) [2015] UKSC 7
On appeal from [2013] EWCA Civ 276

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Sumption, Lord Carnwath, Lord Hodge

BACKGROUND TO THE APPEAL

Newhaven is a port town on the mouth of the River Ouse in East Sussex; its harbour (“the Harbour”) has existed since the mid-sixteenth century. The Newhaven Harbour and Ouse Lower Navigation Act 1847 established harbour trustees with powers to maintain and support the Harbour and associated works. The Newhaven Harbour Improvement Act 1878, transferred these powers to the Newhaven Harbour Company. That Act also conferred on the Harbour Company the power to make byelaws in the manner prescribed by the Harbours, Docks and Piers Clauses Act 1847.

In 1931, byelaws were made regulating access to the Harbour and the use of the Harbour for (among other things) fishing, playing sports or games and dog walking (“the Byelaws”). The Harbour was subsequently vested in Newhaven Port and Properties Limited (“NPP”) in 1991 by statutory instrument (“the 1991 Newhaven Order”). West Beach (“the Beach”) is part of the operational land of the Harbour, and is subject to statutory provisions and to the Byelaws. NPP is obliged to maintain and support the Harbour and it has powers including the dredging of the sea bed and the foreshore

In December 2008 Newhaven Town Council applied to the County Council to register the beach as a town or village green on the basis that it had been used by a significant number of local inhabitants “as of right” for a period of at least 20 years. The issue raised by this appeal is whether the County Council was wrong in law to decide to register the Beach as a village green under the Commons Act 2006. This was on the basis either:

- (i) that the public enjoyed an implied licence to use the foreshore and therefore the use was not “as of right”;
- (ii) that the public enjoyed an implied licence arising from the Byelaws and therefore the use was not “as of right”; or
- (iii) that in any event, the Commons Act 2006 cannot be interpreted so as to enable registration of land as a town or village green if such registration was incompatible with some other statutory function.

JUDGMENT

The Supreme Court unanimously allows the appeal. Lord Neuberger and Lord Hodge (with whom Lady Hale and Lord Sumption agree) give the main judgment, allowing the appeal on both the second and third ground. Lord Carnwath (who writes a concurring judgment) would have preferred not to reach any decision on the third ground as it was not necessary to do so in order to dispose of the appeal.

REASONS FOR THE JUDGMENT

Use “as of right” means use without any right, whether derived from custom and usage, statute, prescription or express or implied permission of the owner. NPP argued that the public enjoyed an implied licence to use the foreshore for sports and pastimes and therefore that use was not “as of right”. In the alternative they argued that the public had an implied licence to use the Beach arising from the Byelaws. In the further alternative they argued that the Commons Act 2006 could not be interpreted so as to enable registration in circumstances where registration was incompatible with some other statutory function to which the land was to be put, that is, as a working harbour [23-24].

Implied licence to use the foreshore

In the absence of express permission from the owner of the foreshore, there are three possible conclusions on the legal basis of the public’s use of the foreshore for bathing; (i) there exists a general common law right to use the foreshore for bathing; (ii) the owner of the foreshore is presumed to permit members of the public to use the foreshore for bathing until the owner revokes this implied permission; or (iii) no such right exists and members of the public who do so are trespassers [29]. However, given the difficulty of the issues raised, it seems that, unless necessary to do so for the purpose of determining this appeal, the Court ought not to determine the first issue; it is therefore best to proceed on the assumption that, so far as the general common law is concerned, members of the public used the Beach for bathing “as of right” and not “by right” [50-51] Lord Carnwath’s concurring judgment offers further discussion and analysis on the question of public rights over the foreshore and the approach taken in Scotland, New Zealand and the United States [105-140].

Implied licence from byelaws

A byelaw can permit an activity which would otherwise be unlawful; there is nothing in the wide words of the 1847 Clauses Act to prevent byelaws created under that Act from creating such a permission [54-56]. Moreover, a prohibition can be expressed in such a way as to imply a permission; a requirement that dogs in a park must be kept on a lead implies a permission to bring dogs into the park [57-58]. A normal speaker of English reading the Byelaws would assume that he or she was permitted to bathe or play provided the activity did not fall foul of the restrictions in the Byelaws [60-63]. The only remaining question was whether the Byelaw needed to be brought to the public’s attention for this implied licence to exist. It is not always necessary for the landowner to show that members of the public have to have had it drawn to their attention that their use of land was permitted in order their use to be treated as being “by right”. In this case there existed a public law right for the public to go onto the land and to use it for recreational purposes, and therefore, the recreational use of the land in question by inhabitants of the locality was “by right” and not “as of right” [69-71]. It follows that NPP’s appeal should be allowed on the second issue [74].

Statutory incompatibility

The statutory scheme for registering town and village greens is analogous to the acquisition of rights over land by long use (“prescription”) under English and Scots law. Under both English and Scots law, it is not possible to acquire rights by prescription against a public authority which had acquired land for specified statutory purposes and continued to carry out those purposes, when the use of the land would be incompatible with those statutory purposes [91]. The question of incompatibility is one of the statutory construction and some assistance may be obtained from the rule that a later general provision does not depart from an earlier special one [93]. The 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. Registration would clearly be incompatible with the use of the Harbour as a working harbour [95-97]. It follows that the Commons Act 2006 cannot operate in respect of the Beach by reason of statutory incompatibility [101-102].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.uk/decided-cases/index.html