

Supreme Court

**Regina (Lancashire County Council) v Secretary of State for the
Environment, Food and Rural Affairs**

Regina (NHS Property Services Ltd) v Surrey County Council

[2019] UKSC 58

2019 July 15, 16;
Dec 11

Lord Wilson, Lord Carnwath, Lady Black,
Lady Arden, Lord Sales JJSC

*Commons — Town or village green — Registration — Application to register land
owned by public authority as town or village green — Whether registration
incompatible with statutory purposes for which land held — Commons Act 2006*
(c 26), s 15

In two separate cases applications were made to register land as a town or village green under section 15 of the Commons Act 2006¹ on the basis that local inhabitants had indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years. In the first case the land, which lay adjacent to a primary school, was owned by the claimant education authority. The Secretary of State's inspector held that most of the land should be registered under section 15, rejecting the claimant's contention that registration would be inconsistent with the statutory purposes for which it was held. The judge dismissed the claimant's claim for judicial review of that decision. In the second case the land, which adjoined a hospital, was owned by the claimant company, which was owned by the Secretary of State for Health and provided facilities to bodies exercising functions under the National Health Service Act 2006. The registration authority registered the land under section 15, rejecting the claimant's contention that registration would be inconsistent with the statutory purposes for which it was held. The judge allowed the claimant's claim for judicial review of that decision. On appeal the Court of Appeal upheld the registration of the land in both cases, holding that in each case registration was permissible because it was not incompatible with any statutory purposes that specifically related to the land in question.

On the claimants' appeals—

Held, allowing the appeals (Lord Wilson JSC dissenting and Lady Arden JSC dissenting in part), that section 15 of the Commons Act 2006 did not apply to land which had been acquired and was being held for statutory purposes which were incompatible with the land's registration as a town or village green; that in order for such an incompatibility to arise it was not necessary (i) that the land was actually being used, or was intended to be used in future, for such a statutory purpose, or (ii) that the land was specified in the statute whose purposes were incompatible with registration or (iii) that the land was held by a statutory undertaker, as opposed to a public authority; that, therefore, the issue of incompatibility was to be determined as a matter of principle, by comparing the statutory purpose for which the land was held with the rights claimed pursuant to the 2006 Act, rather than by carrying out a factual assessment of how the land was being used or was proposed to be used; that, in the first case, registration of the land would be incompatible with the educational

¹ Commons Act 2006, s 15: "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies. (2) This subsection applies where— (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and (b) they continue to do so at the time of the application."

- A statutory purposes for which the land was held, which included the construction of new school buildings or playing fields and (in relation to part of the land) the safeguarding of children on land used for education purposes; that, in the second case, registration of the land would be incompatible with the health-related statutory purposes for which the land was held, namely the provision of health facilities; and that, accordingly, neither the land in the first case nor the land in the second case was capable of being registered as a town or village green under section 15 of the 2006 Act (post, paras 55–60, 65–66, 68–69, 76).

R (*Newhaven Port & Properties Ltd*) v *East Sussex County Council* [2015] AC 1547, SC(E) applied.

New Windsor Corpn v Mellor [1975] Ch 380, CA, *Oxfordshire County Council v Oxford City Council* [2006] Ch 43, CA and R (*Lewis*) v *Redcar and Cleveland Borough Council* (No 2) [2010] 2 AC 70, SC(E) considered.

Decision of the Court of Appeal [2018] EWCA Civ 721; [2018] 2 P & CR 15 reversed.

The following cases are referred to in the judgments:

Ashworth Frazer Ltd v Gloucester City Council [2001] UKHL 59; [2001] 1 WLR 2180; [2002] 1 All ER 377, HL(E)

British Transport Commission v Westmorland County Council [1958] AC 126; [1957] 2 WLR 1032; [1957] 2 All ER 353, HL(E)

- D *E v Secretary of State for Home Department* [2004] EWCA Civ 49; [2004] QB 1044; [2004] 2 WLR 1351; [2004] LGR 463, CA

Edinburgh (Magistrates of) v North British Railway Co (1904) 6 F 620, Ct of Sess

Edwards v Bairstow [1956] AC 14; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E)

Ellice's Trustees v Comrs of the Caledonian Canal (1904) 6 F 325, Ct of Sess

Jones v Bates [1938] 2 All ER 237, CA

- E *New Windsor Corpn v Mellor* [1975] Ch 380; [1975] 3 WLR 25; [1975] 3 All ER 44; 73 LGR 337, CA

Oxfordshire County Council v Oxford City Council [2005] EWCA Civ 175; [2006] Ch 43; [2005] 3 WLR 1043; [2005] 3 All ER 961; [2005] LGR 664, CA; [2006] UKHL 25; [2006] 2 AC 674; [2006] 2 WLR 1235; [2006] 4 All ER 817; [2006] LGR 713, HL(E)

R v Inhabitants of Leake (1833) 5 B & Ad 469

- F *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385; [1999] LGR 651, HL(E)

R v Suffolk County Council, Ex p Steed (1995) 71 P & CR 463

R (Barkas) v North Yorkshire County Council [2014] UKSC 31; [2015] AC 195; [2014] 2 WLR 1360; [2014] 3 All ER 178; [2014] LGR 459, SC(E)

R (Beresford) v Sunderland City Council [2003] UKHL 60; [2004] 1 AC 889; [2003] 3 WLR 1306; [2004] 1 All ER 160, HL(E)

- G *R (Cooper Estates Strategic Land Ltd) v Wiltshire Council* [2019] EWCA Civ 840; [2019] PTSR 1980; [2020] 2 All ER 106, CA

R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] UKSC 11; [2010] 2 AC 70; [2010] 2 WLR 653; [2010] 2 All ER 613; [2010] LGR 295, SC(E)

R (Newhaven Port & Properties Ltd) v East Sussex County Council [2012] EWHC 647 (Admin); [2014] QB 186; [2012] 3 WLR 709; [2012] 3 All ER 1361; [2013] EWCA Civ 276; [2014] QB 186; [2013] 3 WLR 1389; [2013] 4 All ER 677, CA; [2015] UKSC 7; [2015] AC 1547; [2015] 2 WLR 601; [2015] 2 All ER 991; [2015] LGR 232, SC(E)

- H *TW Logistics Ltd v Essex County Council* [2018] EWCA Civ 2172; [2019] Ch 243; [2018] 3 WLR 1926; [2019] 3 All ER 312, CA

Tabernacle Permanent Building Society v Knight [1892] AC 298, HL(E)

Winterburn v Bennett [2016] EWCA Civ 482; [2017] 1 WLR 646, CA

The following additional cases were cited in argument:

Associated Provincial Picture Houses Ltd v Wednesbury Corp'n [1948] 1 KB 223;
[1947] 2 All ER 680, CA

Attorney General v Great Eastern Railway Co (1880) 5 App Cas 473, HL(E)

Attorney General v Poole Corp'n [1938] Ch 23; [1937] 3 All ER 608, CA

Attorney General v Teddington Urban District Council [1898] 1 Ch 66

Ayr Harbour Trustees v Oswald (1883) 8 App Cas 623, HL(Sc)

Bayley v Great Western Railway Co (1884) 26 Ch D 434, CA

Betterment Properties (Weymouth) Ltd v Dorset County Council; Paddico (267) Ltd v Kirklees Metropolitan Council (Geo H Haigh & Co Ltd intervening) [2007] EWHC 365 (Ch); [2007] 2 All ER 1000; [2008] EWCA Civ 22; [2009] 1 WLR 334; [2008] 3 All ER 736, CA

Betterment Properties (Weymouth) Ltd v Dorset County Council (No 2) [2014] UKSC 7; [2014] AC 1072; [2014] 2 WLR 300; [2014] 2 All ER 1; [2014] LGR 249, SC(E)

Blount v Layard (Note) [1891] 2 Ch 681, CA

Calder Gravel Ltd v Kirklees Metropolitan Borough Council (1989) 60 P & CR 322

Churchwardens and Overseers of West Ham v Fourth City Mutual Building Society [1892] 1 QB 654

Edinburgh, Magistrates of v North British Railway Co (1904) 6 F 620, Ct of Sess

Fitch v Fitch (1797) 2 Esp 543

Hamnett v Essex County Council [2017] EWCA Civ 6; [2017] 1 WLR 1155, CA

Ladd v Marshall [1954] 1 WLR 1489; [1954] 3 All ER 745, CA

Mann v Brodie (1885) 10 App Cas 378, HL(Sc)

Mills v Silver [1991] Ch 271; [1991] 2 WLR 324; [1991] 1 All ER 449, CA

National Provincial Bank Ltd v Hastings Car Mart Ltd [1965] AC 1175; [1965] 3 WLR 1; [1965] 2 All ER 472, HL(E)

R v Inner London Education Authority, Ex p Ali (1990) 2 Admin LR 822, DC

R (G) v Barnet London Borough Council [2003] UKHL 57; [2004] 2 AC 208; [2003] 3 WLR 1194; [2004] 1 All ER 97; [2003] LGR 569, HL(E)

R (Goodman) v Secretary of State for Environment, Food and Rural Affairs [2015] EWHC 2576 (Admin); [2016] PTSR 1523; [2016] 2 All ER 701

R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council [2010] EWHC 530 (Admin); [2010] LGR 631

Simplex G E (Holdings) v Secretary of State for the Environment (1988) 57 P & CR 306, CA

APPEALS from the Court of Appeal

By a claim form issued on 8 December 2015 the claimant in the first case, Lancashire County Council, sought judicial review of the decision of an inspector appointed by the Secretary of State for the Environment, Food and Rural Affairs to register land owned by the claimant and known as Moorside Fields, Lancaster, as a town green following an application under section 15 of the Commons Act 2006 by the interested party, Janine Bebbington. The ground of the claim was, inter alia, that registration under the 2006 Act was incompatible with the statutory purposes by and for which the land was held. By a judgment dated 27 May 2016 Ouseley J [2016] EWHC 1238 (Admin) dismissed the claim. By an appellant's notice filed on 27 June 2016 and pursuant to the permission of the Court of Appeal (Lindblom LJ) granted on 3 May 2017 the claimant appealed.

By a claim form issued on 8 December 2015 the claimant in the second case, NHS Property Services Ltd, sought judicial review of the decision of the registration authority, Surrey County Council, dated 23 September 2015 to register land owned by the claimant and known as Leach Grove Wood,

- A Leatherhead, Surrey, as a town or village green following an application under section 15 of the Commons Act 2006 by Philippa Cargill and the interested party, Timothy Jones. The ground of the claim was, inter alia, that registration under the 2006 Act was incompatible with the statutory purposes by and for which the land was held. By a judgment dated 13 July 2016 *Gilbart J* [2016] EWHC 1715 (Admin); [2016] 4 WLR 130 allowed the claim and quashed the registration authority's decision. By an
- B appellant's notice filed on 3 August 2016 and pursuant to permission of the judge the interested party appealed. The appeals in the first and second cases were conjoined.

- By a judgment dated 12 April 2018 the Court of Appeal (Jackson, Lindblom and Thirlwall LJ) [2018] EWCA Civ 721; [2018] 2 P & CR 15 dismissed the appeal of the claimant in the first case and allowed in part the
- C appeal of the interested party in the second case.

By notices of appeal dated 9 May 2018 and 24 May 2018 and with permission of the Supreme Court (Baroness Hale of Richmond PSC, Lord Carnwath and Lady Arden JJSC) granted on 31 October 2018 the claimants in both cases appealed.

- The issues before the Supreme Court, as stated in the statements of facts and issues agreed by the parties, were: (1) (solely in relation to the first
- D appeal) the basis on which the land was held by the claimant, including whether the inspector's conclusions as to the basis on which the land was held were lawful or correct, on the evidence before her; and (2) (in relation to both appeals) statutory incompatibility, namely the extent to which, applying the approach in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547, incompatibility with the statutory
- E purposes for which land was held by a public authority arose, so as to preclude registration of such land as a town or village green.

The facts are stated in the judgment of Lord Carnwath and Lord Sales JJSC, post, paras 12–21.

Douglas Edwards QC, Jeremy Pike and Daisy Noble (instructed by *Sharpe Pritchard LLP*) for the claimant in the first case.

- F The appeal should be allowed and the decision of the planning inspector appointed by the Secretary of State should be quashed for two main reasons: (1) the inspector made material errors of fact, which were relied on by the Court of Appeal, when arriving at the erroneous conclusion that it was not possible to be sure that the relevant land was acquired and is held for statutory education purposes (“issue (1)”); and (2) the appeal should be
- G allowed since the land cannot be lawfully registered as a town or village green by reason of incompatibility between the statutory purposes for which the land is held by the claimant and the consequences of statutory registration pursuant to the Commons Act 2006, following *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547 (“issue (2)”).

- H *Issue (1): statutory education purposes*

Five main submissions relate to issue (1). (a) An error of fact may give rise to a self-standing ground for a judicial review claim which is not dependent upon a finding of unreasonableness. (b) The inspector's conclusion on the claimant's statutory holding power is unlawful on the evidence before her.

(c) The inspector failed to engage the presumption of regularity. (d) The inspector's conclusion is *Wednesbury* unreasonable and irrational (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp'n* [1948] 1 KB 223). (e) Further proof that the inspector had made a material error of fact is provided by new evidence, which should be admitted, demonstrating that the land, at least the part used as playing fields (A and B), was acquired for statutory educational purposes.

Under issue (1)(a), the failure by the inspector, as fact-finder, to consider relevant factors is a point of law upon which the facts found can be displaced by an appellate court without any need to find unreasonableness (see *E v Secretary of State for the Home Department* [2004] QB 1044). An assessment made without any supporting evidence cannot stand (*Edwards v Bairstow* [1956] AC 14, 29). The requirements, as identified in *E v Secretary of State*, to demonstrate such a material error of fact are satisfied in the present case since: the mistake was one of "existing fact", namely the statutory basis on which the land was acquired and held during the relevant qualifying period; the fact was established in that the evidence before the inspector can only show that the land was acquired and is held for statutory education purposes; the claimant is not responsible for the mistake; and the error played a material part in the inspector's reasoning. Ouseley J's analysis in the present case [2016] EWHC 1238 (Admin) at [61], as adopted by the Court of Appeal [2018] 2 P & CR 15 at paras 56 and 58, was wrong, in that the alleged error of law (an error of fact) arises from the conclusions reached by the inspector on the basis of the information which was before her.

Under issues (1)(b) and (d) which go together, the inspector's conclusion was not consistent with the evidence before her, all of which pointed towards the land having been acquired and held for education purposes. Moreover, her conclusion was internally inconsistent in that she herself stated in her report that "there is no evidence to suggest that [the land] is held other than for educational purposes". It is to be noted that both Ouseley J (at para 57) and the Court of Appeal (at para 64) doubted that they would have reached the same conclusion. Further, although it is not strictly necessary for the claimant to demonstrate that the inspector's decision is unreasonable in the *Wednesbury* sense in order to establish a material error of fact, such unreasonableness exists in that no reasonable inspector, properly informed and having properly considered that evidence, could have reached the conclusion which she did.

Under issue (1)(c), the inspector failed to address the evidential presumption of regularity which was engaged in the present case as a result of the evidence as to the claimant's treatment and use of the land, which in turn depended upon the land being held for statutory education purposes (see *Calder Gravel Ltd v Kirklees Metropolitan Borough Council* (1989) 60 P & CR 322, 338–339, per Sir Nicolas Browne-Wilkinson V-C). The presumption of regularity applies to all of the land acquired by the claimant in the 1948 conveyance, including that upon which the school was built and the area used as playing fields. The inspector failed to address the implications to be drawn from the endorsement on the 1948 conveyance of the land, which includes areas A and B used as playing fields. That endorsement was in the form of a stamp which stated: "Recorded in the books of the Ministry of Education under section 87(3) of the Education Act 1944." The effect of section 87 of the Education Act 1944 was to exempt

- A land that was to be used for education purposes from the effects of the Mortmain and Charitable Uses Act 1888, which imposed restrictions upon assurances, such as conveyances, of land to “any corporation in mortmain”, including religious and charitable organisations. The inclusion of the endorsement is consistent only with the land having been conveyed for education purposes. Further, the inspector paid no regard to the fact that at the time of her decision part of the land was in use for education purposes as a playground and sports field. Had the inspector addressed the presumption of regularity, she could not have sustained her decision as to the statutory holding power.

- Finally, under issue (1)(e), a material error of fact may arise where a decision-maker reaches a conclusion of fact in ignorance of relevant evidence (as in *E v Secretary of State* [2004] QB 1044). Following the inspector’s decision the claimant found further evidence concerning the acquisition of part of the land, in particular a resolution to acquire 13.8 acres for the purposes of building a primary school. That new evidence should be admitted since it clearly establishes the material error of fact concerning the statutory holding power (see *E v Secretary of State*, paras 90–95). Although in terms of admissibility the starting point is the guidance given in *Ladd v Marshall* [1954] 1 WLR 1489, there is a discretion to depart from that guidance in exceptional circumstances and, in judicial review, flexibility has been allowed where the interests of justice require (*E v Secretary of State*, paras 81 and 82). Ouseley J at para 54, and the Court of Appeal at para 59, took an unjustifiably narrow and strict approach to the admissibility of additional evidence in contrast with the flexible, benevolent approach taken by the courts in other contexts concerning the registration of town and village greens (see *Paddico (267) Ltd v Kirklees Metropolitan Council (Geo H Haigh & Co Ltd intervening)* [2014] AC 1072, paras 33–42 and 44, per Baroness Hale of Richmond DPSC and *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, para 2, per Lord Bingham of Cornhill).

F *Issue (2): statutory incompatibility*

- On issue (2), where a local education authority holds land for the discharge of its statutory functions, registration of such land as a green pursuant to section 15 of the 2006 Act would be incompatible with the use of that land in fulfilment of those functions. The approach of the courts below, which was to limit the operation of statutory incompatibility to situations in which there is a specific statutory function that attaches to a particular parcel of land, is wrong and is contrary to *Newhaven* [2015] AC 1547. Alternatively, if land held for statutory purposes can be registered as a town or village green, the fulfilment of the statutory duties must prevail over the status of that land as a green.

- The following effects flow from registration as a green, as inferred from and following *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 (“the *Trap Grounds* case”): (a) local inhabitants become vested with enforceable rights to continue to use the land for lawful sports and pastimes; and (b) the protective provisions within the Victorian legislation (the Inclosure Act 1857 (20 & 21 Vict c 31) and the Commons Act 1876 (39 & 40 Vict c 56)) are engaged.

In the context of land held for statutory education functions, the effect of registration following the *Trap Grounds* case would be that the land could not lawfully be used for the discharge of those functions, since registration could preclude: (i) the education authority from undertaking any building works on the land, including constructing a new school or extending an existing school; (ii) use of the land for physical education or children's play; and (iii) the fencing of land in a way that interferes with local inhabitants' use. Thus, the effects of registration would "prevent", "impede" and "restrict" the use of the green in any meaningful way (see *Newhaven* at para 96, per Lord Neuberger of Abbotsbury PSC and Lord Hodge JSC).

The analysis in *Newhaven*, at para 91, of the acquisition of prescriptive rights over rights of way through long use, applies in other contexts, such as that in issue. It would be odd if a process of implied or deemed dedication could prevent the acquisition of a public right of way, but could not prevent the registration of land as a green, the rights over which are much more onerous. It follows that the principle established in *Newhaven*, at para 93, applies to land held by a local education authority—namely that where a statutory undertaker acquires and holds land in order to use it for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. That principle is not limited to statutory undertakers but applies to public authorities in general. Further, the reference in para 93 to incompatibility with "continuing use" does not require the land to be in actual use for statutory purposes at the point of registration, but rather may apply to incompatibility with future uses for those purposes; in *Newhaven* the beach in question had not in fact been used for harbour purposes nor was there any fixed intention to do so.

Therefore, there is nothing within the majority judgment in *Newhaven* which supports a conclusion that, for statutory incompatibility to arise through the registration of land as a green pursuant to the 2006 Act, the relevant statutory purpose giving rise to the inconsistency must be one which is "specific" to the land in question, as held by the Court of Appeal below at para 40. The correct question is whether the statutory purposes for which the land is held are capable of being discharged on the land consistently with its registration.

There are a number of criticisms of the Court of Appeal's reasoning, purportedly applying *Newhaven*, that no statutory incompatibility was established in the present case because the statutory education purposes in relation to the land were not "specific" provisions attached to "particular" land. That limitation does not follow from the proper interpretation of *Newhaven* and is illogical and unjustified. A consequence of that approach is that statutory incompatibility is only likely to arise as a result of registration of a public authority's land as a green where the statutory holding power, and the obligations arising from it, are derived from a private or local Act. It is generally only by such instruments that the necessary specificity and particularity will be secured.

The Court of Appeal's interpretation of *Newhaven* poses a number of difficulties. First, there was no mention in the judgment of Lord Neuberger PSC and Lord Hodge JSC in *Newhaven* of any such specificity or limitation. That judgment confirmed the proposition that rights cannot be created by dedication or prescription where they would be inconsistent with

A the statutory purposes for which the land is held. In none of the cases referred to on the issue of statutory incompatibility in that judgment was it suggested that incompatibility may only derive from a specific statutory function applicable to the particular land in question (see eg *British Transport Commission v Westmorland County Council* [1958] AC 126).

B Second, the approach proceeds on a misunderstanding of the legal basis and consequences of the acquisition of land by a public authority under, for example, the Education Act 1996, which involve a deliberate, conscious decision that the land is required for education purposes and, having been so acquired, it cannot be used for any other purpose absent a formal appropriation.

C Third, the approach is not grounded in the particular circumstances in *Newhaven* since there were no powers or duties to use, for a specific purpose, any particular area of land, let alone the beach that was in issue in that case.

Fourth, the Court of Appeal confined the principle in *Newhaven* to a very specific, narrow range of private or local Acts, so that the normal type of statutory undertakers who derive their powers from the exercise of general Acts would be excluded.

