

APPLICATION TO REGISTER LAND AT FREEMAN'S WOOD OFF NEW QUAY
ROAD, LANCASTER AS A TOWN OR VILLAGE GREEN
VG109

REPORT

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RECOMMENDATION: that the Application is granted (subject only to a detailed boundary amendment to exclude land owned by Hurstwood Holdings Limited).

1. INTRODUCTION

1.1 I am instructed in this case by Lancashire County Council as the commons registration authority for its administrative area (“the Registration Authority”) to act as the Inspector in respect of an application (hereafter “the Application”) to register land at Freeman’s Wood off New Quay Road, Lancaster (“the Application Land”) as a town or village green.

1.2 The Application was made by Mr Jon Barry of 145 Willow Lane, Lancaster (“Mr Barry”/“the Applicant”) on behalf of the Friends of Coronation Field and Freeman’s Wood.

1.3 My instructions were to hold a public inquiry and thereafter to provide a report to the Registration Authority together with a recommendation for the determination of the Application.

1.4 I held the inquiry at the Town Hall, Dalton Square, Lancaster on 27th, 28th and 30th August 2019. I thoroughly inspected the Application Land on 29th August 2019 (on an unaccompanied basis in accordance with the agreement of the parties to the inquiry).

1.5 At the inquiry the Applicant was represented by Mr Cain Ormondroyd of counsel and the main objector to the Application, Satnam Investments Limited (“Satnam”), was represented by Mr David Manley QC.

1.6 I thank Mr Ormondroyd and Mr Manley for their assistance and the Registration