D Furthermore, there is no logical basis for the Court of Appeal's limitation: the effect of registration as a green of land held by an education authority is inconsistent with the discharge of its "defined" statutory duties on that land in the same way as was registration of the beach in *Newhaven*.

E Contrary to the Court of Appeal's suggestion at paras 36 and 39, the limitation is not justified by the floodgates argument for the following reasons. First, the burden of proof is, in all cases, on the local authority to demonstrate an incompatibility by reference to the purposes for which the land was acquired. There are many instances in which no question of incompatibility arises, such as in the cases referred to by the Court of Appeal at para 14 (*New Windsor Corpn v Mellor* [1976] Ch 380, *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70 and the *Trap Grounds* case [2006] 2 AC 674), as Lord Neuberger PSC and Lord Hodge JSC noted in *Newhaven* [2015] AC 1547, paras 98–99. It is also very common that the purpose for which land is held by a local authority is unknown, and in which the principle of statutory incompatibility will not assist the landowner. Second, there are other statutory purposes for which land may be held by a local authority which would not give rise to an incompatibility with registration as a green.

G Finally, in order for the principle of statutory incompatibility to be engaged, an inconsistency between the current statutory purposes for which land is held and registration as a green has to be demonstrated (see *Newhaven*, para 101). Thus, the incompatibility has to be established at the stage of registration and not at some potential future date. In the present case registration of the land as a green precludes the discharge by the education authority of its current statutory functions.

H *Future use*

In the event that the court is not persuaded by the claimant's submissions on statutory incompatibility, the concept of "future use" as identified by Lord Carnwath JSC in *Newhaven* at paras 138–139, becomes relevant, given that post-registration the land would remain held for the particular

statutory functions of the claimant as education authority, and the conflict between the consequences of registration, giving rights to local inhabitants (see the *Trap Grounds* case) and the protection under the Victorian legislation, versus the exercise of the statutory functions for which the land is held, would remain unresolved. A reconciliation can be arrived at in the following way. If a local authority owns land for a specific statutory purpose at the point of registration and the land is registered as a green, the rights that accrue and the protection operate subject to the entitlement of the authority to use the land, thereafter, for that statutory purpose. The basis for this solution is “the principle of equivalence”, under which the local inhabitants’ rights that accrue upon registration are equivalent to the nature of the use that took place during the qualifying period (see *T W Logistics Ltd v Essex County Council* [2019] Ch 243, paras 63–82).

George Laurence QC, Jonathan Clay and Simon Adamyk (instructed by *Womble Bond Dickinson (UK) LLP, Newcastle upon Tyne*) for the claimant in the second case.

The first issue, relevant only to the NHS claimant, is whether it should be granted permission to appeal on the “implied permission issue”, namely, was the use by the public of the land during the qualifying period with the implied permission of the landowner, provided such use did not disrupt the exercise of the statutory powers for which the land was held; and, if so, what, if any, consequence did that have for the operation of the doctrine of statutory incompatibility in relation to the land? Permission to appeal should be granted since it is necessary to consider the implied permission issue and the substantive, statutory incompatibility issue together, albeit sequentially, in order to assess properly the policy considerations and legal principles underlying this area as a whole.

Addressing those policy issues, in the present case there is a direct and obvious conflict between the registration of the land as a town or village green under section 15 of the Commons Act 2006 (and the rigid statutory restrictions on the use or development of land which that triggers) and the exercise of powers and duties to hold the land for the purposes of providing hospitals and other clinical facilities for the benefit of the wider public under, *inter alia*, section 3 of the National Health Service Act 2006.

Public authorities frequently find themselves with land held for their statutory purposes which is not currently needed for those purposes. It is in the public interest that such land should be able to be used for a recreational purpose in the meantime until it is needed or disposed of (“meantime use”). Where the land is in public ownership, it is also in the public interest that, in being so used in the meantime, the prescriptive principle should not be allowed to operate so as to frustrate the very statutory purposes for which the land is held.

There are three solutions to prevent such an outcome (as identified in *Ellice’s Trustees v Comrs of the Caledonian Canal* (1904) 6 F 325, 333–336). (1) By applying the “implied permission” principle, whereby a public authority’s passive response to the public’s use of its land is evidence of an implied permission to do so as long as such use does not disrupt the exercise of the powers for which the land is held. (2) By applying the “statutory incompatibility” principle, as established in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547, to prevent the prescriptive principle operating by resolving the statutory incompatibility issue in favour

A of wider public use. (3) By applying the “future use” principle, by which, even if the land were registered as a green, the rights which local people thereupon gained would have to give way if the landowner later wanted to use the land for its own, statutory, purposes (see *Ellice’s Trustees*, p 336).

B Each of these ways would avoid the unattractive consequence that, by not positively deciding to commit the land to meantime recreational use pending its being needed, the NHS owners acted unlawfully and ultra vires and thereby enabled the registration of the land as a green to the detriment of their statutory powers and in dereliction of their statutory duties.

C Local authority landowners often have no need to invoke the doctrine of statutory incompatibility in order to defeat claims to register their land as greens. Either (a) they will have an express power to allocate their land for public use, whether temporarily or for an indefinite period (see *R (Barkas) v North Yorkshire County Council* [2015] AC 195 and *Newhaven*, paras 20–24, per Lord Neuberger of Abbotsbury PSC, and paras 70–84, per Lord Carnwath JSC), or (b) the authority, having no immediate need to use the land for the purposes for which it has been appropriated, may allow it to be used for recreation in the meantime either as an adjunct to the purposes for which it acquired or appropriated the land (see *Attorney General v Teddington Urban District Council* [1898] 1 Ch 66, 70 and *Bayley v Great Western Railway Co* (1884) 26 Ch D 434, 450 per Cotton LJ and p 456 per Bowen LJ) or under section 120(2) of the Local Government Act 1972. In all these cases, the land has been lawfully allocated or committed under statutory powers for public recreational use.

E If the claimant’s submissions on implied permission are accepted, that does not have the effect that its statutory incompatibility argument must be rejected (see *Newhaven*). Solution (1) above, the implied permission route, and solution (2), the statutory incompatibility route, are not mutually exclusive and can and should both be given effect on the facts of this case (as in *Newhaven*).

Solution (1): implied permission

F In relation to solution (1), that of implied permission, there is a critical distinction in the application of section 15 of the Commons Act 2006 between a private owner (such as in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335) tolerating use of land not held for public purposes (which can provide no evidence of an implied permission) and a public owner passively responding to recreational use in a statutory context (see *Barkas* [2015] AC 195, paras 14, 24, 64, 66, 82 and *Newhaven* [2015] AC 1547, para 68). These differences are reflected in the distinction between a public, or publicly-based, licence and a private one (see *Barkas*, paras 23 and 59 and *Newhaven*, paras 71 and 77). In particular, where the landowner is able to rely on a statutorily-based permission, that automatically renders public use “by right” without the public having any knowledge that that is so (see *Newhaven*, paras 69–71 and *Barkas*, para 23).

H Surrey County Council (who previously owned the land in the present case) appropriated the land in 1971 to “Education, Health and Services”. Section 158(2) of the Local Government Act 1933 (23 & 24 Geo 5, c 51) and, later, section 120(2) of the 1972 Act, expressly authorised the land to be used for any of its functions including, therefore, recreational purposes, pending its being used for the purposes for which it was acquired. Use by the

public would therefore (i) have been pursuant to the same kind of public law right, derived from statute, as existed in *Barkas* and *Newhaven*; and (ii) would likewise have been “by right” and not “as of right”. Therefore, such meantime use by the public will automatically be treated as impliedly permitted and the land will not be registrable as a green (see *Newhaven*, paras 135–136, per Lord Carnwath JSC).

It is noted that the decision in *Barkas*, which related to a revocable licence, is an exception to the principle identified by Lord Walker of Gestingthorpe in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, that the landowner has to do something to bring his permission to the attention of the local public in order for such permission to be implied (see also *Newhaven*, paras 69–71, per Lord Neuberger PSC).

In response to the argument raised by the Secretary of State, it is implicit that a public authority, holding land for a particular purpose when it is not for the time being needed for that purpose, is able to put that land to meantime uses. When the authority does so the land is held subject to an implied permissive licence (referring to *R (Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2016] PTSR 1523).

A positive decision is in fact not necessary in the present case to trigger implied permission since the claimant’s passive response to the use of its land for recreation is only consistent with, and not potentially destructive to, the statutory purposes for which the NHS owners hold the land (similarly in *Newhaven*, para 102). It is enough that a public authority simply submits to the land being used for recreation purposes to trigger the right to the same implied permission as arises where the land is deliberately appropriated to recreational use. Recreational use of land for which a public body has no current need can, and should, be regarded as impliedly permitted, notwithstanding the lack of overt action to convey such permission to the public.

In the event that an actual decision is required to trigger an implied permission, such a decision can be shown in two ways. First, the passage of time is sufficient to show that at some point a decision must have been made to submit to the use of the land in this way, on the basis that if the land was required at a later date for the purposes for which it was held, the owner would not be liable to be met by an application to register the land as a green. Although there is no evidence of any positive decision by the NHS owners to commit the land to “meantime” recreational use, the use itself over a protracted period is sufficient to evidence such a decision, if such a decision is necessary.

Second, such a decision would be presumed to have been taken pursuant to the presumption of correctness or regularity. Where land is held for a recreational purpose, and “members of the public then use the land for that purpose, the obvious and natural conclusion is that they enjoy a public right, or a publicly based licence, to do so” (see *Barkas* [2015] AC 195, para 23 and *Goodman* [2016] PTSR 1523, para 31). Under the presumption of regularity, it is right to presume that the claimant did what it had to do to trigger an implied permission for a meantime use (see *Calder Gravel Ltd v Kirklees Metropolitan Borough Council* (1989) 60 P & CR 322).

Further, where the land has been committed to recreational use by a public authority owner, no adverse consequences can be drawn from failing to warn the public off (see *Barkas*, para 65) or failing to take any other steps

A to render use not as of right, such as to erect fencing or grant an express permission to use.

The interested party's argument that mere toleration of use cannot prevent rights being acquired, in reliance on *Sunningwell* [2000] 1 AC 335, is misconceived, since an implied ancillary power is attached to the land, allowing the public to use the land temporarily for lawful recreation pending its being needed for its statutory purposes. The absence of any express
B general power in such terms is consistent with the availability of the implied power. [Reference was made to *Attorney General v Great Eastern Railway Co* (1880) 5 App Cas 473.] The consequences of exercising such an implied power cannot logically differ from the consequences of exercising an express power, namely the automatic conferment, in each case, of an implied permission to use the land for recreation without having to take any step to
C bring such permission to the attention of the public. Under such a logic it is inappropriate to infer that members of the public have been using the land as of right simply because the authority has not objected (see *Barkas*, para 24).

This proposition, if accepted, involves no violation of the rule that, in the case of privately owned land, tolerated use is not to be equated with implied permission (cf *Mills v Silver* [1991] Ch 271, *Sunningwell* [2000] 1 AC 335
D and *Beresford* [2004] 1 AC 889, and see *Newhaven* [2015] AC 1547, paras 69, 71, per Lord Neuberger PSC, and para 135, per Lord Carnwath JSC).

The interested party's reliance on *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 ("the *Trap Grounds* case") to support his contention that there is and should be no general exemption for public authorities is misplaced since that case is not authority for the implied
E permission principle.

The relevant statutory NHS powers and duties in relation to the various NHS owners of the land over the 20-year period, and ongoing, are entirely consistent with the holding of the land for relevant NHS purposes while allowing the owners, from time to time, to allow the public to indulge in "meanwhile" recreational use.

Although the issue of implied permission is a legal issue, not a factual one,
F the findings of fact made by the inspector in his report are consistent with the inference that the NHS owners' passive response to the recreational use by the public of the land is evidence of an implicit knowledge of such use and permission to do so, as long as such use does not disrupt their statutory activities (see *Newhaven*, para 102, per Lord Neuberger PSC). Therefore, the use by the public having been peaceable and open, the landowner from
G time to time plainly knew about such use and was content that it should be taking place.

Solution (2): statutory incompatibility

In relation to solution (2), applying the principle of statutory incompatibility, the NHS claimant adopts the submissions made by the education authority claimant.
H

The Court of Appeal [2018] 2 P & CR 15 interpreted and applied *Newhaven* narrowly and established new principles going beyond those set out in that case at para 93. The Court of Appeal found that the doctrine of statutory incompatibility is engaged only where there is inconsistency between registration as a green and a "specific statutory power" concerning

a particular parcel of land, and wrongly interpreted the decision in *Newhaven* so as to limit its operation, in practice, to statutory undertakers exercising powers or duties under private Acts. A

By virtue of section 223(1) of the National Health Service Act 2006, the claimant's only statutory function in respect of the land is to hold it exclusively to enable the local clinical commissioning group to exercise its statutory health functions. Any registration of the land as a green would prohibit the future expansion of the hospital or other hospital-related facilities on or on to the land, which is an essential function of the claimant. The Court of Appeal failed to identify any statutory function of the NHS which could be carried out on the land if it is registered as a green. Therefore, applying the reasoning in *Newhaven*, it should not be necessary to lead evidence as to the plans for the future of land which adjoins the working hospital. For the doctrine of statutory incompatibility to apply, there need be no direct actual conflict at the time of registration (see *Newhaven*, para 96). B C

In the event that the claimant had dedicated the land as a green, it would have been acting ultra vires its powers under the National Health Service Act 2006. [Reference was made to *British Transport Commission v Westmorland County Council* [1958] AC 126 and *Teddington* [1898] 1 Ch 66.] The consequences are more serious than if a right of way is granted across the land, since the public would acquire rights of recreation all over the land (see the *Trap Grounds* case [2006] Ch 253). D

Solution (3): future use

In relation to solution (3), the principle of future use contemplates that (a) the registration of land as a green will take place, but nevertheless (b) the consequences of registration (in the form of the stringent protection of the land pursuant to the Victorian legislation (the Inclosure Act 1857 and the Commons Act 1876) and of the public rights which would normally follow from such registration) are subject to, and must yield to, the more specific statutory powers and duties which govern the use of the land by the public authority landowner. This reasoning applies a fortiori where, as here, the public authority not only has a power to use the land for certain statutory purposes but is under a duty to do so. It is highly desirable that public land which is not currently needed for the use for which it is held should be made available for public use in the meantime (see *Blount v Layard (Note)* [1891] 2 Ch 681, 691, per Bowen LJ). E F

In the event that solution (3) is adopted, as set out in *Newhaven* [2015] AC 1547, para 139, it should be adapted so as to ensure that local people are only entitled to use the land so long as their doing so does not prevent the land being developed for hospital use, or other healthcare purposes, or from being sold with vacant possession. It would be unsatisfactory to apply solution (3) without appropriate adaptation, in such a manner as in effect to compel the claimant to retain the land for future medical use even if, in the future, it was of the opinion that it would be better to dispose of it for full value, freed from recreational rights associated with it being a green, and to use the proceeds of sale to acquire other more suitable land elsewhere. A statutory body such as the claimant (whose sole function is effectively to acquire and hold land for medical purposes which are to be fulfilled by others) must have an implied ancillary power enabling it to dispose of the H

A land and acquire other land for similar purposes if circumstances change. It would be necessary, therefore, if the land were registered as a green but solution (3) adopted, for the rights gained in consequence of registration to be limited to whatever extent was necessary to permit the disposal and future development of the land or any part of it, whether for medical purposes or for non-medical purposes, by a future purchaser.

B *Tim Buley QC* (instructed by *Treasury Solicitor*) for the Secretary of State in the first case.

A number of questions arise in relation to the education authority claimant's agreed issue (1), the preliminary issue regarding the statutory holding power: (a) whether a judicial review court is entitled to substitute its own finding of fact other than on the basis that the inspector's finding was irrational; (b) whether the inspector's conclusion here was "wrong" applying the appropriate standard pursuant to question (a); (c) did the inspector err by failing to apply a "presumption of regularity"; (d) whether the inspector's conclusion of fact was irrational; and (e) whether the lower courts were wrong to refuse to admit new evidence not before the inspector.

Issue (1): statutory education purposes

D On issue (1)(a), the standard of review, the claimant's method of reframing the inspector's finding of fact as an "error of fact" (*E v Secretary of State for Home Department* [2004] QB 1044), or as being made without an evidential basis, does not alter the basic principle that a court should only interfere with the factual findings of a public body where those findings are irrational. When faced with a finding that is tainted by some public law error falling short of irrationality, the court will generally limit itself to quashing and remitting the matter. It is only where a finding is irrational, and that to the point where only one possible conclusion was open to the decision-maker, that a court can substitute its own conclusion.

E The claimant's arguments on why a court might depart from the irrationality standard are misconceived. First, its contention that a judicial review court is freely entitled to disregard or substitute findings of fact made by a public body or court whenever it considers that those findings are "wrong" would swallow up the *Wednesbury* principle entirely (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp'n* [1948] 1 KB 223). There needs to be new objective evidence or a concession about the factual error (see *E v Secretary of State*, para 66, per Carnwath LJ).

F Second, the claimant's argument that an error of law may occur where a finding of fact is made on the basis of "no relevant" or inconsistent evidence begs the question of how one decides whether the evidence relied upon by the decision-maker is sufficient to her conclusion. The answer is, in public law, by applying the *Wednesbury* standard (see *Edwards v Bairstow* [1956] AC 14, 36, per Lord Radcliffe).

G On issues (1)(b) and (d), whether the inspector erred in concluding that the land was not held by the local authority for educational purposes, the claimant does not assert that the inspector's reasoning on this question was tainted by some discrete error or misdirection, simply that she reached the wrong (and therefore perverse) conclusion. The question whether the inspector, on the particular facts of this case, reached an irrational conclusion is not of general importance, and the court should approach the issue on the basis that (i) the inspector is an expert and specialist fact-finder who

considered the evidence at a public inquiry and (ii) the question of whether her decision was irrational was considered by the two lower courts, both of whom rejected the claimant's arguments (see Ouseley J [2016] EWHC 1238 (Admin) at [56]–[63]; and the Court of Appeal [2018] 2 P & CR 15, para 64). Ouseley J was right, for the reasons he gave, to conclude that the inspector's conclusion was not irrational, as upheld by the Court of Appeal. The inspector was entitled on the evidence before her to find that the claimant had not demonstrated, in accordance with the burden of proof upon it, that the land was held for statutory educational purposes.

On issue (1)(c), the presumption of regularity has no application here, where there is no question of the local authority having acquired the land unlawfully. Under the presumption, the only question is whether it lawfully acquired the land for educational purposes, or lawfully acquired it for some other purpose (see *Calder Gravel Ltd v Kirklees Metropolitan Borough Council* (1989) 60 P & CR 322). The Court of Appeal was correct in holding that the presumption does not apply in the present case (see para 63, per Lindblom LJ). Further, the inspector made no error and was entitled to conclude that the documentation relating to the legality of the local authority's conduct in acquiring the land did not justify the inference that it was acquired for educational purposes.

On issue (1)(e), any new evidence, not seen by the inspector, but said to be relevant to the basis on which the local authority held the land, should be admitted pursuant to the principles from *Ladd v Marshall* [1954] 1 WLR 1489. Since this was an issue for the discretion of Ouseley J as trial judge, the only question on appeal is whether he erred in the exercise of that discretion. The claimant's submission in answer to this, that the lower courts took "an unjustifiably narrow and strict approach to the admissibility of the additional evidence", implicitly acknowledges that it cannot satisfy the *Ladd v Marshall* test, and that is plainly right since the additional material was always within its possession. The judge was entitled to apply the *Ladd v Marshall* principles with reasonable strictness due to the circumstances of the present case in which a public body seeks to have its own mistakes disregarded, to the detriment both of the Secretary of State and the local inhabitants. The claimant's clear failure to satisfy those principles should result in refusal to admit the new material later on.

Implied permission

Although not a necessary part of the Secretary of State's case, he contends that the NHS claimant should not be given permission to appeal on the "implied permission" point, because the point is not arguable or suitable for permission (bearing in mind it was not raised in the lower courts). In the alternative, if permission is granted, it should in any case be rejected. The Secretary of State agrees with and adopts the arguments advanced by the interested party in the NHS claimant's appeal, Mr Jones.

The distinction between permission to use land, on the one hand, and mere toleration of use on the other, is fundamental to the concept of use "as of right" as a basis for the acquisition of public and private rights (see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 and *T W Logistics Ltd v Essex County Council* [2019] Ch 243, per Lewison LJ at para 89). To infer permission from mere toleration of use by a public body would: (i) appear to render such land immune from registration

- A as a green or indeed from the acquisition of other forms of right; (ii) be inconsistent with the outcome of any case in which such rights have been acquired over land held by a public body; and (iii) have provided a sufficient basis for the decisions in all cases where the acquisition of rights over such public body land were defeated by some more precise doctrine (including *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547 and *R (Barkas) v North Yorkshire County Council* [2015] AC 195).

B Although there might be no case which is expressly inconsistent with the “implied permission” principle contended for by the NHS claimant, that principle cannot be reconciled with the thrust of the earlier case law and there is no case which gives any positive support to it. The argument by the NHS claimant is in reality an invitation to the court to legislate.

- C The argument of the NHS claimant that the court should infer that public bodies have an implied or ancillary power to use land for lawful recreational purposes for so long as the land is not required for its main statutory purpose, is misconceived. There is no need to infer any such specific ancillary power, because a public body will generally have all of the ordinary rights of any other landowner, which include the right to give permission for the public to go on the land, whether for recreation or any other purpose.
- D That is quite different from the much more specific powers of certain public bodies to allocate land specifically for public use (as in *Barkas*) or to make byelaws (as in *Newhaven*). It follows that there is nothing which distinguishes the position of the public landowner, who can give permission to go on the land but has not done so, from the position of the private landowner, who is entitled to give permission but again has not done so.

- E Contrary to the NHS claimant’s contention, in considering whether use is “as of right”, it is a basic rule that any permission to go on the land must be communicated at the time, or in advance, of the use occurring: *Newhaven*, para 68. The NHS claimant’s statement that *Barkas* is an exception to this is mistaken, since that case was dealing with the different position where the public’s legal right to be on the land takes effect by operation of law without the need for the permission to be communicated. The NHS claimant’s
- F reliance on *R (Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2016] PTSR 1523 is also misconceived since that case was decided on its particular facts which were within the narrow context of the situation in *Newhaven*.

- G It follows that the public’s permission to go on the land must be apparent to them at the time of use, not merely something that is inferred after the event from a long period of toleration. Accordingly, the principle of “implied permission” has little substance: the permission must be apparent from the outset, on the basis of one day’s toleration.

- H A follow-on from the NHS claimant’s argument is the contention that, as a matter of law, for all purposes, the public are entitled to infer that they have permission to go on all public land, held for whatever statutory purpose, unless expressly told the contrary. A consequence of that would be that the public would never be trespassers on public land unless given an express notice or prohibition against doing so, or unless the current use of the land were inconsistent with recreational activity. That would have far wider consequences than just for village green law or the law of prescription.

Issue (2): statutory incompatibility

A

On issue (2), the substantive issue shared by both the education authority and the NHS claimants, the principle of statutory incompatibility arising from *Newhaven* [2015] AC 1547, that a town or village green cannot be registered over land which is subject to specific statutory duties to hold the land for particular purposes, has no application in the present case, where the local authority is under no obligations relating to the land that are inconsistent with its registration as a green.

B

Section 15 of the Commons Act 2006 embodies Parliament's intention that the creation of a new green by registration serves a public purpose (see *Summingwell* [2000] 1 AC 335 and *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 ("the *Trap Grounds*" case)). Further, section 15 is mandatory: where the conditions for registration are met, the registration authority is required to register the land. There is no exception, save for the principle in *Newhaven*, either for publicly held land or on the basis of the statutory incompatibility principle (see the interpretation of section 15 of the 2006 Act in *Newhaven*, at para 76).

C

The claimant local authority has entirely general functions, unrelated to this land or indeed any land, to secure adequate provision of education in its area, and it holds land essentially as a resource for the better performance of those functions. That does not bar registration as a village green any more than it would bar the creation of a private easement or a public right of way. Statutory incompatibility, for village greens as for rights of way, is confined to cases where the statutory regime imposes some limit on the public body disposing of or alienating the land voluntarily. The principle does not apply simply because a public body holds land for the furtherance of some general statutory purpose which does not have to be performed on the land in question and has no implications for the body's voluntary decisions concerning the disposal or granting of rights over the land.

D

E

The *Newhaven* exception to the clear statutory rule under section 15 should be interpreted narrowly. Although the principle is not confined to "statutory undertakers" per se, it may well be largely confined, in practice, to statutory undertakers or other special public bodies which hold specific land for specific purposes, for three reasons. First, the alternative appears to be that nearly all public body land is immune from registration, which would be very surprising given that the 2006 Act gives no special treatment to public land. Second, since there is no wider principle of statutory incompatibility in relation to public and private rights of way, it would be surprising if the position were different for village greens. Third, *Newhaven* says, in terms, that there is no general principle of public or local authority immunity. The statutory provisions in play in *Newhaven* concerned duties in relation to a specific piece of land, i.e. the beach.

F

G

The *Newhaven* principle of statutory incompatibility only makes sense in situations where the court is faced with a direct conflict between two statutory regimes, and the stark choice of either not registering the green, thereby departing from section 15 of the 2006 Act, or registering the green, thereby departing from the conflicting provisions (the *Newhaven Port* legislation in the *Newhaven* case itself).

H

In the present case, there is no problem of incompatibility between the provisions of two statutory regimes since the education legislation says nothing about the use of land and does not impose any specific powers and

- A obligations in relation to the specific land in issue (cf the Newhaven Port legislation in *Newhaven* [2015] AC 1547, see para 94). There have been cases where land held by a local authority was registered as a village green: see *New Windsor Corpn v Mellor* [1975] Ch 380, the *Trap Grounds* case [2006] 2 AC 674 and *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70. The claimant's interpretation of the *Newhaven* principle of statutory incompatibility is incorrect, in that Lord Neuberger of
- B Abbotsbury PSC, at para 93, stressed that for the principle to apply the land had to be held for specific statutory purposes that are inconsistent with registration as a green: "Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one." The statutory purposes relied on by the claimant as being inconsistent with the 2006 Act are of a
- C general nature, not "special"; the provisions of the Education Act 1996 have nothing to do with the land, they do not attach to the land, but simply provide that there have to be sufficient schools in any particular area.

- The Secretary of State's interpretation of statutory incompatibility is further supported by the Supreme Court's treatment in *Newhaven*, paras 98–101, of various cases relied upon by the registration authority, including *New Windsor*. Lord Neuberger PSC's conclusion at para 101
- D (that the ownership of land by a public body which has statutory powers that it can apply in future to develop land is not of itself sufficient to create a statutory incompatibility), only makes sense if the *Newhaven* principle requires more than that registration as a village green will interfere with the purpose for which land is held for the time being—it is not enough merely that land is held with a view to future development. Examples of cases in
- E which "plans for the future" development of the land in issue would come within the principle of statutory incompatibility (see *Newhaven*, para 96), are *British Transport Commission v Westmorland County Council* [1958] AC 126 ("BTC") and *Goodman* [2016] PTSR 1523.

- There is strong support for the Secretary of State's approach to the ambit of the *Newhaven* principle derived from both English and Scottish case law on private and public rights of way and easements. The analogy with the
- F English case law (as made in *Newhaven* at paras 78–80, 91) on the rules of prescriptive acquisition (for example *Sunningwell* [2000] 1 AC 335) supports a limitation on the statutory incompatibility principle, namely that it is only in play where the statutory purposes for which the land is held prevent the public body from granting the rights in question voluntarily. In order to set up an incompatibility in England in relation to rights of
- G way/easement law, the land has to be held for the particular purpose which prevents its alienation, and the landowner has to be bound to use it for that purpose (see *BTC* [1958] AC 126, 142, per Viscount Simonds). Those requirements are not satisfied where the land is held by a public authority pursuant to general statutory purposes, such as in the present case (cf *Newhaven* and *BTC*).

- H Under the relevant Scottish case law, which provides a stronger analogy with the registration of greens: (i) mere private law incapacity does not bar the acquisition of prescriptive rights; but (ii) a statutory bar to a voluntary grant of the rights in question by reason of the statutory purposes for which the land is held will do so (see *Mann v Brodie* (1885) 10 App Cas 378 and *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623, referred to in

Ellice's Trustees v Comrs of the Caledonian Canal (1904) 6 F 325; see also *Newhaven* [2015] AC 1547, para 86). The corollary is that the mere fact that a statutory undertaker or other public body holds land for some public purpose does not bar the creation of rights by prescription. That requires something about the way in which the land is held which would prevent the voluntary grant of the right in question. Where there is nothing to prevent the right being granted expressly, there is nothing to prevent the operation of the rules of prescription. The same point can be made about public rights of way (see *Magistrates of Edinburgh v North British Railway Co* (1904) 6 F 620, 636–637, per Lord Kinnear, quoted in *Newhaven*, para 83). The application of the statutory incompatibility principle under the Scottish case law is limited in that it does not apply wherever a public body holds land for any purpose that, in itself, would prevent the acquisition of rights by prescription. That limitation should be applied by analogy to the registration of town or village greens.

Accordingly, the English and the Scottish case law on acquisitive prescription points, essentially, to the same principle of statutory incompatibility, namely that, where the statutory basis upon which land is held by a public body prevents that public body from granting rights voluntarily, so too will it prevent the same rights from arising as a result of prescription or “acquiescence”. Although that cannot be automatically applied to the interpretation of section 15 of the 2006 Act, it provides strong support for a similar limitation on the principle which the court divined, on the basis of Parliament’s presumed intent, in *Newhaven*.

In applying the principle of statutory incompatibility to the present case, the powers and duties relied on by the claimant, as education authority, in relation to the land do not engage the principle of statutory incompatibility (see e.g. sections 13, 14 and 542 of the Education Act 1996 and regulation 10 of the School Premises (England) Regulations 2012 (SI 2012/1943)). This is for four main reasons.

First, the obligations in question do not attach in any way directly to the land in issue (in contrast to *Newhaven* and the older cases on statutory undertakers). Indeed, they are not obligations relating to land at all, since land is relevant to the discharge of the local authority’s educational functions only as a resource which it may draw upon in order to discharge its obligations.

Second, the obligations are entirely general in character, to secure sufficient education in their area, and to secure that any playing fields as do exist are of an appropriate standard. There is no scope here for the local authority to rely on the principle, seen as important in *Newhaven*, that the general scheme of the village green legislation should yield to some more specific scheme relating to the land in issue. If anything, this points the other way—on the basis that section 15 of the 2006 Act is concerned specifically with the establishment of public rights over land it can be said to be more “specific” to the land than the local authority’s entirely general obligations, unrelated to land, to secure schools etc.

Third, the obligations do not impose any limitation on the local authority’s voluntary dealing with the land: it can decide to dispose of the land altogether, or at any time to appropriate the land for some other purpose, on the basis that it is no longer required for educational purposes.

- A There is nothing to prevent it granting a private easement, or dedicating a public right of way.

Fourth, the exercise or purported exercise of rights by third parties could lead to the establishment of rights by prescription. Nothing about the fact that the land is held for educational purposes, or the local authority's general obligations under the 1996 Act, prevents the creation of an easement or a public right of way by prescription. Indeed, in the extreme case, the land

- B could be made subject to adverse possession. Accordingly, the claimant's argument here, that the land enjoys some special immunity to registration as a village green would, if correct, give it an immunity which it does not enjoy from the establishment of any "analogous" right.

On the correct interpretation of *Newhaven*, there is nothing about the village green legislation which is incompatible with the education

- C legislation. There is no question of registration under section 15 of the 2006 Act preventing the local authority from doing something which it is required to do by the 1996 Act, whether in relation to the land in issue or indeed more generally. The two legislative schemes are concerned with completely different subject matters and impact upon each other only in the most indirect way. Accordingly, there is no statutory incompatibility of a kind which prevents the registration of the land in question as a village green, and

- D the appeal should be dismissed.

Future use

The claimant's alternative argument that engages the "future use" issue, as identified by Lord Carnwath JSC in *Newhaven* [2015] AC 1547, paras 138–139, is a wholly new and unheralded point which the court

- E should not entertain. The claimant does not have permission to argue these points on this appeal, they were not argued below nor raised with the inspector, and they do not form part of any "agreed issue".

Moreover, even if these procedural difficulties were overcome, there is a fundamental problem in that there is simply no space for these arguments in this appeal, which is an appeal from a claim for judicial review of the

- F inspector's decision to register the land as a green. The arguments which the claimant makes do not go to the question of whether the inspector was right to so register, or to the legality of her decision. The inspector made no ruling, and expressed no opinion, about what the consequences of registration would be, in terms of when and how the 19th century restrictions (the Inclosure Act 1857 and the Commons Act 1876) on interference with village greens might apply, and she had no jurisdiction to do so. The argument on

- G the principle of future use has no relevance to the relief which can be sought in this appeal or the outcome of the appeal, since any observations which the court may make would be obiter dicta.

On the merits of the argument on future use, the claimant applies the principle as identified by Lord Carnwath JSC in *Newhaven* in an illogical way. The principle is not some kind of addendum to the statutory

- H incompatibility rule which the majority in *Newhaven* adopted, as opposed to an alternative to it. Once the majority approach is accepted, the statutory incompatibility principle either applies, or it does not, and there is no room for the secondary principle for which the claimant contends. Further, it is difficult to see how such a principle could operate in relation to the land in issue.

Ned Westaway (instructed by *Harrison Grant*) for the interested party in the first case. A

Registration of land as a town or village green under section 15 of the Commons Act 2006 does not prevent a landowner from performing activities on that land to their own private advantage, provided that it does not unreasonably interfere with public use. There has to be “give and take on both sides” (*Fitch v Fitch* (1797) 2 Esp 543, and see *Oxfordshire County Council v Oxford City Council* (“the *Trap Grounds* case”) [2006] 2 AC 674, para 51, per Lord Hoffmann and *T W Logistics Ltd v Essex County Council* [2019] Ch 243, para 32, per Lewison LJ). As a matter of law, therefore, registration as a green does not necessarily prevent even the very substantial use of land for a landowner’s private purposes. The same analysis must apply to a local authority landowner’s public statutory purposes (see *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, paras 100–101, per Lord Brown of Eaton-under Heywood JSC; para 47, per Lord Walker of Gestingthorpe JSC; para 74, per Lord Hope of Craighead DPSC; para 84, per Lord Rodger of Earlsferry JSC; and para 115, per Lord Kerr of Tonaghmore JSC). B C

Issue (1): statutory education purposes

On the education authority claimant’s agreed issue (1), that of the statutory holding power, the planning inspector was entitled on the evidence before her to find that the claimant had not demonstrated (in accordance with the burden of proof upon it) that the land was held for statutory educational purposes. D

The claimant’s argument on issue (1)(a) suggests an incipient attempt to argue that the appropriate standard of review is not public law irrationality. The proper approach to a challenge to the lawfulness of a finding of fact made by a registration authority or specialist inspector, in the context of a claim for judicial review of a determination of an application under the Commons Act 2006, is irrationality, or public law unreasonableness. The claimant’s complaint was essentially a rationality challenge, not an error of fact complaint at all (cf error of fact cases such as *Simplex G E (Holdings) v Secretary of State for the Environment* (1988) 57 P & CR 306, discussed in *E v Secretary of State for Home Department* [2004] QB 1044, para 59). E F

In relation to the claimant’s issues (1)(b) and (d), in coming to the conclusion that the claimant had not demonstrated that the land in question was held for statutory educational purposes, the inspector was neither irrational nor culpable of a public law mistake of fact, on the evidence before her. The inspector considered the issue of statutory incompatibility and relied on evidence from both sides and multiple site visits. The argument is not that the inspector misunderstood the evidence that was before her, but that she should have come to a different conclusion as to its significance and weight. That is an argument purely of whether her conclusion was rationally open to her having regard to established principles of administrative law. The claimant’s reliance on *Edwards v Bairstow* [1956] AC 14 as a mistake of fact case is misconceived since that case fell under the head of “irrationality”. G H

Further, it is not accepted that all the evidence pointed one way. For example, there was evidence before the inspector that the land had not been used extensively, if at all, for education for many years. In any event, the fact

A that evidence points in one direction does not necessarily lead to the conclusion that the burden of proof has been discharged. It is essentially a question of contextual judgment, which the inspector was both appointed to make and well placed to carry out. Accordingly, the inspector's conclusions as to the basis for which the land was held were lawfully open to her and, as the lower courts held, cannot sensibly be challenged by these proceedings.

B On issue (1)(c), the presumption of regularity was not engaged. The claimant's argument on this issue was properly rejected by the Court of Appeal [2018] 2 P & CR 15, para 63. Further, the inspector did have regard to the endorsement on the 1948 conveyance, but noted that the authority for it was unknown. She would also have been aware that the 1948 conveyance related to land partially used for the construction of the primary school.

C On issue (1)(e), applying the principles in *Ladd v Marshall* [1954] 1 WLR 1489 and *E v Secretary of State* [2004] QB 1044, Ouseley J was correct to refuse to admit fresh evidence seeking to plug gaps in the evidence that was before the inspector, principally because that evidence could have been obtained with reasonable diligence. The court should not lightly interfere with the exercise of judicial discretion at first instance on the admission of evidence.

D *Issue (2): statutory incompatibility*

The claimant's issue (2), that of the principle of statutory incompatibility in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547, is not apt to be extended to apply to land held by a local authority for educational purposes (even were that demonstrated) and the inspector, Ouseley J [2016] EWHC 1238 (Admin) and the Court of Appeal were correct to reject the claimant's case on this point.

E For statutory incompatibility to be demonstrated in accordance with *Newhaven*, three elements need to be demonstrated: (a) the land was acquired and is held for the exercise of specific statutory powers and duties; (b) those powers and duties are incompatible with registration of the land as a green under section 15 of the Commons Act 2006, so as to require its disapplication; and (c) there is a factual basis for the statutory incompatibility.

F Since the 2006 Act says nothing about statutory incompatibility, the principle, as enunciated in *Newhaven*, para 93 is one of statutory construction. The principle usually applies to statutory undertakers, who routinely own land held and used exclusively for a defined statutory purpose, and to local Acts, rather than general statutes, since it is more common for the former to set out specific powers and duties that apply to specific land (as required under *Newhaven*, paras 92 and 93). The ratio of *Newhaven* is narrow (see *TW Logistics* [2019] Ch 243, para 48, per Lewison LJ), and the principle is accordingly narrow, confined to circumstances where the exercise of statutory powers and duties, both necessarily and actually, conflicts with the registration of land as a green.

G This conflict is necessary for the exercise of statutory interpretation to have any purchase at all. This means that the powers and duties must be both clearly prescribed and specific to the land in question, and be incompatible with registration. Although this is a question of statutory construction, it involves a factual element: there must be "actual" conflict between two statutory regimes and the statutory powers and duties must attach to the

H

land. In stark contrast with the present case, evidence of this incompatibility was not required in the *Newhaven* case since the effect of registration was obvious: it would “clearly impede” the harbour authority’s statutory functions: see *Newhaven*, para 96. A

It follows that the claimant’s submission that the present case is congruent with *Newhaven*, because there is nothing in the judgment of Lord Neuberger of Abbotsbury PSC and Lord Hodge JSC to suggest that the inconsistency must be specific to the land in question, is misconceived. On the contrary, it is clear that the court only intended the principle to apply where statutory powers and duties necessarily prevented the exercise of town and village green rights on the land itself. B

The interested party’s contention that the principle should be construed narrowly, is bolstered by three aspects of the *Newhaven* decision [2015] AC 1547: (i) the facts, (ii) the antecedent case law and (iii) the principle of statutory construction that the general (*lex generalis*) gives way to the specific (*lex specialis*). C

First, there is a factual element to the test of whether statutory incompatibility exists in a particular case (see *British Transport Commission v Westmorland County Council* (“BTC”) [1958] AC 126, 143, 144, 148, 152, 153, and, in particular at p 147 where Lord Morton of Henryton identified the test). The claimant’s argument that none of the statutory duties or powers in play in the *Newhaven* case were specific to the land (i.e the beach) is mistaken, since the limits of the harbour were expressly defined in the *Newhaven Harbour Improvement Act 1878* (41 & 42 Vict c lxxi), and the statutory duties and powers relied upon were expressly referable to the harbour (see *Newhaven*, paras 96 and 97). The factual element of the test for statutory incompatibility is not met in the present case since, even if all the land held by the education authority for educational purposes were to be registered as village greens, the claimant would not be in breach of section 14 of the *Education Act 1996*. In contrast with the present case, evidence of this incompatibility was not required in the *Newhaven* case since the effect of registration was obvious: it would “clearly impede” the harbour authority’s statutory functions (para 96). D

Second, in *Newhaven* Lord Neuberger PSC and Lord Hodge JSC drew on comparative case law about prescriptive acquisition to support the principle of statutory incompatibility in the context of registration of land as a green, albeit “by way of analogy” (paras 78 and 91). The mere fact that there are objects prescribed by an Act relating to land is not sufficient in English law to prevent the dedication or prescription of a right of way or easement—there must be a “special purpose” giving rise to incompatibility (see the *BTC* case). The Scottish case law referred to in *Newhaven* relates to public bodies (usually statutory undertakers) with specific duties derived from statutes relating to specific land (see *Magistrates of Edinburgh v North British Railway Co* (1904) 6 F 620, *Ellice’s Trustees v Comrs of the Caledonian Canal* (1904) 6 F 325 and *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623). *Ayr Harbour Trustees* was a case of obvious incompatibility (see *BTC* [1958] AC 126, 165, per Lord Keith of Avonholm), similar to the situation in *Newhaven* (see para 96). While none of the antecedent case law expressed the principle as one of statutory construction, it suggests that the circumstances in which it should apply are strictly confined. E F G H

- A Third, the rule that the general (e.g. the Commons Act 2006) gives way to the specific (e.g. the Newhaven legislation) was an important part of the jurisprudential basis behind the *Newhaven* principle (see *Newhaven*, para 93). The rule (*generalia specialibus non derogant*) is to be invoked sparingly and only where strictly necessary: i.e. “if [one provision] is so inconsistent with or repugnant to [the] other that the two are incapable of standing together” (*Halsbury’s Laws of England* 5th ed, vol 96 (2012), para 301, quoting Smith J in *Churchwardens and Overseers of West Ham v Fourth City Mutual Building Society* [1892] 1 QB 654, 658, approved in *Hamnett v Essex County Council* [2017] 1 WLR 1155, para 26, per Gross LJ, and observed by the Court of Appeal in the present case [2018] 2 P & CR 15, para 36). It follows that although this is not a case of implied repeal, the principle works here in the sense that one statute is disapplied in favour of another.

C Further, the statutory incompatibility principle does not apply generally to public land (see *Newhaven*, para 101) and the fact that a local authority’s statutory powers apply to land and might be exercised does not in itself preclude registration as a green.

- D In the present case, the inspector and the courts below were correct not to extend the principle of statutory incompatibility to preclude registration of the claimant’s land as a green for two main reasons. First, the statutory provisions relied upon by the claimant are general rather than specific (cf the provisions in *Newhaven*). Second, on the facts of the present case, as reflected by the conclusions of the inspector, there was no actual incompatibility.

- E The statutory provisions relied on by the claimant do not fit with the principle of statutory incompatibility as identified in *Newhaven*. Sections 13 and 14 of the Education Act 1996 provide a general duty to seek to provide sufficient schools in any given area. They say nothing about how any particular land is to be used and do not define how the need for schools is to be met (see *R (G) v Barnet London Borough Council* [2004] 2 AC 208, para 14 and *R v Inner London Education Authority, Ex p Ali* (1990) 2 Admin LR 822, 828). A local authority is not obliged to meet the duty on certain land, or in any particular way: sections 13 and 14 are just two of a much wider range of powers and duties that local authorities have to support education and training and many different factors will apply as to how it carries out those duties, which may pull in different directions.

- G Ouseley J [2016] EWHC 1238 (Admin) at [80] and [81] (as confirmed by the Court of Appeal at paras 41 and 42) was correct in holding that the legislation was insufficient to engage the principle. General educational provisions do not give rise to a necessary incompatibility with registration of land under section 15 of the 2006 Act. Even if an education authority held no “education land”, the range of duties it has fulfil its duty to provide education, training and recreational facilities (including the duties in sections 13 and 14) would still apply. On the other hand, as the inspector held, “educational purposes” covers a range of uses.

- H Registration of the land as a green may circumscribe, but would not prevent, the claimant carrying out educational functions on the land, as Ouseley J rightly concluded at para 79 of his judgment. It follows that the claimant’s “correct question” in the present case, namely whether the statutory purposes for which the land is held are capable of being discharged

on the land consistently with its registration as a green, must be answered in the positive: educational purposes are capable of co-existing with local inhabitants' continued recreational use. A

The conclusion that the statutory provisions in this case do not give rise to a necessary incompatibility is underscored by the factual position, which is an element of the principle (see *Newhaven* [2015] AC 1547, paras 96 and 97 and para 87 referring to *BTC* [1958] AC 126). As the inspector held, the evidence before her was simply insufficient to show that most of the land was needed for educational uses that would prevent public recreation. The inspector's decision was correctly upheld by Ouseley J and the Court of Appeal. B

Finally, in the event that the principle of statutory incompatibility is extended to land held for educational purposes, the implications could be far-reaching. The principle could apply to public land wherever there are statutory functions associated with that land. That would potentially exclude from registration as a green a very large amount of land. It is simply unrealistic to consider that Parliament would have intended such a wide-ranging exclusion from registration where the 2006 Act and other statutory provisions say nothing about it. C

Conversely, in the vast majority of cases, the circumstances in which a local authority holds land for a statutory purpose will prevent registration as a green without any need to invoke a principle of statutory construction. The criteria in section 15 of the 2006 Act are strict and many applications to register local authority land as a green will be summarily defeated. There are a wide variety of means by which landowners (public or private) can act to prevent land from being vulnerable to registration as a green, from erecting signs to submitting planning proposals, or in the case of a local authority, identifying land for potential development in a statutory development plan. Where a public body holds land for public recreation any public use will be "by right" rather than "as of right" (see *R (Barkas) v North Yorkshire County Council* [2015] AC 195). D

Finally, the "future use issue" relied on by the claimants as an alternative ground, was not raised below and does not arise for determination as part of a challenge to the registrability of the land. In any event, it is without merit and the authorities do not support it. [Reference was made to the *Trap Grounds* case [2006] 2 AC 674, *Lewis* [2010] 2 AC 70 and *T W Logistics* [2019] Ch 243.] E

The claimants' solution, that a local authority could do whatever it liked, however much it interferes with local inhabitants' use, provided it does so in furtherance of statutory powers, is radical since it could exclude the public altogether by fencing or developing the land. That is not equivalence at all, nor does it have any relationship to the qualifying period—it is simply an attempt to defeat registration of a green by other means. The argument should, accordingly, be rejected. F

Ashley Bowes (instructed by *Richard Buxton Solicitors, Cambridge*) for the interested party in the second case. G

A number of points concerning policy considerations are relevant to both issues on the NHS claimant's appeal (i.e the preliminary implied permission issue and the substantive statutory incompatibility issue). H

First, there is a recognised public interest in preventing the disturbance of long-standing, peaceable recreational use of land. There is also a particular

- A public interest recognised in the village green legislation for the preservation of land which meets the definition of “town or village green” (see the *Report of the Royal Commission on Common Land 1955–1958* (1958) (Cmnd 462), *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 349, per Lord Hoffmann and *Oxfordshire County Council v Oxford City Council* (“the *Trap Grounds* case”) [2006] 2 AC 674, paras 59 and 64, per Lord Hoffmann and para 86, per Lord Scott of Foscote).

B Since those cases were decided, Parliament has had three further opportunities to limit the scope of the legislation so as to preserve land held by public authorities from registration as town or village greens (the Countryside and Rights of Way Act 2000, the Commons Act 2006 and the Growth and Infrastructure Act 2013). However, Parliament has consistently declined to create any general exception for land owned by public bodies.

- C Instead, when passing the 2013 Act, Parliament directed its mind to the circumstances in which the public interest in preserving village greens may be curtailed in favour of using land for other important public interests, such as building a hospital or school (see *R (Cooper Estates Strategic Land Ltd) v Wiltshire Council* [2019] PTSR 1980, paras 4, 5–10, per Lewison LJ, referring to the *Trap Grounds* case). By inserting section 15C and Schedule 1A into the 2006 Act, Parliament chose to strike that balance via the creation of a series of “trigger events” which suspend the right to register land as a village green, rather than by way of a general exemption for the NHS or other public bodies.

D The local planning authority drawing up a development plan document is under a statutory obligation to co-operate with, inter alia, NHS clinical commissioning groups (“CCGs”) (see sections 39 and 33A of the Planning and Compulsory Purchase Act 2004). The CCG could therefore seek, through that engagement process, the allocation or safeguarding of its land within a development plan for its future needs.

- E Finally, Parliament passed all this legislation in the knowledge that land held by public authorities under statutory powers had been registered as town or village greens, including NHS-owned land. Judge Waksman QC upheld such a registration in 2010 in *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] LGR 631, in which he rejected, at para 92, counsel’s argument that the NHS were outside the scope of the village green legislation.

Implied permission

- G The preliminary issue that arises solely on the NHS claimant’s case, namely that permission should be granted to argue, for the first time, that the public’s use of the land in issue for recreation should be treated as having implied permission from the claimant or its predecessors (the “implied permission” point), is unarguable as it is contrary to two well-established legal principles.

H First, toleration of recreational use of land by the landowner does not equate with permission and cannot prevent rights being acquired by long use (*Mills v Silver* [1991] Ch 271, 279G–280B, 281G–H, as approved in relation to the registration of new village greens in *Sunningwell* [2000] 1 AC 335, 358F, and, in relation to land held by public authorities and to statutory undertakers holding land for narrow and specific statutory purposes, in

R (Barkas) v North Yorkshire County Council [2015] AC 195, para 28 and *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547, para 45).

A landowner has to do very little in order to prevent long use maturing into legal rights. They simply need take some positive step, at some point every 20 years, from which it may be inferred that the use is either prohibited or permitted (see *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, paras 57, 59, per Lord Rodger of Earlsferry, and para 79, per Lord Walker of Gestingthorpe). [Reference was also made to *Winterburn v Bennett* [2017] 1 WLR 646 and *T W Logistics Ltd v Essex County Council* [2019] Ch 243.] Although the Supreme Court in *Barkas* departed from part of the judgment in *Beresford*, specifically Lord Scott's reasoning at paras 43–50, it did not overrule *Beresford* on this particular point (see *Barkas*, para 38, per Lord Neuberger of Abbotsbury PSC).

Second, the principles of prescription operate no differently towards public landowners (see *Newhaven* [2014] QB 186, 220, para 121, per Ouseley J). Moreover, the cases before the Supreme Court which have involved a public authority landowner (the *Trap Grounds* case [2006] 2 AC 674, *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, *Barkas* and *Newhaven*) have all been rationalised within the legal framework of prescription, not as special cases outside it (see *Barkas*, paras 64–65, per Lord Carnwath JSC, as agreed by Lord Neuberger PSC at para 24; and *Newhaven* [2015] AC 1547, para 71, per Lord Neuberger PSC). In the present case, the claimant concedes that there is no such positive act that renders the use permissive, but merely a belated decision to erect permissive signage taken after the qualifying period had elapsed. Management actions by themselves are not enough to evidence a formal decision (see *R (Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2016] PTSR 1523, para 31). The claimant's contention that permission can be inferred in the present case by the absence of such a "positive act" would erode the distinction between permissive use and tolerated use and should be rejected. Accordingly, permission to appeal on the implied permission issue should be refused.

Statutory incompatibility

In relation to the substantive issue in both the education authority and NHS claimants' appeals, that of statutory incompatibility, the interested party endorses and adopts the arguments made by the Secretary of State and the interested party in the education authority claimant's case.

Specifically in relation to the NHS claimant's appeal, the interested party relies upon the reasoning of the Court of Appeal to resist this ground. First, the claimant does not in fact take issue with the approach of Court of Appeal to the statutory construction exercise (see [2018] 2 P & CR 15, para 36). There has never been an express or implied exemption for land held pursuant to statutory powers from the scope of the village green legislation (see *Barkas* [2015] AC 195, para 66, per Lord Carnwath JSC). A general exemption from registration for publicly-held land should therefore not be inferred, contrary to the claimant's approach.

The claimant's submission, that it does not merely have powers which it "can apply" to develop the land, but that its powers can only be exercised by doing so (in conjunction with the relevant CCG), and that the present case is in this sense stronger than *Newhaven* itself, misreads the bright line drawn in

- A *Newhaven* [2015] AC 1547, para 101, per Lord Neuberger PSC, that “the ownership of land by a public body . . . which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility”. The claimant has the power to develop land in the future for healthcare purposes, but that is not akin to a duty to do so (cf *Newhaven*). The land is not required, nor is it even central to, the performance of the claimant’s statutory duties or that of its CCG client.

- B Those duties, under section 223(1) of the National Health Service Act 2006, to hold land for its CCG, and the general target duty at section 3(1) of that Act, are general in nature, in that they *may* be discharged upon the land in issue. The NHS has no general land-holding power, in comparison with education authorities. Following the claimant’s argument, if the question of whether the Commons Act 2006 applies to a piece of land simply depends on whether the relevant statutory powers can be exercised in relation to that land without thereby interfering with the continued enjoyment of recreation, the result would be that no land held pursuant to statutory powers would ever be registerable, in effect creating a complete exemption for public authorities. Such land would either be excluded on the claimant’s test, or the specific statutory purpose for which the land was held would itself be public recreation, in which case the use would be “by right” not “as of right” and therefore the land would not be registrable (see *Barkas*). That would conflict with the wide terms in which Parliament has cast the code for registration and with the scope of the *Newhaven* doctrine and is, therefore, wrong.

- E The claimant submitted no evidence, at any point in this dispute, that the performance of its statutory duties would be hindered by the registration of this small piece of land as a village green. There is no obligation to use the land for the construction of a hospital and there is no duty on the claimant to continue to operate a hospital on the adjacent land. It could close the hospital tomorrow and sell the land on the open market, consistently with its statutory powers and duties (cf the situation in *Newhaven*).

- F The claimant does not directly challenge, or sufficiently address, the correct factual finding made by the Court of Appeal [2018] 2 P & CR 15, para 46, that registration of the land as a green would not preclude the performance of its statutory duties. Thus, even on the claimant’s incorrect distillation of the principle in *Newhaven*, registration is not precluded as a matter of law.

- G The claimant characterises the land in issue by submitting, when dealing with the future use issue, that it would be unsatisfactory to compel it to retain the land for future healthcare use even if it thought, at some point in time, that it would be better to dispose of it for full value, freed from recreation rights, and to use the proceeds of sale to acquire more suitable land elsewhere. That characterisation reveals just how different a case this is to *Newhaven*: there is no duty on the claimant to perform its statutory purposes on the land in issue. The present situation does not raise a clash of duties (cf *Newhaven*), but merely a clash between the landowner’s preferences as to the manner in which they use and dispose of the land, and the duty which arises upon registration. That balance has already been struck in the legislation.

Future use

In relation to the alternative side issue raised by both claimants, namely that, notwithstanding registration, there might be scope for use by them of the land in issue for their statutory purposes (the “future use” issue), the interested party has a number of points. First, the approach by Lord Carnwath JSC in *Newhaven* [2015] AC 1547, paras 138–139, was made in the specific context of the facts of that case, particularly that there were in existence “more specific statutory powers” governing the use of the land in question. No such specific statutory powers apply here.

Next, the NHS claimant is not seeking registration of the land subject to a proviso that if and when it wanted to put the land to a use that would be incompatible with recreation, the purpose for which the land was held have precedence. Rather, it is seeking the ability to sell the land, free from any constraints as a village green, to a potential third party with no statutory holding powers or purposes. There would be no logical justification to permit a potentially private third-party landowner to take the land free from the rights of local inhabitants.

Further, even if the land were to be only retained by the claimant, registering the land subject to the ability of the landowner to do as he pleased with it at some future point, even at the expense of local inhabitants’ rights, would conflict with the principle of equivalence settled by the Supreme Court in *Lewis* [2010] 2 AC 70 (see paras 100, 101–105, per Lord Brown of Eaton-under Heywood JSC; paras 54, 71 and 78, per Lord Hope of Craighead DPSC; and para 109, per Lord Kerr of Tonaghmore JSC) and recently applied by the Court of Appeal in *T W Logistics* [2019] Ch 243, paras 32, 107, 108.

Moreover, the claimant’s approach would render the village green proprietary right acquired upon registration by the local inhabitants inherently unstable, as it could be reduced or extinguished on the arbitrary will of the landowner, contrary to the need for property rights to have a degree of permanence or stability (see *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1965] AC 1175, 1247G–1248A, per Lord Wilberforce).

For these reasons it would be inappropriate in principle, and on the basis contended for in this instance, to register the land subject to such a qualifying provision.

Laurence QC in reply.

Where there is an operative statutory incompatibility, a landowner can oppose registration of the land as a green, even where that landowner has done nothing with the land in the qualifying period, or longer (cf *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, para 105, per Lord Brown of Eaton-under-Heywood JSC).

The interested party in the second case submitted, in relation to the implied permission point, that the landowner always has to do something to bring the permission to the attention of the relevant public, in reliance on *R (Barkas) v North Yorkshire County Council* [2015] AC 195 which, he argued, followed *R (Beresford) v Sunderland City Council* [2004] 1 AC 889. That is incorrect since, in the present case which is comparable to *Barkas*, whatever the landowner has to do does not have to be done publicly, but can be done internally (Lord Neuberger PSC in *Barkas* provided an exception to,

- A and departed from *Beresford*). However, even that is not necessary in the present case, where the court can easily infer that there was such a decision, or that it arose due to the application of the presumption of regularity. It follows that the interested party was wrong in contending that *Barkas* and *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547 have rationalised the earlier law by reference to the need for a positive act which has to be drawn to the public's attention.

B *Edwards QC* in reply.

- The Secretary of State's submission that the functions of a local education authority are set out in a general Act and are not effectively fixed in land, fails to reflect the status of land held for statutory purposes by education authorities, which are provided with powers to acquire land for the purposes of their functions (e.g. section 530 of the Education Act 1996 and section 120 of the Local Government Act 1972). When an education authority exercises those powers of acquisition it will go through a deliberative process involving a determination that it is necessary to acquire land in order to fulfil its purposes, either immediately or in the future. That will particularly be the case when an education authority uses powers of compulsory purchase. Critically, once land has been acquired by an education authority, it can only thereafter be used in the discharge of its functions. Its duties and powers then, effectively, become embedded or fixed onto that land. The position in relation to an education authority in this respect is not materially different from the situation in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547.

- The Secretary of State's submissions on how the well-established principles operate to limit the acquisition of public rights of way by implied or deemed dedication and private easements over land held for statutory purposes (referring to *British Transport Commission v Westmorland County Council* [1958] AC 126 ("BTC")), need to be treated with caution. The principle in *BTC*, as described by the Supreme Court in *Newhaven* at paras 78 and 79, operates to restrict rights of way by implied or deemed dedication or easements through a prescriptive process and introduces a reasonable foreseeability test. That principle is directly applicable to land held by a local education authority. If, in a case, there is an assertion of a public right of way that has come into existence through dedication, it would be open to the authority to argue that that right of way would be inconsistent with the statutory purposes for which it holds the land. In the event that the Secretary of State's submission is grounded on some principle that, for the *BTC* approach to apply, there has to be some prohibition on either the alienation or the grant of rights over land held for statutory purposes, such an approach is not found in the case law.

In cases in which the statutory incompatibility is obvious, it will not be necessary for the parties to lead evidence to demonstrate that incompatibility (*Newhaven*, para 96). That reasoning applies to certain cases in which the land is held by an education authority, although not every case.

- H In reply to the interested party's argument on the statutory holding power, the inspector's comment in her report that there was some evidence of a low level of use of part of the land for education purposes during the relevant period should be viewed in the context of her ultimate conclusions that the land was not held for such purposes and that, as a matter of law, the

statutory incompatibility approach set out in *Newhaven* does not apply. In any event, a decision-maker examining statutory incompatibility in the context of education use should look at the issue broadly. A

The registration authority in the second case did not appear and was not represented.

The court took time for consideration. B

11 December 2019. The following judgments were handed down.

LORD CARNWATH and **LORD SALES JJSC** (with whom **LADY BLACK JSC** agreed)

Introduction C

1 The principal issue in these two appeals relates to the circumstances in which the concept of “statutory incompatibility” will defeat an application to register land as a town or village green where the land is held by a public authority for statutory purposes. In *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547 (“*Newhaven*”) this court held that the duty under section 15 of the Commons Act 2006 did not extend to an area held under the specific statutes relating to the Newhaven Harbour. We are asked to decide whether the same principle applies to land held by statutory authorities under more general statutes, relating respectively (in these two cases) to education and health services. D

2 Although the two appeals raise similar issues, they were dealt with by different procedural routes. The first (Lancashire) is within the area of a “pilot” scheme under the Commons Registration (England) Regulations 2008 (SI 2008/1961), under which, where the registration authority (in this case Lancashire County Council—“LCC”) has an interest in the land, applications are referred for determination to the Planning Inspectorate (regulations 27–28). The second case (Surrey) was not covered by the pilot scheme. The application was determined by Surrey County Council as registration authority, following a non-statutory inquiry before a barrister appointed by the council. E
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Modern greens—development of the law

3 As will be seen, in *Newhaven* the issue was described as one of “statutory interpretation”. Unfortunately, interpreting the will of Parliament in this context is problematic, because there is no indication that the concept of a modern green, as it has been developed by the courts, was part of the original thinking under the Commons Registration Act 1965. Carnwath J reviewed the earlier history, including the *Report of the Royal Commission on Common Land 1955–1958* (1958) (Cmnd 462) which preceded the 1965 Act, in his judgment at first instance in *R v Suffolk County Council, Ex p Steed* (1995) 71 P & CR 463 (one of the first cases under the 1965 Act), and later, as Carnwath LJ in the Court of Appeal in *Oxfordshire County Council v Oxford City Council* [2006] Ch 43 (“the *Trap Grounds* case”). As he observed in the latter (at para 51): G
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“The concept of a ‘modern’ classic green, as it has emerged in the cases since 1990, would, I think, have come as a surprise to the Royal

A Commissioners, and to the draftsman of the 1965 Act. There is no hint of it in the Royal Commission report, or the parliamentary debates on the Bill. The commissioners' terms of reference were directed to sorting out the problems of the past, not to creating new categories of open land, for which there was no obvious need. By this time, of course, there were numerous statutes conferring on public authorities modern powers for the creation and management of recreational spaces for the public."

B Carnwath LJ also noted, at para 52, that, as late as 1975, in *New Windsor Corpn v Mellor* [1975] Ch 380 ("New Windsor"), all three members of the Court of Appeal (including Lord Denning MR) had thought it natural to read the Act as referring to 20 years "before the passing of the Act" (at pp 391 and 395)—an interpretation which would have ruled out the possibility of a modern green being established by more recent use.

C 4 It was not until the early 1990s that claims were first put forward based on 20 years' use since the 1965 Act had come into force at the end of July 1970 (apparently following the advice of the Open Spaces Society in their publication *Getting Greens Registered* (1995)). When the first case came before the House of Lords in 1999 (*R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335), no one seems to have argued that the Act was directed to pre-1965 use only. In that case, the D House of Lords, led by Lord Hoffmann, adopted a relatively expansive view of the new concept. He drew a parallel with the Rights of Way Act 1932, which he thought had reflected Parliament's view "that the previous law gave too much weight to the interests of the landowner and too little to the preservation of rights of way which had been for many years in de facto use" and the "strong public interest in facilitating the preservation of footpaths for access to the countryside" (p 359D–E). He commented, at p 359E: "in defining class c town or village greens by reference to similar criteria in 1965, E Parliament recognised a similar public interest in the preservation of open spaces which had for many years been used for recreational purposes."

F 5 That interpretation of Parliament's thinking would, with respect, have been difficult to deduce from the 1965 Act itself, or from anything said—in Parliament or anywhere else—at the time. However, when the issue came before the House again, in the *Trap Grounds* case [2006] 2 AC 674, Lord Hoffmann was able to claim implicit Parliamentary support in the debates which preceded the amendments made by the Countryside and Rights of Way Act 2000. As he said, at para 26:

G "No one voiced any concern about the construction which the House in its judicial capacity had given to the 1965 Act. On the contrary, the only question raised in debate was whether the locality rule did not make it too difficult to register new village greens."

H By then, as he also noted (para 28) the new Commons Bill (the 2006 Act as it became) was before Parliament, providing a further opportunity for legislative reconsideration if thought appropriate. In *Newhaven* [2015] AC 1547, para 18, this fact was cited as a reason for not having given permission to reopen the general approach adopted in the *Trap Grounds* case.

6 As to the attributes of a modern green, the 2006 Act itself, like the 1965 Act which preceded it, is very sparse in the information it gives. Section 1 of the 2006 Act requires each registration authority to maintain a register of town or village greens. Section 15 indicates that any person can

apply to register land as a green where, in subsection (2)(a)—“a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for the period of at least 20 years”. As to the purpose of registration, section 2(2)(a) states simply that the purpose of the register is “to register land as a town or village green”. The Act offers no further guidance as to the interpretation of the section 15 formula, nor as to the practical consequences of registration.

7 An unexplained curiosity is that section 10 of the 1965 Act, which provided that the register was “conclusive evidence of the matters registered, as at the date of registration”, is not repeated in the 2006 Act. As things stand the repeal of section 10 has been brought into effect only in the pilot areas. (Section 18 of the 2006 Act, headed “Conclusiveness”, which has effect in the pilot areas, does not on its face go so far as section 10.) In the *Trap Grounds* case [2006] 2 AC 674, Lord Hoffmann had agreed (at para 43) with Carnwath LJ’s analysis in the Court of Appeal [2006] Ch 43, para 100, that the 1965 Act “created no new legal status, and no new rights or liabilities other than those resulting from the proper interpretation of section 10”. It was on the “rational construction of section 10” that he relied for his view that land registered as a town or village green “can be used generally for sports and pastimes” (para 50), and was also subject to section 12 of the Inclosure Act 1857 (20 & 21 Vict c 31) and section 29 of the Commons Act 1876 (39 & 40 Vict c 56) (para 56). None of the experienced counsel before us was able to offer an explanation for the disappearance of section 10, but none sought to argue that it had made any material difference to the rights following registration. Not without some hesitation, we shall proceed on that basis.

8 Lord Hoffmann made clear that, following registration, the owner was not excluded altogether, but retained the right to use the land in any way which does not interfere with the recreational rights of the inhabitants, with “give and take on both sides” (para 51). That qualification was further developed in *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70 (“*Lewis*”), in which it was held that the local inhabitants’ rights to use a green following registration could not interfere with competing activities of the landowner to a greater extent than during the qualifying period.

9 One important control mechanism which emerged from the cases was the need for the use to be “as of right”. It was established that these words, by analogy with the law of easements, imported the principle “nec vi, nec clam, nec precario”, or in other words “the absence of any of the three characteristics of compulsion, secrecy or licence” (per Scott LJ in *Jones v Bates* [1938] 2 All ER 237, 245, cited by Lord Hoffmann in *Sunningwell* [2000] 1 AC 335, 355). It followed that in practice an owner could prevent use qualifying under section 15 by making it sufficiently clear to those seeking to use the land (generally by suitable notices) either that their use was objected to, or that it was permissive. On the other hand, silent acquiescence in the use, or toleration, did not prevent it being “as of right”.

10 More recently (from 25 April 2013) amendments made by the Growth and Infrastructure Act 2013 (embodied in new sections 15A and following of the 2006 Act) have provided some assistance to landowners, first by enabling a formal statement to be made to bring user “as of right” to

A an end, and secondly by defining certain planning-related “trigger events” which suspend or extinguish the right to apply to register a green. In *R (Cooper Estates Strategic Land Ltd) v Wiltshire Council* [2019] PTSR 1980, para 4, Lewison LJ said of these amendments:

B “Ever since the *Trap Grounds* case . . . the courts have adopted a definition of a TVG [town or village green] which goes far beyond what the mind’s eye would think of as a traditional village green. The consequence of this interpretation of the definition is that there have been registered as TVGs: rocks, car parks, golf courses, school playgrounds, a quarry, scrubland, and part of a working port. If land is registered as a TVG the effect of the registration is, for practical purposes, to sterilise land for development. This became a concern for the Government, because the criteria for registration did not take into account any planning considerations; and because it was thought in some quarters that applications for registration of TVGs were being used as a means of stopping development outside the planning system.”

D The 2013 amendments are of no direct relevance to the issues in the present appeal, but they are relied on as showing that Parliament has given specific attention to the balance to be drawn between the rights of the various interests involved.

E 11 We would draw two main lessons from the historical review. First, whatever misgivings one may have about the unconventional process by which the concept of a modern green became part of our law, the emphasis now should be on consolidation, not innovation. Secondly, the balance between the interests of landowners and those claiming recreational rights, as established by the authorities, and as now supplemented by the 2013 Act, should be respected. Our task in the present appeal is not to make policy judgments, but simply to interpret the majority judgment in *Newhaven* and apply it to the facts of these cases.

The proceedings and the parties

F *Lancashire*

12 The land at issue in the first appeal is known as Moorside Fields, in Lancaster. It lies adjacent to Moorside Primary School and extends to some 13 hectares. It is divided into five areas, referred to in the proceedings as Areas A to E, described (by the planning inspector) as follows:

G “Area A, referred to as the meadow was, until recently, an undeveloped plot of land. It is adjacent to Moorside Primary School (the school) and is currently being used to facilitate the construction of an extension at the rear of the school. Area B is a mowed field, referred to as the school playing field and both it and Area A are currently surrounded by fencing.

H “Areas C and D border Areas A and B. In the past they have been the subject of mowing tenancy agreements but these ceased in around 2001. They are separated from each other and from Areas A and B by . . . hedges and in places are overgrown with brambles. Area E, also adjacent to the school, is currently overgrown and difficult to access. At some times of the year it contains a pond.”

Like the school the land is owned by LCC, the present appellant, which is both education authority and registration authority.

13 On 9 February 2010 the interested party, Ms Janine Bebbington, a local resident, applied to register the land as a town or village green. Her application was based on 20 years' qualifying use up to the date of registration, or alternatively up to 2008. LCC, as local education authority, objected. Following a statutory inquiry, an inspector appointed by the Secretary of State (Ms Alison Lea, a solicitor) in a decision letter dated 22 September 2015 determined that four of the five areas (that is A to D, but not E) should be registered under the Act. She excluded Area E because she found insufficient evidence of its use over the 20-year period. LCC has postponed formal registration of Areas A to D, pending the outcome of the judicial review claim.

14 LCC maintains that the land was acquired for and remains appropriated to educational purposes, in exercise of the LCC's statutory powers as education authority. The statutory provisions upon which LCC relied (or now rely) as showing incompatibility were: (1) section 8 of the Education Act 1944 which imposed a duty on local education authorities "to secure that there shall be available for their area sufficient schools" for providing primary and secondary education, sufficient in number, character and equipment; (2) sections 13 and 14 of the Education Act 1996 which require local authorities to contribute to the development of the community by securing efficient primary and secondary education; (3) section 542 of the 1996 Act which requires school premises to conform to prescribed standards, including (under regulation 10 of the School Premises (England) Regulations 2012 (SI 2012/1943)) suitable outside space for physical education and outside play; and (4) section 175 of the Education Act 2002 which requires the education authority to "make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children". (The issue of safeguarding does not appear to have been raised at the inquiry.)

15 The inspector was not satisfied that the land was held for educational purposes (an issue to which we shall return below), but even on the assumption that it was she found no incompatibility:

"119. Furthermore, even if the land is held for 'educational purposes', I agree with the applicant that that could cover a range of actual uses. LCC states that the landholding is associated with a specific statutory duty to secure a sufficiency of schools and that if LCC needed to provide a new school or extra school accommodation in Lancaster in order to enable it to fulfil its statutory duty, it would not be able to do so on the Application Land were it to be registered as a town or village green. However, Areas A and B are marked on LCC's plan as Moorside Primary School. The school is currently being extended on other land and will, according to Lynn MacDonald [a school planning manager for the county council], provide 210 places which will meet current needs. There is no evidence to suggest that the school wishes to use these areas other than for outdoor activities and sports and such use is not necessarily incompatible with use by the inhabitants of the locality for lawful sports and pastimes.

"120. Areas C and D are marked on LCC's plan as 'Replacement School Site'. However, there is no evidence that a new school or extra school accommodation is required on this site, or indeed anywhere in

A Lancaster. Lynn MacDonald stated that the Application Land may need to be brought into education provision at some time but confirmed that there were no plans for the Application Land within her five-year planning phase.

B “121. Nevertheless, she pointed out there is a rising birth rate and increased housing provision in Lancaster, and that although there are surplus school places to the north of the river, no other land is reserved for school use to the south of Lancaster. Assets are reviewed on an annual basis and if not needed land can be released for other purposes. However there was no prospect that this would happen in relation to the Application Land in the immediate future.

C “122. I do not agree with LCC’s submission that the evidence of Lynn MacDonald demonstrates the necessity of keeping the Application Land available to guarantee adequate future school provision in order to meet LCC’s statutory duty. Even if at some stage in the future there becomes a requirement for a new school or for additional school places within Lancaster, it is not necessarily the case that LCC would wish to make that provision on the Application Land.”

She concluded (para 124):

D “It seems to me that, in the absence of further evidence, the situation in the present case is not comparable to the statutory function of continuing to operate a working harbour where the consequences of registration as a town or village green on the working harbour were clear to their Lordships [in *Newhaven*]. Even if it is accepted that LCC hold the land for ‘educational purposes’, there is no ‘clear incompatibility’ between
E LCC’s statutory functions and registration of the Application Land as a town or village green. Accordingly I do not accept that the application should fail due to statutory incompatibility.”

16 On the LCC’s application for judicial review, the inspector’s decision was upheld by Ouseley J [2016] EWHC 1238 (Admin), including her approach to the issue of statutory incompatibility.

F *Surrey*

G 17 The second appeal relates to some 2.9 hectares of land at Leach Grove Wood, Leatherhead, owned by NHS Property Services Ltd (“NHS Property Services”), a company wholly owned by the Secretary of State for Health. The land adjoins Leatherhead Hospital, and is in the same freehold title. An application for registration under the 2006 Act was made by Ms Philippa Cargill on 22 March 2013, with the support of the second defendant, Mr Timothy Jones, and others. They relied on use over a period of 20 years ending in January 2013 (when permissive signs were erected on the land).

H 18 At the time of the application, the land was owned by the Surrey Primary Care Trust. By section 83(1) of the National Health Service Act 2006 primary care trusts were under a duty to provide, or to secure the provision of, primary medical services in their area. The land was held by the Trust pursuant to the statute, for those purposes. On the dissolution of the Trust in 2013, the freehold title of the land was transferred to NHS Property Services, which had been created by the Secretary of State for

Health under his power to form companies “to provide facilities or services to persons or bodies exercising functions, or otherwise providing services, under this Act”: section 223(1) of the National Health Service Act 2006. Following the amendment of the National Health Service Act 2006 by the Health and Social Care Act 2012, functions previously exercised by the Secretary of State acting through a primary care trust fell to be exercised by a clinical commissioning group (“CCG”)—in this case the Surrey Downs CCG. The principal statutory duties of a CCG are defined by section 3(1) of the National Health Service Act 2006; in summary they involve the provision of hospital accommodation and medical services “to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility”.

19 Following a non-statutory inquiry, the inspector, William Webster, barrister, in his report dated 9 June 2015, recommended refusal of registration. He rejected the company’s objection based on statutory incompatibility (paras 175(d)–(f)). He contrasted the case with *Newhaven* [2015] AC 1547 in which there had been “an obvious and irreconcilable clash as between the conflicting statutory regimes”:

“(e) . . . The position of the NHS is quite different in that no positive duty (analogous to that imposed on the undertaker in *Newhaven*) arises on the part of the landowner to do anything in the case of the land (in contrast to *Newhaven*) and the general duty imposed on the Secretary of State to promote a comprehensive health service is wholly unaffected.

“(f) It seems to me that it is irrelevant that the land may be held under the same title as the remainder of the hospital site. The fact that the relevant NHS bodies had (and still has [sic]) the capacity to use the land for health and ancillary purposes is no different to any other public body holding land for a purpose which they do not choose to exercise for the time being.”

He also accepted that there had been sufficient qualifying use of the land by local inhabitants for more than 20 years, but he held that it was not in respect of a relevant “locality” or “neighbourhood” as required by section 15. Surrey County Council, as registration authority, did not accept his recommendation, but determined to register the land which was done on 5 October 2015.

20 On the application for judicial review by NHS Property Services, on 13 July 2016 Gilbart J [2016] 4 WLR 130 quashed the registration, holding that the county council had failed properly to consider the question of statutory incompatibility. He had before him the judgment of Ouseley J in the Lancashire case [2016] EWHC 1238 (Admin), but distinguished it by reference to the wider powers conferred by the education statutes:

“134. . . . It is clear that there was no general power in any of the relevant bodies to hold land. Land could only be acquired or held if done so for the purposes defined in the relevant Acts. The defined statutory purposes do not include recreation, or indeed anything outside the purview of (in summary) the purposes of providing health facilities. Could the land be used for the defined statutory purposes while also being used as a town or village green? No one has suggested that the land in its current state would perform any function related to those purposes,

A and the erection of buildings or facilities to provide treatment, or for administration of those facilities, or for car parking to serve them, would plainly conflict with recreational use.

B “135. Indeed, it is very hard indeed to think of a use for the land which is consistent with those powers, and which would not involve substantial conflict with use as a village green. A hospital car park, or a clinic, or an administrative building, or some other feature of a hospital or clinic would require buildings or hard standing in some form over a significant part of the area used. By contrast, it is easy to think of functions within the purview of education, whereby land is set aside for recreation. Indeed, there is a specific statutory duty to provide recreational facilities, which may include playing fields, and other land, for recreation, the playing of games, and camping, among other activities—see section 507A Education Act 1996.

C “136. It is not relevant to the determination of the issue that the land has not in fact been used for the erection of hospital buildings or used for other hospital related purposes. The question which must be determined is not the factual one of whether it has been used, or indeed whether there are any plans that it should be, but only whether there is incompatibility as a matter of statutory construction. If the land is in fact surplus to requirements, then the use of the [2006 Act] is not the remedy.

D “137. Given those conclusions, it is my judgement that there is a conflict between the statutory powers in this case and registration.”

The Court of Appeal

E 21 The appeals in both cases, respectively by LCC and the applicants for registration in the Surrey case, were heard together by the Court of Appeal (Jackson, Lindblom and Thirlwall LJ). In a judgment dated 12 April 2018 [2018] 2 P & CR 15, given by Lindblom LJ, with whom the others agreed, the court upheld the decision to register in both cases. On the issue of statutory incompatibility, he distinguished the *Newhaven* case [2015] AC 1547, for reasons which are sufficiently apparent from the following short extracts from the judgment:

Lancashire

G “Crucially, as a matter of ‘statutory construction’ there was no inconsistency of the kind that arose in [*Newhaven*] between the provisions of one statute and the provisions of the other. The statutory purpose for which Parliament had authorised the acquisition and use of the land and the operation of section 15 of the 2006 Act were not inherently inconsistent with each other. By contrast with [the *Newhaven* case], there were no ‘specific’ statutory purposes or provisions attaching to this particular land. Parliament had not conferred on the county council, as local education authority, powers to use this particular land for specific statutory purposes with which its registration as a town or village green would be incompatible.” (Para 40.)

Surrey

H “As in the Lancaster case, therefore, the circumstances did not correspond to those of [*Newhaven*]. The land was not being used for

any ‘defined statutory purposes’ with which registration would be incompatible. No statutory purpose relating specifically to this particular land would be frustrated. The ownership of the land by NHS Property Services, and the existence of statutory powers that could be used for the purposes of developing the land in the future, was not enough to create a ‘statutory incompatibility’. The clinical commissioning group would still be able to carry out its statutory functions in the provision of hospital and other accommodation and the various services and facilities within the scope of its statutory responsibilities if the public had the right to use the land at Leach Grove Wood for recreational purposes, even if the land itself could not then be put to use for the purposes of any of the relevant statutory functions. None of those general statutory functions were required to be performed on this land. And again, it is possible to go somewhat further than that. Although the registration of the land as a village green would preclude its being developed by the construction of a hospital or an extension to the existing hospital, or as a clinic or administrative building, or as a car park, and even though the relevant legislation did not include a power or duty to provide facilities for recreation, there would be nothing inconsistent—either in principle or in practice—between the land being registered as a green and its being kept open and undeveloped and maintained as part of the Leatherhead Hospital site, whether or not with access to it by staff, patients or visitors. This would not prevent or interfere with the performance of any of the relevant statutory functions. But in any event, as in the Lancaster case, the two statutory regimes were not inherently in conflict with each other. There was no ‘statutory incompatibility’.” (Para 46.)

Was the Lancashire land held for educational purposes?

22 Before we turn to the main issue it is convenient to dispose of a preliminary issue which arises only in respect of the first appeal. For what purposes was the land held? The inspector recorded the evidence on which LCC relied as showing that the land was held for the relevant statutory purposes.

“113. LCC has provided Land Registry Official copies of the register of title which show that LCC is the registered proprietor of the Application Land. Areas A, B and E were the subject of a conveyance dated 29 June 1948, a copy of which has been provided. It makes no mention of the purposes for which the land was acquired but is endorsed with the words ‘Recorded in the books of the Ministry of Education under section 87(3) of the Education Act 1944’. The endorsement is dated 12 August 1948.

“114. Areas C and D were the subject of a conveyance dated 25 August 1961. Again the conveyance makes no mention of the purposes for which the land was acquired but the copy provided has a faint manuscript endorsement as follows ‘Education Lancaster Greaves County Secondary School’.

“115. In addition LCC provided an instrument dated 23 February 1925 and a letter from LCC to the school dated 1991. The instrument records that the Council of the Borough of Lancaster has applied to the Minister of Health for consent to the appropriation for the purposes of

A the Education Act 1921 of the land acquired by the council otherwise than in their capacity as Local Education Authority. The land shown on the plan is the [Barton Road Playing Field (land also owned by LCC, to the immediate west of Areas C and D and separated from them by a shallow watercourse, but accessible from them via a stone bridge and also stepping stones)]. An acknowledgement and undertaking dated March 1949 refers to the transfer to the county council of the education functions of the City of Lancaster and lists deeds and documents relating to school premises and other land and premises held by the corporation. It lists the [Barton Road Playing Field]. The 1991 letter encloses a note from Lancashire Education Committee outlining a proposal to declare land surplus to educational requirements. This relates to the land adjacent to Area C which was subsequently developed for housing. As none of this documentation relates directly to the Application Land I do not find it of particular assistance.

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D “116. At the inquiry LCC provided a print out of an electronic document headed ‘Lancashire County Council—Property Asset Management Information’ which in relation to ‘Moorside Primary School’ records the committee as ‘E’. I accept that it is likely that this stands for ‘Education’. An LCC plan showing land owned by ‘CYP education’ shows Areas A, B and E as Moorside Primary School and Areas C and D as ‘Replacement School Site’. In relation to Areas C and D the terrier was produced, and under ‘committee’ is the word ‘education’. The whole page has a line drawn through it, the reason for which is unexplained.”

23 The inspector stated her conclusions:

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F “117. LCC submits that the documentation provides clear evidence that the Application Land is held for educational purposes and that no further proof is necessary. However, no council resolution authorising the purchase of the land for educational purposes or appropriating the land to educational purposes has been provided. The conveyances themselves do not show for what purpose the council acquired the land, and although the endorsements on those documents make reference to education, the authority for them is unknown. Lynn MacDonald . . . confirmed that the Application Land was identified as land which may need to be brought into education provision, but was unable to express an opinion about the detail of LCC’s ownership of the land.

G “118. The information with regard to the purposes for which the Application Land is held by LCC is unsatisfactory. Although there is no evidence to suggest that it is held other than for educational purposes, it is not possible to be sure that LCC’s statement that ‘the Application Land was acquired and is held for educational purposes and was so held throughout the 20-year period relevant to the application’ accurately reflects the legal position.”

H 24 In fairness to the inspector, we should note that this issue seems to have been raised rather the late in the day, and was less than fully explored in LCC’s submissions before her (see Ouseley J [2016] EWHC 1238 (Admin) at [49], noting Ms Bebbington’s evidence as to what took place at the inquiry); the counsel who have appeared for LCC in the court proceedings did not act for it at the inquiry.

25 Ouseley J indicated that, left to himself, he would have been likely to have reached a different view, at para 57: A

“I rather doubt that, confined to the express reasoning in the DL [the decision letter], I would have reached the same conclusion as the inspector as to what could be inferred from the conveyances and endorsements on them in relation to the purpose of the acquisition of the various areas. I can see no real reason not to conclude, on that basis, that the acquisition was for educational purposes. No other statutory purpose for the acquisition was put forward; there was no suggestion that the parcels were acquired for public open space. I would have inferred that there were resolutions in existence authorising the acquisitions for that contemporaneously evidenced intended purpose, which simply had not been found at this considerable distance in time. It would be highly improbable for the lands to have been purchased without resolutions approving it. The presumption of regularity would warrant the assumption that there had been resolutions to that effect, and that the purpose resolved upon would have been the one endorsed on the conveyances. This is reinforced by the evidence in DL para 116, which shows the property, after acquisition, to be managed by or on behalf of the Education Committee. The actual use made of some of the land is of limited value in relation to the basis of its acquisition or continued holding.” B
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26 However, he was unwilling to conclude that the inspector’s decision was irrational, at para 61:

“As I read the DL, the fundamental problem for the inspector in the LCC evidence was the absence of what she regarded as the primary sources for power under which the acquisition or appropriation of the land occurred: the resolutions to acquire or to appropriate it for educational purposes. She was entitled to regard those as the primary sources to prove the basis for the exercise of the powers of the authority . . . she approached her decision, as I read it, knowing what transpired before her, not on the basis that resolutions related to acquisition might well have existed but could not be found at this distance in time, but on the basis that none had been produced despite proper endeavours to find them, endeavours which had nonetheless produced the conveyances, and other related documents. So she was not prepared to assume that resolutions in relation to acquisition had existed. That was entirely a matter for her, and cannot come close to legal error.” E
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The Court of Appeal in substance adopted Ouseley J’s reasoning.

27 In this court, Mr Edwards QC for LCC accepts that this issue was one of fact for the inspector. But he submits that her conclusion was unsupportable on the evidence before her, or was vitiated by error of fact (under the principles set out in *E v Secretary of State for Home Department* [2004] QB 1044). For good measure he submits that the courts below were wrong not to admit evidence, discovered after the inquiry, in the form of council minutes from February 1948 recording the resolution to acquire Areas A and B (and E) for a “proposed primary school”. H

28 He starts from the proposition that the LCC, as a statutory local authority, could only acquire land “for the purposes of any of their

A [statutory] functions” (see now the Local Government Act 1972, section 120(1)(a)); and that in normal circumstances the land would continue to be held for the purpose for which it was acquired unless validly appropriated for an alternative statutory purpose, when no longer required for the first: section 122. The inspector, he says, gave no weight to that statutory context.

B 29 As regards Areas A, B and E, he submits, the evidence before the inspector was quite clear (even without the new evidence). The inspector properly noted that the acquisition had been “Recorded in the books of the Ministry of Education under section 87(3) of the Education Act 1944”. However, she failed to understand or give due weight to the significance of that note. As Mr Edwards explains, the effect of section 87 of the Education Act 1944 (headed “Exemption of assurances of property for educational purposes from the Mortmain Acts”) was to exempt from the Mortmain and Charitable Uses Act 1888 and related Acts, land transferred, inter alia, to a local education authority, if the land was to be used for educational purposes. (The law of Mortmain dating back to the Statutes of Mortmain in 1279 and 1290, was not finally abolished until 1960.) A copy of the conveyance or other document by which the transfer of such land was made was required, within six months of its taking effect, to be sent to the Education Minister. Section 87(3) provided that a record should be kept of any conveyance sent to the minister pursuant to the section. Accordingly, says Mr Edwards, the reference to the record under section 87(3) should have been treated by the inspector as clear evidence that the original purpose of the acquisition was for educational purposes, even in the absence of a contemporary resolution to that effect. Against that background, the lack of evidence of any competing purpose to which the land might have been appropriated over the subsequent years pointed to the inference that it continued to be held for its original purpose.

E 30 As regards Areas C and D, Mr Edwards submits, the indication on the 1961 conveyance of an educational purpose, taken with the references in later documents to its being treated as educational land, and the lack of any evidence of a competing purpose, were sufficient to support the inference, on the balance of probabilities, that education was the purpose for which it had been acquired and subsequently held.

Discussion

G 31 Although Mr Edwards has accepted that this issue was one of fact for the inspector, that concession needs to be seen in context. The inspector’s assessment was one depending, not so much on evaluation of oral evidence, but largely on the inferences to be drawn from legal or official documents of varying degrees of formality.

H 32 In our view, Ouseley J’s approach to the natural inferences to be drawn from the material before the inspector was correct, but he was wrong to be deflected by deference to the inspector’s fact-finding role. The main difference between them was in the weight given by the inspector to the absence of specific resolutions, from which she found it “not possible to be sure” that the land had been acquired and held for educational purposes. On its face the language appears to raise the threshold of proof above the ordinary civil test to which she had properly referred earlier in the decision. But even discounting that point, she was wrong in our view to place such

emphasis on the lack of such resolutions. Her task was to take the evidence before her as it stood, and determine, on the balance of probabilities, for what purpose the land was held. On that approach, Ouseley J's own assessment was in our view impeccable. The inspector's assessment was irrational, having regard to the relevant standard of proof and the evidence available. There was no evidence to support any inference other than that each part of the land had been acquired for, and continued during the relevant period to be held for, statutory educational purposes. An assessment made without any supporting evidence cannot stand: *Edwards v Bairstow* [1956] AC 14, 29.

33 In respect of Areas A and B, furthermore, there was a clear error of law, in the inspector's failure to appreciate, or take account of, the significance of the reference to section 87(3) of the 1944 Act. This may be because she was given little assistance on the point by LCC at the inquiry. It is less clear why the point, having been clearly raised in submissions in the court proceedings (see Ouseley J, para 44), seems to have been ignored in the subsequent judgments. On any view, that reference, and the inferences to be drawn from it, went beyond a pure issue of fact, and were appropriate for review by the court. In agreement with Mr Edwards we would regard it as providing unequivocal support for the conclusion that the land comprising Areas A and B was acquired for educational purposes. There was no evidence to suggest that it had ever been appropriated to other purposes.

34 In respect of Areas C and D, the evidence is less clear-cut, but we agree with Mr Edwards' submission that it is sufficient, on the balance of probabilities, to support the same conclusion and that, in the absence of any evidence to support any other view, it was irrational for the inspector to reach a different conclusion. Again, we think that Ouseley J's assessment of the facts was the correct one.

35 In these circumstances it is unnecessary to consider whether Ouseley J erred in refusing to admit the new evidence. We note, however, that it does no more than support what was already a strong case in respect of Areas A and B; it does nothing to enhance the case for Areas C and D.

Implied permission

36 We can also deal more briefly with an issue that arises only in respect of the Surrey site: that is Mr Laurence QC's application for permission to argue (for the first time) that the public's use of the land for recreation should be treated as having implied permission from NHS Property Services or its predecessors, thus showing that the use was "by right" rather than "as of right". This, as he accepts, is a departure from *Sunningwell* [2000] 1 AC 335, where it was held that mere toleration by a landowner of the public's use could not be taken as evidence that the landowner had impliedly consented to that use. He seeks to distinguish the position of land that is held for public purposes such as by his client. We quote his printed case:

"there is a critical distinction between (i) a private owner (such as the kindly rector in *Sunningwell*) tolerating use of land not held for public purposes—which can provide no evidence of an implied permission—and (ii) a public owner passively responding to recreational use in a statutory context which justifies the inference that that response to the public's use of the land is evidence of an implicit permission so long as the permitted

A use does not disrupt the public authority's use of the land for its statutory purposes. In such a case it is irrelevant that in a non-statutory, private context such a response might be characterised as toleration."

B 37 He also relies on section 120(2) of the Local Government Act 1972, which authorises land acquired by agreement by a local authority for a particular purpose to be used, pending its requirement for that purpose, for any of the authority's functions, which, he submits, would include recreational use. It can be inferred, accordingly, that any use by the public was permitted under that power, and as such was pursuant to the same kind of public law right, derived from statute, as was held in *R (Barkas) v North Yorkshire County Council* [2015] AC 195 ("*Barkas*") and *Newhaven* [2015] AC 1547 to give rise to implied permission.

C 38 This submission seems to us to face two major difficulties. The first is that no such claim was made before the inspector. As he recorded:

D "No issue arises on 'as of right'. There were no vitiating features in play which would preclude use as of right and the application land was at no time held by SCC [Surrey County Council] or by any of the various NHS bodies mentioned herein for purposes which conferred an entitlement on members of the public to use the land for informal recreation. For instance, there was no evidence of any overt act or acts on the part of the objector, or its predecessor, to demonstrate that, before January 2013, the landowner was granting an implied permission for local inhabitants to use the wood."

E In answer to this, Mr Laurence asserts that the issue is one of law rather than fact. Even if that were so, it would in our view be unfair to all those who took part in the five-day inquiry in 2015 to allow the point to be taken for the first time four years later in this court.

F 39 However, his main difficulty is that the submission is contradicted by clear authority. In *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, Lord Walker of Gestingthorpe had accepted the emphasis placed by Mr Laurence himself (appearing on that occasion for the supporters of registration) on "the need for the landowner to *do something*" (para 78); "passive acquiescence" could not be treated "as having the same effect as permission communicated (whether in writing, by spoken words, or by overt and unequivocal conduct)" (para 79). Later in the judgment (para 83) Lord Walker accepted that permission might be "implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all-comers", but he found no evidence in that case of "overt acts (on the part of the city council or its predecessors)" justifying the inference of an implied licence.

G 40 Nothing in *Barkas* or *Newhaven* undermines the principle that passive acquiescence is insufficient. Mr Laurence's then submission that the landowner must "do something" remains good law, even if there has been some qualification of the form of communication required to the public.
H The existence in each case of an overt act of the owner was emphasised in the majority judgment in *Newhaven*, para 71:

"In this case, as in *Barkas*, the legal position, binding on both landowner and users of the land, was that there was a public law right, derived from statute, for the public to go onto the land and to use it for

recreational purposes, and therefore, in this case, as in *Barkas*, the recreational use of the land in question by inhabitants of the locality was ‘by right’ and not ‘as of right’. The fact that the right arose from an act of the landowner (in *Barkas*, acquiring the land and then electing to obtain ministerial consent to put it to recreational use; in this case, to make the Byelaws which implicitly permit recreational use) does not alter the fact that the ultimate right of the public is a public law right derived from statute (the Housing Act 1936 in *Barkas*; the 1847 Clauses Act and the 1878 Newhaven Act in this case).”

The law remains, as submitted by Mr Laurence in *Beresford*, that passive acquiescence, even by a statutory authority with power to permit recreational use, is not enough.

41 Accordingly we would refuse permission for this additional ground of appeal.

Statutory incompatibility

42 We turn next to the central issue in the case, based on the *Newhaven* case [2015] AC 1547.

The majority judgment

43 In the judgment of the majority (given by Lord Neuberger of Abbotsbury PSC and Lord Hodge JSC) the decision not to confirm the registration was supported by two separate lines of reasoning: implied permission and statutory incompatibility. Although the latter was unnecessary for the decision, it was clearly identified as a separate ground of decision (para 74). Lord Carnwath JSC was alone in basing his decision on the implied permission issue alone (para 137), seeing “considerable force” in the contrary reasoning on the latter issue of Richards LJ in the Court of Appeal [2014] QB 186. No one has argued that we should regard the majority’s reasoning on this issue as other than binding. Accordingly our decision in the present case depends to a large extent on the correct analysis of that reasoning, and its application to the facts of the two cases before us.

44 The operation of Newhaven Harbour had been subject to legislation since at least 1731. At the relevant time the governing statutes included (inter alia) the Newhaven Harbour and Ouse Lower Navigation Act 1847 (10 & 11 Vict c ix), section 49 of which required the trustees to—“maintain and support the said harbour of Newhaven, and the piers, groynes, sluices, wharfs, mooring berths, and other works connected therewith” and section 33 of the Harbours, Docks and Piers Clauses Act 1847 (10 & 11 Vict c 27), which provided that, subject to payment of rates—“the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers.”

45 The land owned by the harbour company (“NPP”) included an area known as West Beach, described in the judgment as “part of the operational land of the Harbour” (para 8), although not currently used for any harbour purpose. As the judgment explained, at para 9:

“The Beach owes its origin to the fact that, in 1883, pursuant to the powers granted by the 1863 Newhaven Act, the substantial breakwater was constructed to form the western boundary of the Harbour. The breakwater extends just over 700 metres out to sea. After the construction

A of the breakwater, accretion of sand occurred along the eastern side of the breakwater, and that accretion has resulted in the Beach.”

46 Following an application by the Newhaven Town Council to register the Beach as a town or village green, and the holding of a public inquiry, it was found by the inspector that the Beach had been used by residents of the locality for well over 80 years (save during the war periods) for recreation.

B On that basis the registration authority resolved to register the land. That decision was subject to an application for judicial review, which succeeded before Ouseley J, but was dismissed by the Court of Appeal. Their decision was in turn reversed by the Supreme Court.

The judgment of this court in Newhaven

C 47 In the part of their judgment directed to the statutory incompatibility issue, Lord Neuberger PSC and Lord Hodge JSC referred to case law on public rights of way, easements and servitudes by way of analogy, adopting a cautious approach (paras 76–90). Nonetheless, they found it did provide guidance. In English law, public rights of way are created by dedication by the owner of the land, and the legal capacity of the landowner to dedicate

D land for that purpose is a relevant consideration (para 78, referring in particular to *British Transport Commission v Westmorland County Council* [1958] AC 126; see also para 87). Similarly, in the English law of private easements, the capacity of the owner of the potential servient tenement to grant an easement is relevant to prescriptive acquisition, which is based on the fiction of a grant by that owner (para 79). The law of Scotland with respect of creation of public rights of way and private servitudes had also

E developed on the footing that the statutory capacity of a public authority landowner to allow the creation of such rights was a relevant matter. In particular, in *Magistrates of Edinburgh v North British Railway Co* (1904) 6 F 620 it was held that it was not possible that a public right of way “which it would be ultra vires to grant can be lawfully acquired by user” (paras 83–84); and in *Ellice’s Trustees v Comrs of the Caledonian Canal* (1904) 6 F 325 it

F was held that the commissioners of the canal did not have the power to grant a right of way which was not compatible with the exercise of their statutory duties, and that this also meant that no private right of way or servitude could arise by virtue of user of the land over many years by those claiming such a right of way (paras 85–86). Although the Scots law of prescription had been reformed by statute, Lord Neuberger PSC and Lord Hodge JSC still regarded the historic position as instructive. Their discussion of English law and Scots

G law in respect of dedication and prescription at paras 76–90 is significant for present purposes, because the reasoning in the cases in those areas regarding statutory incompatibility is general, and is not dependent on the narrower rule of statutory construction that a general provision does not derogate from a special one (*generalia specialibus non derogant*), to which they also later referred by way of analogy.

H 48 There follows the critical part of the majority judgment, under the heading “Statutory incompatibility: statutory construction”, the material parts of which we should quote in full, at paras 91–96:

“91. As we have said, the rules of prescriptive acquisition apply only by analogy because Parliament in legislating for the registration of town and

village greens has chosen similar wording (indulging ‘as of right’ in lawful sports and pastimes) in the 1965 and 2006 Acts. It is, nonetheless, significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes and continued to carry out those purposes, where the user founded on would be incompatible with those purposes. That approach is also consistent with the Irish case, *M’Evoy v Great Northern Railway Co* [1900] 2 IR 325 (Palles CB at pp 334–336), which proceeded on the basis that the acquisition of an easement by prescription did not require a presumption of grant but that the incapacity of the owner of the servient tenement to grant excluded prescription.

“92. In this case if the statutory incompatibility rested only on the incapacity of the statutory body to grant an easement or dedicate land as a public right of way, the Court of Appeal would have been correct to reject the argument based upon incompatibility because the 2006 Act does not require a grant or dedication by the landowner. But in our view the matter does not rest solely on the vires of the statutory body but rather on the incompatibility of the statutory purpose for which Parliament has authorised the acquisition and use of the land with the operation of section 15 of the 2006 Act.

“93. The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: ‘does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?’ In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes. Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (*generalalia specialibus non derogant*), which is set out in section 88 of the code in *Bennion, Statutory Interpretation*, 6th ed (2013), p 281: ‘Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed.’ While there is no question of repeal in the current context, the existence of a *lex specialis* is relevant to the interpretation of a generally worded statute such as the 2006 Act.

“94. There is an incompatibility between the 2006 Act and the statutory regime which confers harbour powers on NPP to operate a working harbour, which is to be open to the public for the shipping of goods etc on payment of rates: section 33 of the 1847 Clauses Act. NPP is obliged to maintain and support the Harbour and its connected works (section 49 of the 1847 Newhaven Act), and it has powers to that end to

A carry out works on the Harbour including the dredging of the sea bed and the foreshore: section 57 of the 1878 Newhaven Act, and articles 10 and 11 of the 1991 Newhaven Order.

B “95. 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 and enjoyment as a place for exercise and recreation—section 12 of the Inclosure Act 1857—or to encroach on or interfere with the green—section 29 of the Commons Act 1876. See the *Oxfordshire* case [2006] 2 AC 674, per Lord Hoffmann, at para 56.

C “96. In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to NPP’s plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP’s ability to alter the existing breakwater. All this is apparent without the leading of further evidence.”

D We discuss this reasoning in detail below.

E 49 Finally in this part of the majority judgment reference is made to cases in which registration of land held by public bodies had been approved by the court: *New Windsor* [1975] Ch 380, the *Trap Grounds* case [2006] 2 AC 674 and *Lewis* [2010] 2 AC 70. The treatment of these cases by Lord Neuberger PSC and Lord Hodge JSC is also significant for present purposes. As regards *New Windsor*, they emphasised that the land was not “acquired and held for a specific statutory purpose”, so “No question of statutory incompatibility arose” (para 98). They observed that in the *Trap Grounds* case, though the land was wanted for use as an access road and housing development “there was no suggestion that [the city council] had acquired and held the land for specific statutory purposes that might give rise to a statutory incompatibility” (para 99). With respect to the *Lewis* case they pointed out that “It was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green”; hence “Again, there was no question of any statutory incompatibility” (para 100).

G 50 In relation to each of these cases, Lord Neuberger PSC and Lord Hodge JSC referred in entirely general terms to the statutory powers under which a local authority might hold land and were at pains to emphasise that the land in question was not in fact held in exercise of any such powers which gave rise to a statutory incompatibility. That was the basis on which they distinguished the cases. It is clearly implicit in this part of their analysis that they considered that land which was acquired and held by a local authority in exercise of general statutory powers which were incompatible with use of that land as a town or village green could not be registered as such.

H 51 Their discussion concludes, at para 101:

“In our view, therefore, these cases do not assist the respondents. The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself

sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour.”

Incompatibility—the case for the appellants

52 For LCC Mr Edwards submits that the decision in *Newhaven* [2015] AC 1547 is of general application to land held by a statutory authority for statutory purposes, whatever the nature of the Act. He points out that the statutory duties or powers in *Newhaven* were not specific to the Beach itself, but rather applied to all of the land acquired and held, from time to time, by NPP and its predecessors for the operation of the Port. NPP had not, within living memory, used the Beach for its statutory harbour purposes. The critical passage in the majority judgment (para 93) refers generally to land—“which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes”. It is not limited to statutory powers directed to a specific location or undertaking. No one has argued that the principle is limited to statutory undertakers, as opposed to public authorities in general. Nor is there any requirement for the land to be in actual use for statutory purposes at the point of registration; it simply has to be held for such purposes. In *Newhaven* the Beach had not been used for harbour purposes nor was there any fixed intention to do so at any particular time in the future (see para 96).

53 In the present case, notwithstanding the inspector’s findings, there was, he submits, clear incompatibility with LCC’s functions in respect of the land. The effect of registration would be that there accrues a right vested in the inhabitants of Scotforth East Ward to use the land for lawful sports and pastimes of a variety of forms, including walking and dog walking. LCC could not restrict their entry onto the land, including Area B which was at the time of the inspector’s decision used as a playing field by the school (see Decision Letter, para 10). Given the statutory safeguarding obligations towards primary school pupils, the use of that area for play could not continue. Any use of the land to provide a new or expanded school would be precluded. In substance, the land would be no longer available in any meaningful sense for use in fulfilment of the LCC’s statutory duties as local education authority.

54 Mr Laurence makes similar submissions in respect of the Surrey site, supported in that case by the conclusions of Gilbart J [2016] 4 WLR 130.

Discussion

55 In our judgment, the appeals should be allowed in both cases. On a true reading of the majority judgment in *Newhaven* [2015] AC 1547 on the statutory incompatibility point, the circumstances in each of these cases are such that there is an incompatibility between the statutory purposes for which the land is held and use of that land as a town or village green. This has the result that the provisions of 2006 Act are, as a matter of the construction of that Act, not applicable in relation to it.

56 The principle stated in the key passage of the majority judgment at para 93 is expressed in general terms. The test as stated is not whether the land has been allocated by statute itself for particular statutory purposes, but

- A whether it has been acquired for such purposes (compulsorily or by agreement) and is for the time-being so held. Although the passage refers to land “acquired by a statutory undertaker”, we agree with Mr Edwards that there is no reason in principle to limit it to statutory undertakers as such, nor has that been argued by the respondents. That view is supported also by the fact that the majority felt it necessary to find particular reasons to distinguish cases such as *New Windsor* [1975] Ch 380, the *Trap Grounds* case [2006] 2 AC 674 and *Lewis* [2010] 2 AC 70, all of which involved local authorities rather than statutory undertakers. Accordingly, the appellants argue with force that the test is directly applicable to the land acquired and held for their respective statutory functions.

- 57 The reference in para 93 to the manner in which a statutory undertaker acquired the land is significant. Acquisition of land by a statutory undertaker by voluntary agreement will typically be by the exercise of general powers conferred by statute on such an undertaker, where the land is thereafter held pursuant to such powers rather than under specific statutory provisions framed by reference to the land itself (as happened to be a feature of the provisions which were applicable in *Newhaven* itself). That is also true of land acquired by exercise of powers of compulsory purchase.
- D In relation to the latter type of case, the majority said in terms that “the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes” (para 93). On our reading of the majority judgment, it is clear that in relation to both types of case Lord Neuberger PSC and Lord Hodge JSC took the view that an incompatibility between general statutory powers under which land is held by a statutory undertaker (or, we would add, a public authority with powers defined by statute) and the use of such land as a town or village green excludes the operation of the 2006 Act.

- 58 This interpretation of the judgment is reinforced by the analysis it contains of the English and Scottish cases on dedication and prescription in relation to rights of way, easements and servitudes and the guidance derived from those cases (see paras 76–91): para 47 above. It is also reinforced by the way in which Lord Neuberger PSC and Lord Hodge JSC distinguished the *New Windsor*, *Trap Grounds* and *Lewis* cases: paras 49 and 50 above.

- 59 The respondents in these appeals submit that the reasoning of Lord Neuberger PSC and Lord Hodge JSC is more narrowly confined, and depends upon identifying a conflict between a particular regime governing an area of land specified in the statute itself and the general statutory regime in the 2006 Act. In support of this interpretation the respondents point to the highly specific nature of the statutory provisions governing the relevant land in *Newhaven* and to the reference in para 93 to the rule of statutory construction that a general provision does not derogate from a special one (*generalia specialibus non derogant*).

- 60 However, for the reasons we have set out above, this interpretation of the judgment does not stand up to detailed analysis. Lord Neuberger PSC and Lord Hodge JSC stated only that “some assistance” could be obtained from consideration of that rule of construction, not that it provided a definitive answer on the issue of statutory incompatibility. In other words, they treated it as a helpful analogy for the purposes of seeking guidance to answer the question they posed in para 93, just as they treated the English and Scottish cases on prescriptive acquisition as helpful. The way in which

they posed the relevant question in para 93 shows that their reasoning is not limited in the way contended for by the respondents, as does their discussion of the prescriptive acquisition cases and the local authority cases of *New Windsor*, *Trap Grounds* and *Lewis*.

61 We do not find the construction of the 2006 Act as identified by the wider reasoning of the majority in *Newhaven* surprising. It would be a strong thing to find that Parliament intended to allow use of land held by a public authority for good public purposes defined in statute to be stymied by the operation of a subsequent general statute such as the 2006 Act. There is no indication in that Act, or its predecessor, that it was intended to have such an effect.

62 Lord Hoffmann in *Sunningwell* [2000] 1 AC 335 concluded that it could be inferred that Parliament intended to allow for the creation of new rights pursuant to the 1965 Act by reason of the “public interest in the preservation of open spaces which had for many years been used for recreational purposes”, but in doing so he recognised that “A balance must be struck” between rights attaching to private property and competing public interests of this character: p 359B–E. It is natural to expect that where a public authority is holding land for public purposes defined by statute which are incompatible with the public interest identified by implication from the 1965 Act, and now the 2006 Act, that balance will be affected. The proper inference as to Parliament’s intention is that the general public interest identified by Lord Hoffmann will in such a case be outweighed by the specific public interest which finds expression in the particular statutory powers under which the land is held.

63 As Lord Neuberger PSC and Lord Hodge JSC appreciated, this general point can be made with particular force in relation to land purchased using compulsory purchase powers set out in statute. Such powers are generally only created for use in circumstances where an especially strong public interest is engaged, such as could justify the compulsory acquisition of property belonging to others. It seems highly unlikely that Parliament intended that public interests of such a compelling nature could be defeated by the operation of the general provisions in the 2006 Act.

64 In construing the 2006 Act it is also significant that it contains no provision pursuant to which a public authority can buy out rights of user of a town or village green arising under that Act in relation to land which it itself owns. That is so however strong the public interest may now be that it should use the land for public purposes. Since in such a case the public authority already owns the land, it cannot use any power of compulsory purchase to eradicate inconsistent rights and give effect to the public interest, as would be possible if the land was owned by a third party. Although section 16 of the 2006 Act makes specific provision for “deregistration” of a green on application to the “appropriate national authority”, in relation to land which is more than 200 square metres in area the application must include a proposal to provide suitable replacement land: subsections (2), (3) and (5). This procedure is available to any owner of registered land, public or private; it is not designed to give effect to the public interest reflected in specific statutory provisions under which the land is held. Often it will be impossible in practice for a public authority to make a proposal to provide replacement land as required to bring section 16 into operation. Again, it would be surprising if Parliament had intended to create the

A possibility that the 2006 Act should in this way be capable of frustrating important public interests expressed in the statutory powers under which land is held by a public authority, when nothing was said about that in the 2006 Act.

65 In our view, applying section 15 of the 2006 Act as interpreted in the majority judgment in *Newhaven* [2015] AC 1547, LCC and NHS Property Services can show that there is statutory incompatibility in each of their
B respective cases. As regards the land held by LCC pursuant to statutory powers for use for education purposes, two points may be made. First, so far as concerns the use of Area B as a school playing field, that use engages the statutory duties of LCC in relation to safeguarding children on land used for education purposes. LCC has to ensure that children can play safely, protected from strangers and from risks to health from dog mess. The rights
C claimed pursuant to the registration of the land as a town or village green are incompatible with the statutory regime under which such use of Area B takes place. Secondly, however, and more generally, such rights are incompatible with the use of any of Areas A, B, C or D for education purposes, including for example construction of new school buildings or playing fields. It is not necessary for LCC to show that they are currently being used for such purposes, only that they are held for such statutory purposes (see *Newhaven*,
D para 96). The 2006 Act was not intended to foreclose future use of the land for education purposes to which it is already dedicated as a matter of law.

66 Similar points apply in the Surrey case. Although the non-statutory inspector found against the appellant on the statutory incompatibility issue, the registration authority failed to consider it. Gilbert J was satisfied that, within the statutory regime applicable in that case, there was no feasible use
E for health related purposes, and indeed none had been suggested. The Court of Appeal took a different view, but largely, as we understand it, on the basis that recreational use of the subject land would not inhibit the ability of NHS Property Services to carry out their functions on other land. We consider that Gilbert J was correct in his assessment on this point. The issue of incompatibility has to be decided by reference to the statutory regime which
F is applicable and the statutory purposes for which the land is held, not by reference to how the land happens to be being used at any particular point in time (again, see *Newhaven*, para 96).

67 As Lady Arden and Lord Wilson JJSC take a different view regarding the effect of the majority judgment in *Newhaven*, we should briefly explain why, with respect, we are not persuaded by their judgments. We are all in agreement that the outcome of these appeals turns upon the proper
G interpretation of the majority judgment in *Newhaven*. We cannot accept their interpretation of that judgment.

68 In our view, although the case might have been decided on narrower grounds, Lord Neuburger PSC and Lord Hodge JSC deliberately posed the relevant question in para 93 in wide terms, specifically in order to state the issue as one of statutory incompatibility as a matter of principle, having
H regard to the proper interpretation of the relevant statute pursuant to which the land in question is held. That is why the heading for the relevant section of their judgment is “Statutory incompatibility: statutory construction”. They say in terms in para 93, “The question of incompatibility is one of statutory construction.” Nowhere do they say it is a matter of statutory construction and an evaluation of the facts regarding the use to which the land has been

put. According to their judgment, the issue of incompatibility is to be determined as a matter of principle, by comparing the statutory purpose for which the land is held with the rights claimed pursuant to the 2006 Act, not by having regard to the actual use to which the authority had put the land thus far or is proposing to put it in future. We consider that this emerges from the critical para 93, and also from the paragraphs which follow in their judgment.

69 Thus, in para 94 they identify the relevant incompatibility as that between the 2006 Act and “the statutory regime which confers harbour powers on NPP to operate a working harbour”. In para 96, it is to that statutory incompatibility that they refer, not to incompatibility with any use to which NPP had as yet put the land in question or might in fact put it in the foreseeable future. As a matter of fact, the Beach had not been used for the applicable statutory purposes. Further, in our opinion, by stating in para 96 that it was not necessary for the parties to lead evidence as to NPP’s plans for the future of the harbour “in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred”, Lord Neuberger PSC and Lord Hodge JSC were seeking to emphasise, contrary to Lady Arden and Lord Wilson JJSC’s interpretation of their judgment, that what matters for statutory incompatibility to exist so as to prevent the application of the 2006 Act is a comparison with the relevant statutory powers under which the land is held, not any factual assessment of how the public authority might in fact be using or proposing to use the land.

70 The same point can be made about para 97, where Lord Neuberger PSC and Lord Hodge JSC said that it was unnecessary to consider evidence about actual proposed use of the land on the facts, since they were able to determine by looking at the statutory powers “that there is a clear incompatibility between NPP’s statutory functions in relation to the Harbour, which it continues to operate as a working harbour [i.e. to hold under the statutory powers referred to in para 94], and the registration of the Beach as a town or village green”. Their discussion at paras 98–100 of *New Windsor*, the *Trap Grounds* case and *Lewis* supports the same conclusion. In each of those cases the relevant land had been held for a very long period without actually being put to use which was inconsistent on the facts with use as a town or village green and without any proposal that it should be put to such use. The implication from what Lord Neuberger PSC and Lord Hodge JSC say about them is that if it had been shown that the land was held for specific statutory purposes which were incompatible with registration under the 2006 Act, that would have constituted statutory incompatibility which would have prevented registration. Their treatment of these cases cannot be reconciled with Lady Arden and Lord Wilson JJSC’s proposed interpretation of their judgment. We do not think that para 101 can be reconciled with that proposed interpretation either. In that paragraph Lord Neuberger PSC and Lord Hodge JSC contrast a case in which a public body might have statutory purposes to which it could in future appropriate the land (but has not yet done so) with the situation in *Newhaven* itself, where in the relevant period NPP held the Beach “for the statutory harbour purposes and as part of a working harbour” (i.e. under the statutory regime referred to in para 94). In our view they were there emphasising that what matters for a statutory incompatibility defence to arise is that the land in question should

A be held pursuant to statutory powers which are incompatible with registration as a town or village green. Nor, with respect, do we think that Lady Arden and Lord Wilson JJSC have offered any good answer to the points we have made at paras 61–64 above.

B 71 We also consider that the reading of *Newhaven* proposed by Lady Arden and Lord Wilson JJSC would undermine the very clear test which Lord Neuberger PSC and Lord Hodge JSC plainly intended to state. Instead of focusing on the question of the incompatibility of the statutory powers under which the relevant land is held, Lady Arden and Lord Wilson JJSC would introduce an additional factual inquiry into the actual use to which the authority is putting the land or proposes to put the land in the foreseeable future. Thus, Lady Arden and Lord Wilson JJSC would adopt from the English case of *Westmorland* [1958] AC 126 a test of what use C could reasonably be foreseen for the land in question, even though Lord Neuberger PSC and Lord Hodge JSC say nothing to support that in the relevant part of their judgment. They refer to both English and Scottish cases on prescriptive acquisition as being relevant to their assessment of the correct approach to be adopted in interpreting the 2006 Act, and in each D case only by way of broad analogy, as they explain at para 91. The Scottish cases they cite do not employ any such test as in *Westmorland* and are consistent with the clear principled test, based on statutory construction, which we understand Lord Neuberger PSC and Lord Hodge JSC to have laid down.

Future use

E 72 Finally, for completeness, we should mention briefly an issue which does not strictly arise within the scope of the appeals, but has been the subject of some discussion. That is the question whether, notwithstanding registration, there might be scope for use by the appellants of the land for their statutory purposes. This arises from a suggestion put forward in Lord Carnwath JSC's minority judgment in *Newhaven* [2015] AC 1547. He F noted that in the *Trap Grounds* case [2006] 2 AC 674 it had not been necessary to consider the potential conflict between the general village green statutes and more specific statutory regimes, such as under the Harbours Acts. He said, at para 139:

G “It is at least arguable in my view that registration should be confirmed if the necessary use is established, but with the consequence that the 19th century restrictions are imported subject only to the more specific statutory powers governing the operation of the harbour.”

H 73 Mr Edwards, supported by Mr Laurence, seeks to build on that tentative suggestion, taken with the principle of “equivalence” adopted in *Lewis* [2010] 2 AC 70. As he submits, the Supreme Court accepted that there should be equivalence between the use of the land for lawful sports and pastimes in the qualifying period (in that case subject to concurrent use as a golf course) and the extent of rights vested in local inhabitants after registration. That approach was taken a stage further by the Court of Appeal in *TW Logistics Ltd v Essex County Council* [2019] Ch 243, holding that the 19th century statutes, as applied to a registered modern green, are not to be construed as interfering with the rights of the landowner to

continue pre-existing uses so far as not inconsistent with the uses which led to registration (per Lewison LJ, paras 63–82).

74 This is not a suitable occasion to examine the scope of the principle of equivalence, so far as it can be relied on to protect existing uses by the landowner. *Lewis* was a somewhat special case. Lord Brown of Eaton-under-Heywood JSC was able to draw on “[his] own experience both as a golfer and a walker for over six decades” (para 106) to attest to the feasibility of an approach based on “give and take” in that particular context. The same approach may not be so easy to apply in other contexts, and as applied to other forms of competing use. Permission has been granted for an appeal to this court in *TW Logistics*. That may, if the appeal proceeds, provide an opportunity for further consideration of this difficult issue. In any event, those cases were concerned with actual uses by the owners, not with potential uses for statutory purposes for which the land is held, as in the present cases.

75 In view of our conclusion that the land in each appeal should not have been found to be capable of being registered under the Act, the issue of what uses might have been open to a statutory owner if it were so registered does not arise, and we prefer to say no more about it on this occasion.

Conclusion

76 For these reasons we would allow the appeals in both cases.

LADY ARDEN JSC (dissenting in part)

Identifying the difference of view

77 My views differ from those of Lord Carnwath and Lord Sales JJSC on these appeals in an important respect. My conclusion is that the question of incompatibility between two sets of statutory provisions (on this appeal, the provisions of the Commons Act 2006 and the statute authorising the holding of land by the public authority in question) involves an assessment of the facts as well as a proposition of law. The fact that a public authority holds land for statutory purposes which are incompatible with the use of the land as a town or village green (“TVG”), is not of itself sufficient to make the land incapable of being registered under the 2006 Act as a TVG. It must be shown that the land is in fact also being used pursuant to those powers, or that it is reasonably foreseeable that it will be used pursuant to those powers, in a manner inconsistent with the public’s rights on registration as a TVG. That requirement in my judgment follows from *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547. References in this judgment to public authorities exclude public authorities which are subject to a statutory duty to carry out a particular function on specified land, identified by statute, where such land is sought to be registered as a TVG. Such authorities are outside the scope of this judgment.

Identifying the correct approach to questions of statutory inconsistency

78 As a matter of constitutional principle, courts must approach the statute book on the basis that it forms a coherent whole. That means that, when interpreting legislation, courts must, in the absence of an indication of some other intention by Parliament, strive to ensure that the provisions work

- A together and apply so far as possible to their fullest extent, such extent being judged according to the intention of Parliament demonstrated principally in the words used. (We have not been shown any other admissible evidence as to Parliament's intention, such as ministerial statements in Hansard.) The courts cannot simply decline to enforce parts of a statute because there may be a conflict with some other statute. It has to be shown that the part sought to be disapplied is irreconcilable with another part of it. If the two can stand together there is no statutory irreconcilability or inconsistency: compare, for example, *Tabernacle Permanent Building Society v Knight* [1892] AC 298. One statute cannot be said to be incompatible with another if the two statutes can properly be read together. So, the test is: can the two statutes in question properly be interpreted so that they stand together and each has the fullest operation in the sense given above?
- B
- C 79 In *Newhaven*, as I shall demonstrate by reference to the majority judgment in that case in the next section of this judgment, the point was that there was a risk that the statutory undertaking's working harbour would be stymied in its operations if the Beach was held to be a TVG. It was not a case where a statutory authority has acquired land for a statutory purpose but, at the time of the proposed registration as a TVG, it is not likely that the land will be used for that purpose in the reasonably foreseeable future.
- D

Newhaven and the limits of this court's decision in that case

- 80 The judgments in *Newhaven* in my judgment should be approached on the basis that they are consistent with the principles explained in para 78 above, even though the members of this court in that case did not articulate them. This court should read their decision, if this can properly be done as a matter of statutory interpretation, as leading to the result that where public authority ownership of land and registration as a TVG can co-exist, that course will be available. As a matter again of constitutional principle, land should not be relieved of the burden of an Act of Parliament having (so far as relevant) unqualified application if there is an alternative, properly available interpretation which will lead to the two enactments in question standing together.
- E
- F 81 On timing, the question whether there is any conflict between public authority powers and TVG legislation must be determined as at the date when the application for registration is made. At that point in time, the public authority may be holding land it has acquired under statutory powers for a particular purpose for which it is not yet required. It is not required to apply the land for that purpose and it may decide not to do so and for example to sell the land or use it for some other purpose. Moreover, even while holding the land for a particular purpose, the local authority may be using it for another purpose because it is not required for the statutory purpose for which it is appropriated at that point in time: Local Government Act 1972, section 120(2).
- G
- H 82 The factual scenario in *Newhaven* was different: the harbour company was already in operation and the beach was liable to be involved in its then current trading operations. The case shows that incompatibility is not a purely legal matter depending on the existence of statutory powers which if exercised would be inconsistent with use of the land as a TVG. It is necessary on the facts to be satisfied that that is likely to occur after registration. It requires a real-world assessment of the situation. The court

is not precluded from looking at the facts subsequent to the acquisition of the land any more than the determination as to the reasonableness of a landlord's refusal to give a consent under a lease is restricted to the facts known to the parties at the date of the lease (see *Ashworth Frazer Ltd v Gloucester City Council* [2001] 1 WLR 2180).

Interpreting the decision of this court in Newhaven

83 In *Newhaven* [2015] AC 1547, the harbour company ("NPP") had a statutory duty to maintain a harbour. The dispute concerned a tidal beach in one part of the harbour which as it happened was no longer operational. The Beach had been used for the past 80 years or so by members of the locality. The issue with which these appeals are concerned is the issue in that case as to whether the Beach could be registered as a TVG. This court held that the land in issue, namely the Beach, could not be registered as a TVG.

84 In *Newhaven*, Lord Neuberger of Abbotsbury PSC and Lord Hodge JSC jointly gave the leading judgment. The other members of the Supreme Court agreed with them. Lord Carnwath JSC also wrote a concurring judgment. On these appeals, Lord Carnwath and Lord Sales JJSC examine the leading judgment in detail. They conclude that Lord Neuberger PSC and Lord Hodge JSC held that, where a person applies to register as a TVG land which is held for statutory purposes which would be inconsistent with the land also being TVG, the land is not capable of being so registered, and that the question is purely one of statutory construction. Thus, Lord Neuberger PSC and Lord Hodge JSC formulated the relevant question as, at para 93:

"does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?"

85 Having stated that question, Lord Neuberger PSC and Lord Hodge JSC immediately answered it by the following sentence: "In our view it does not." In that sentence, the word "it", as I read it, refers to section 15 itself.

86 The next sentence in the judgment of Lord Neuberger PSC and Lord Hodge JSC states (also at para 93):

"Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes."

87 That sentence makes it clear that Lord Neuberger PSC and Lord Hodge JSC regarded "use" as a critical issue. That clearly involves fact. Moreover, the expression "continuing use" also makes it clear that they regarded the operations of NPP as constituting use which was being perpetuated and that that was so even though the tidal beach which was in issue was in a part of the harbour which was not itself being used.

88 It is further clear from that sentence, in my judgment, that the Supreme Court was not considering the question what would happen if the

A relevant use had never started or if the relevant land had become surplus to the obligation or power to carry out any particular activity which had been imposed by Parliament. We have not been shown any statutory requirement that a public authority should regularly consider the need for any land and if thought fit dispose of land which is not required for some purpose for which it was acquired, so it may end up holding land for which it has no further need.

B 89 The local authority could voluntarily appropriate the land to some other purpose but, if it fails to reconsider the use for which it acquired land, or appropriates it to some other use, it is likely that the only basis on which the local authority's decision or omission to act could be challenged would be on the basis that its decision attained the standard of irrationality, which is a high standard for an applicant to have to meet. Under the judgment of C Lord Carnwath and Lord Sales JJSC, that land would remain immune from the accrual of rights leading to registration as a TVG even though there would not in fact be any irreconcilability between registration and the statutory power for which the land was conferred. It is not clear what on this basis would happen if the local authority accepts that the original purpose is spent and after the application is made decides to appropriate the D land to some other statutory purpose.

90 Furthermore, in *Newhaven* [2015] AC 1547, para 96, Lord Neuberger PSC and Lord Hodge JSC held:

E "In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is F apparent without the leading of further evidence."

91 It follows that they regarded it as important that the harbour in question was a "working harbour" and that there was a risk of a clash between the registration of the Beach and the use of the harbour for the statutory purposes. They considered that registration would inhibit the use of the adjoining quay to moor vessels. It would prevent the harbour G authority from dredging the harbour in a way which affected the enjoyment of the Beach and restrict its ability to alter the existing breakwater. So, I deduce from that paragraph that Lord Neuberger PSC and Lord Hodge JSC also regarded it as important that there was factual evidence establishing the continuing use and the impact of registration on that use. There had to be real, not theoretical, incompatibility.

H 92 Lord Neuberger PSC and Lord Hodge JSC continue at the end of that paragraph to observe: "All this is apparent without the leading of further evidence."

93 The word "further" confirms that the preceding analysis involved a consideration of the evidence on the ground. In fact the further evidence appears to have been evidence as to plans to upgrade the harbour and use it

as a container terminal: see the judgment of Ouseley J in *Newhaven* [2014] QB 186, para 127. A

94 In para 97, Lord Neuberger PSC and Lord Hodge JSC continue by summarising further matters on which the harbour company relied, but it was not necessary in the light of the conclusion in para 96 to consider those matters. It is to be noted that in para 97, Lord Neuberger PSC and Lord Hodge JSC refer to an incompatibility between the proposed TVG registration and the statutory functions of NPP, which they add: “continues to operate as a working harbour”. This is an express reference to the state of fact. It would clearly have been material if the harbour company held the land but had ceased its statutory functions. B

95 In paras 98–101, Lord Neuberger PSC and Lord Hodge JSC refer to previous leading cases to show that the question of statutory incompatibility had not previously had to be considered. But, importantly for my interpretation, they conclude that (at para 100): “It was not asserted that the council had acquired and held the land for a specific statutory purpose which would be likely to be impeded if the land were to be registered as a town or village green.” So, in a case concerned with future use, the court must consider if the statutory purpose would be “likely” to be impeded, not likely to be impeded if invoked. Lord Neuberger PSC and Lord Hodge JSC clearly envisaged that there would have to be a factual inquiry as to future use and that it would have to be shown that TVG registration would be likely to impede the exercise of those powers. Lack of impediment can logically be shown either by showing that the local authority has acquired the land for purposes (eg recreational purposes) which are not inconsistent with registration as a TVG, or by showing that there is no realistic likelihood of the land being used for the purposes for which it was acquired. C D E

96 In addition, at para 101 of their judgment, Lord Neuberger PSC and Lord Hodge JSC held:

“In our view, therefore, these cases do not assist the respondents. The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour.” F

97 In that paragraph, Lord Neuberger PSC and Lord Hodge JSC addressed the question of a future development of the land. The mere power to undertake such development would not itself be sufficient to create a statutory incompatibility. They contrasted that with the position in *Newhaven*. Lord Neuberger PSC and Lord Hodge JSC again referred to the evidence that the tidal beach was part of the working harbour. G

98 Para 102 dealt with the separate issue of user as of right and para 103 was the summary of the conclusion, which does not take the matter further.

99 For the avoidance of doubt, I agree that this court should apply statutory incompatibility, the concept sought to be employed in *Newhaven*, to determine the question of inconsistency between the provisions of the 2006 Act enabling registration of land in issue on these appeals as TVGs and the statutory provisions, also conferred by public general Acts of Parliament, empowering the acquisition and holding of land by the public authorities in H

- A both appeals. However, in my judgment, that concept is as a matter of constitutional principle to be interpreted as I have explained in para 78 above.

Determination of incompatibility where the issue arises from a future use

- B 100 The use relied on by the local authority in the Lancashire case in relation to Areas A and B is, as in *Newhaven*, a current use, and my analysis of *Newhaven* detailed above does not lead to any different conclusion in relation to those Areas from that reached by Lord Carnwath and Lord Sales JJSC. I would accept the submission of Mr Douglas Edwards QC, for Lancashire County Council, that in practice the land could not be used by the primary school currently using it when there was unrestricted public access as this would not be consistent with the school's safeguarding obligations: this may be inferred from the fact that the site is currently fenced. Schools are responsible for creating and maintaining a safe environment for their pupils. Mr Edwards' submission on this point was not challenged on these appeals.

- D 101 However, as I shall next explain, where the use is only a use which may occur in the future, my analysis makes it necessary to answer further questions before any conclusion about statutory incompatibility can be reached.

102 This has a practical impact in relation to Areas C and D in the Lancashire case. Those Areas have never been used for the statutory purpose of education for which they were acquired and are now held.

- E 103 That raises the question, what test should apply if the case is only one of possible future use? Must it be shown that it is simply possible that the land may be used for the statutory purpose or must it be shown that it is reasonably likely or foreseeable that it will be so used? These questions did not directly arise in *Newhaven*.

- F 104 In answering these questions, I have found assistance in the decision of the House of Lords in *British Transport Commission v Westmorland County Council* [1958] AC 126, in which a railway company contended that it would have been inconsistent with the statutory powers conferred on it for the public to have a right of way over a bridge spanning the railway line (originally built for private benefit) and that accordingly its predecessor (another statutory company) could not have dedicated it to the public. In *Newhaven* [2015] AC 1547, para 87, Lord Neuberger PSC and Lord Hodge JSC cited the judgment of Lord Keith of Avonholm in this case as authority for the proposition that incompatibility with an Act of Parliament is a question of fact:

- H “In *British Transport Commission v Westmorland County Council* [1958] AC 126, 164–165 Lord Keith of Avonholm commented on Lord Kinnear's opinion in [*Magistrates of Edinburgh v North British Railway Co* (1904) 6 F 620], suggesting that it would be going too far to hold that the public could never acquire a right of way over railway property but acknowledging that incompatibility with the conduct of traffic on the railway could bar a public right of passage. He opined, at p 166, that incompatibility was a question of fact and that it was for the statutory undertaker to prove incompatibility.”

105 The other members of the House also treated it as a question of fact (see Viscount Simonds at p 144, Lord Morton of Henryton at p 149, Lord Radcliffe at p 156, Lord Cohen at p 163 and Lord Keith at p 166). Moreover, they held that, to show compatibility, it was not necessary to show that there were no circumstances in which a conflict could arise. That would make it impossible for members of the public ever to acquire a public right of way over land belonging to the railway company. The House also rejected the argument that a statutory company could not grant an easement over a footpath over its railway. To hold otherwise “would be a grave impediment to public amenity” (per Lord Radcliffe at p 153). It was unlikely on the facts that the railway company would ever need to pull the bridge down.

106 The relevant question was whether a conflict, or incompatibility, was reasonably foreseeable. Thus, Viscount Simonds (at p 144), Lord Morton (at p 149), and Lord Keith (at p 166), rejected the following test: was it *possible* that land would be used in future for a certain purpose? They considered that the normal statutory burden should apply and be discharged, namely that it should be shown that the use was reasonably likely to occur.

107 The House considered the question on a current basis and did not decide whether the critical time was the date of dedication or some other date (see for example pp 144–145). At all events it did not seek to determine the question as at the date of the incorporation of the statutory company when its statutory powers were conferred.

108 In my judgment, the test of reasonable foreseeability is the correct test also to apply in this context, i.e. when asking whether there is incompatibility between registration of land as a TVG and the statutory powers of a public authority in relation to the same land where the relevant use that the public authority might make of the land under those powers is a potential future use which has not yet started.

109 It is said by Lord Carnwath and Lord Sales JJSC that this test is not clear. It may not be easy to apply on the facts but that is necessarily so if the law applies a solution which is fact-dependent rather than drawing a bright line as the majority does. Lord Neuberger PSC and Lord Hodge JSC refer to the *Westmorland* case at two points in their judgment. In the light of their conclusion that the evidence as to current use was sufficient it was not necessary for them to consider it in any further detail, but they would not have cited it if they did not approve of its approach. If I am right there is no question of the use of land being stymied by the 2006 Act (cf para 61 above). Circumstances may have moved on and the public authority may no longer require the land it is holding for any particular statutory purpose.

Application of the principles to the facts of the appeals

(1) The Lancashire appeal

110 The issue of future use of the land arises on the Lancashire appeal in relation to Areas C and D. The local authority in the Lancashire appeal did not adduce evidence that it was reasonably likely that these Areas would be used for educational purposes in the future. There had in the past been a plan to relocate a school on this area but that was not proceeded with and there was no substitute. Moreover, those Areas had never been used for educational purposes. Accordingly, as I see it, those plots should have been

A registered as a village green. The only objection to doing so was one of statutory incompatibility and as I see it, that fails on the facts.

B 1111 The position is different in relation to Areas A and B which are currently used for educational purposes. Importantly, as I read the facts, the sites cannot be registered as TVGs and be school playgrounds at the same time for the reason that this would be inconsistent with the school's safeguarding duty. The school has an obligation to provide outdoor space as a playground under regulation 10 of the School Premises (England) Regulations 2012 (SI 2012/1943), and that is its current use. The inspector did not reach any conclusion on the question of the compatibility in fact of the current use of Areas A and B with their registration as TVGs, and she expressly left open the door to further evidence on incompatibility.

C (2) *The Surrey appeal*

D 1112 In the Surrey appeal, the result is different because the site in issue lies immediately next to the hospital. On the basis of my judgment, the correct legal test applying to future use was not applied. There have been no findings of fact as to whether it is reasonably foreseeable that even now the land will be used for the statutory purposes for which it is currently held. In those circumstances, in my judgment, this matter should be remitted to the registration authority for a decision on that issue.

Restrictions on TVG registration in the Growth and Infrastructure Act 2013

E 1113 Lord Carnwath and Lord Sales JJSC begin their judgment with an analysis of the development of the law on TVGs since the *Report of the Royal Commission on Common Land 1955–1958* (1958) (Cmnd 462), chaired by Sir Ivor Jennings QC, which led to the Commons Registration Act 1965. Undoubtedly that Act and its successor, the 2006 Act, have led to the registration of TVGs at a more significant level than can have been envisaged by the Royal Commission.

F 1114 Accordingly, it is now an inescapable fact that the actual use of the TVG legislation has, in the light of practical experience and the needs and expectations of local communities up and down the country, eclipsed the original conception of a more limited role for TVG registration. The clock cannot be turned back.

G 1115 Moreover, Parliament has essentially given its approval to that use in later legislation. The Growth and Infrastructure Act 2013 (“the 2013 Act”) introduced a package of measures designed to restore the balance between the public and landowners but retaining the same basic system of registration.

1116 The three main changes brought about by the 2013 Act in this connection can be summarised, and it will be seen that they were substantial:

H (1) The period within which a person may apply to register land as a TVG after the landowner has terminated the use by members of the public without permission has been reduced from three years to one year: 2006 Act, section 15(3A) as amended.

(2) The 2013 Act has inserted a new section 15C into the 2006 Act terminating the public's right to apply to register land as a town or village green after any one of a range of “trigger events” occurs. These include an application for planning permission. The right to apply for registration as a TVG will arise again if a “terminating event” occurs, namely (in the case of

an application for planning permission) the planning application is withdrawn, is refused or expires, or the local planning authority (“LPA”) does not determine it. (Where the planning application is for a project of public importance under section 293A of the Town and Country Planning Act 1990, the right to make an application to register as a TVG does not arise where the LPA declines to determine it.)

(3) Landowners have a new right to deposit statements with the appropriate registration authority with respect to any land and this will have the effect of terminating any existing or accruing rights to register that land as a TVG (2006 Act, section 15A, as amended). Landowners already had a right to apply to deregister land as a TVG, but comparable land must be offered in exchange: 2006 Act, section 16.

117 Lord Carnwath and Lord Sales JJSC are right to say that these changes are not directly relevant, and there is no information about any fall in the number of TVG registrations. However, these changes are important. It is open to public authorities to take advantage of these changes (and this is my core answer to the points that Lord Carnwath and Lord Sales JJSC make in para 64 above). They show, among other matters, that Parliament did not consider that there should be some special exemption applying in respect of all publicly-held land. That may be a recognition of the fact that public bodies may be holding land which is surplus to their statutory requirements. While many statutes confer a power on statutory bodies to acquire and hold land, we have not been shown any provision requiring the body on which the power is conferred to sell it when it becomes clear that the land is not required or is no longer required for the purpose for which it was acquired. If a public authority took no action to dispose of land it did not need, it might well be difficult to obtain judicial review of its action as irrationality may have to be shown.

118 Moreover, Parliament took no steps in the 2013 Act to revise the conditions for registration for TVGs.

Judgment of Lord Wilson JSC

119 Since circulating the first draft of my judgment I have had the benefit of reading the judgment of Lord Wilson JSC. He agrees with the approach of the Court of Appeal [2018] 2 P & CR 15. I have great admiration for his judgment and that of Lindblom LJ, with which Jackson and Thirlwall LJ agreed. In particular, I agree with the three general points made by Lindblom LJ in para 36. In a sense my approach might be described as a halfway house between their judgments and that of Lord Carnwath and Lord Sales JJSC. The ten judges who have considered the issues on these appeals have unfortunately been very divided. For my own part, I do not consider that the view of the Court of Appeal addresses the effect on incompatibility of the possibility of future use of the sites sought to be registered as TVGs, or the intention of Parliament in such cases. However, if I am wrong on the approach I have taken, I would adopt that of Lord Wilson JSC and the Court of Appeal in preference to that of Lord Carnwath and Lord Sales JJSC. Respectfully, their approach results in introducing into the legislation a blanket exemption for public authorities which Parliament has not itself expressly given. Parliament has instead provided all landowners with other measures which they can use to protect their position for the future.

A 120 Limiting the issue of incompatibility to a “desktop” exercise of considering the statutory powers of the landowner, without reference to the facts on the ground, runs the risk, to borrow Lord Radcliffe’s words in the *Westmorland* case [1958] AC 126, 153, of “a grave impediment to public amenity”. There will potentially be a loss of access by the public to land which they have used for very many years.

B *Conclusion*

C 121 My approach to statutory incompatibility in my judgment strikes a fairer balance between the public interest in the use of land by the public authority for the appropriated statutory purpose and that of the public who are intended by the 2006 Act to have a right of access to recreational spaces than the approach of Lord Carnwath and Lord Sales JJSC. That is my principal answer to the points which they make in paras 61–64 and 67–71 above and my other responses to those paragraphs appear from this judgment. My judgment does not as suggested in any way involve frustrating the intention of Parliament since the statutory powers under which the public authority holds the land will prevail if it is shown that there is a current use of the land in exercise of those powers, or that it is reasonably foreseeable that such use will occur (see para 77 above).

D 122 Accordingly, I would hold that the appeal in Lancashire should be allowed in part and that in Surrey the appeal should also be allowed on the basis that the matter remitted to the registration authority for a determination of the application in accordance with this judgment.

E LORD WILSON JSC (dissenting)

123 I would have dismissed both appeals.

124 Although I hold each of my three colleagues in the majority in the highest esteem, I am driven to suggest that today they make a substantial inroad into the ostensible reach of a statutory provision with inadequate justification.

F 125 It is agreed that, in their capacity as education authorities, local authorities, such as the appellant in the Lancashire case, can hold land only for specified statutory purposes referable to education; that health authorities, such as the appellant in the Surrey case, can hold land only for specified statutory purposes referable to health; and that, for example, in their capacity as housing authorities, local authorities can hold land only for specified statutory purposes referable to housing.

G 126 If public authorities which hold land for specified statutory purposes are to be immune from any registration of it as a green which would be theoretically incompatible with their purposes, the reach of section 15 of the Commons Act 2006 Act is substantially reduced. One would expect that, had such been its intention, Parliament would have so provided within the section. In the absence of any such provision, whence does justification for it come?

H 127 It comes, according to today’s ruling, from the decision of this court in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] AC 1547, from which the court would in any event be able to depart if necessary. In my view interpretation of that decision by today’s majority is controversial. The claim in para 11 above that their interpretation

represents no more than consolidation of the law is unfortunately not one to which I can subscribe. A

128 The decision in the *Newhaven* case wrought an exception to the availability of registration under section 15. It is always dangerous to interpret an exception too widely lest it becomes in effect the rule and the rule becomes in effect the exception.

129 In the *Newhaven* case statutes had cast upon the harbour authority, as the owner/operator of the port, specific *duties* in relation to *that particular harbour*; and the operational land of that harbour included that particular beach. An Act of 1847 obliged the authority to maintain and support that harbour. An Act of 1878 obliged it to keep that harbour open to all for the shipping and unshipping of goods and the embarking and landing of passengers. Incidental to these obligations were statutory powers, including one in an instrument of 1991 to dredge the foreshore of that harbour. Were it to exercise its power to dredge the area of the foreshore to the east of the breakwater, the authority would destroy the Beach. B C

130 It is therefore no surprise to read within the joint judgment of Lord Neuberger of Abbotsbury PSC and Lord Hodge JSC emphasis on the statutory duties cast upon the authority in relation to that particular harbour; no surprise that, in the opening paragraph they described the relevant point of principle as “the interrelationship of the statutory law relating to village greens and other *duties* imposed by statute” (emphasis added); and no surprise that, at the outset of the crucial paragraph (namely para 93, set out in para 48 above), in which they set out their reason for allowing the appeal on the relevant point, they stated: “The question of incompatibility is one of statutory construction.” D

131 What did Lord Neuberger PSC and Lord Hodge JSC mean by “statutory construction”? They meant conflict between two statutory regimes. They explained in the same paragraph that, where such conflict existed, E

“some assistance may be obtained from the rule that a general provision does not derogate from a special one . . . which is set out in . . . *Bennion, Statutory Interpretation*, 6th ed (2013), p 281: ‘Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one.’” F

In the next paragraph they proceeded to explain that the specific duties conferred by statutes on the authority in relation to that harbour were incompatible with the general provision in the 2006 Act which, on the face of it, permitted registration of the Beach as a green and that therefore the general provision had to give way. G

132 By contrast, statutory provisions which confer power to acquire and hold land, not there identified, for educational and health purposes, such as are in play in the present appeals, cannot be said to be incompatible with the general provision in the 2006 Act which, on the face of it, permits registration of the respective parcels of land as greens. H

133 No reason for the disapplication of section 15 of the 2006 Act is advanced other than the alleged effect of the decision in the *Newhaven* case.

A It is in the light of the above circumstances that I would have dismissed the appeals.

134 Let me, however, suppose that my understanding of the decision in the *Newhaven* case is flawed; and that, had I better understood it, its reasoning would extend to the facts in these appeals.

B 135 Even in those circumstances the majority falls, so I venture to suggest, into error.

136 In *R v Inhabitants of Leake* (1833) 5 B & Ad 469 the issue was whether villagers in the Fenlands were obliged to repair a road. If it had been dedicated as a public highway, they were obliged to do so. The land on which the road had been constructed was owned by commissioners who had bought it pursuant to statutory powers to drain specified fens and to keep them drained. They had constructed drains on it and, with the excavated earth, had built a wide bank which the villagers had used as a highway for more than 20 years. In the Court of King's Bench the villagers contended that any dedication by the commissioners of the road as a public highway would have been inconsistent with their powers. On behalf of the majority Parke J, later Lord Wensleydale, made clear that the contention should be addressed by means of a practical inquiry on the ground. He said at p 480:
D "The question then is reduced to this, whether, upon the finding of the jury in this case, the public use of the bank as a road would interfere with the exercise of these powers?" The answer was "No".

137 The *Leake* case demonstrates that for almost 200 years the law of England and Wales in relation to the capacity of a public authority to dedicate its land as a public highway, or indeed as a public footpath, has been to assess its alleged incompatibility with the statutory purposes for which the land is held on a practical, rather than a theoretical, basis.
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138 Such is made clear in the opinions of the Appellate Committee of the House of Lords in *British Transport Commission v Westmorland County Council* [1958] AC 126. A railway company was authorised by statute to buy land in Kendal for the purposes of operating a railway and to build bridges across it where necessary. On one of its bridges it built a footpath, which the public had used for more than 20 years. The question was whether, in the light of the limited statutory purposes for which it could hold land, the company could have dedicated the footpath as a public highway. Applying the *Leake* case, the Appellate Committee held that the answer was to be found by determining whether the use of the footpath by the public was incompatible with the statutory purposes; that incompatibility was a question of fact (p 143); that the test was pragmatic (p 152); that the question was not whether it was conceivable but whether it was reasonably foreseeable that the public use of the footpath would interfere with the company's use of its land in the exercise of its powers for the statutory purposes (p 144); that the burden lay on the company to establish that it was reasonably foreseeable (p 166); and that, by reference to the case stated by the local justices, the company failed to discharge that burden.
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139 In para 78 of their judgment in the *Newhaven* case [2015] AC 1547, Lord Neuberger PSC and Lord Hodge JSC explained the decision in the *Westmorland* case. In paras 77 and 91 they stressed that, like other decisions which they examined and which related to the acquisition of prescriptive rights under English and Scots law, the decision applied only by
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analogy to the statutory registration of a green on land owned pursuant to statutory purposes.

140 Nevertheless, in a case in which the objection to registration as a green is cast as incompatibility with statutory purposes, there is in my view every reason to assess incompatibility in accordance with the approach adopted in the *Leake* case and indorsed in the *Westmorland* case.

141 I am convinced that in the *Newhaven* case such was also the view of Lord Neuberger PSC and Lord Hodge JSC, and indeed of Baroness Hale of Richmond DPSC and Lord Sumption JSC who agreed with them. I refer to four passages in the joint judgment.

142 First, from para 91:

“It is . . . significant in our view that historically in both English law and Scots law, albeit for different reasons, the passage of time would not give rise to prescriptive acquisition against a public authority, which had acquired land for specified statutory purposes *and continued to carry out those purposes*, where the user founded on would be incompatible with those purposes.” (Emphasis added.)

143 Second, from the crucial para 93:

“Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the *continuing use* of the land for those statutory purposes.” (Emphasis added.)

144 Third, the whole of para 96:

“In this case, which concerns a working harbour, it is not necessary for the parties to lead evidence as to [the authority’s] plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour authority from dredging the Harbour in a way which affected the enjoyment of the Beach. It might also restrict [the authority’s] ability to alter the existing breakwater. All this is apparent without the leading of further evidence.”

145 And fourth, from para 101:

“The ownership of land by a public body . . . which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and *as part of a working harbour*.” (Emphasis added.)

146 It thus seems clear from the *Newhaven* case that registration of the beach as a green was there precluded as incompatible with the existing use of the land as a working harbour; and that, in the absence of existing use of the land, the public authority needs to adduce evidence. What evidence? Evidence which makes it reasonably foreseeable that public use of the land

A as a green would in practice interfere with a proposed exercise of the authority's powers in relation to the land for the statutory purposes.

147 It follows that I respectfully disagree with the suggestion in paras 65 and 66 of the judgment of Lord Carnwath and Lord Sales JJSC that incompatibility with statutory purposes should be assessed as a theoretical exercise rather than by means of a practical inquiry into interference with the authority's existing or proposed future use of the land.

B 148 Adopting what I believe to be the correct, practical, approach to the assessment of incompatibility in relation to the present appeals, I agree with the Court of Appeal [2018] P & CR 15 that neither the education authority nor the health authority has established that public use of its land as a registered green would be likely to be incompatible with its use of it pursuant to its statutory powers. In the Lancashire case the inspector conducted the requisite practical assessment, which led her to reject the alleged incompatibility; and, like the Court of Appeal, Ouseley J in the Administrative Court [2016] EWHC 1238 (Admin) found no fault with her reasoning. I discern no ground upon which this court might have concluded otherwise. In the Surrey case the inspector, while recommending refusal of the application for a different reason later shown to be invalid, also rejected the alleged incompatibility on apparently practical grounds; and the error of law which Gilbert J in the Administrative Court [2016] 4 WLR 130 perceived him to have made in assessing it practically rather than as a matter of statutory construction was in my view correctly held by the Court of Appeal to have been no error at all.

E 149 It was with complete passivity that, for no less than 20 years, these two public authorities contemplated the recreational use of their land on the part of the public. Their simple erection at some stage during that period of signs permitting (or for that matter prohibiting) public use would have prevented such use of the land being as of right: *Winterburn v Bennett* [2017] 1 WLR 646. In such circumstances it is hardly surprising that they both failed to establish its practical incompatibility with their own proposed use of it.

F *Appeals allowed.*

SUSANNE ROOK, Barrister

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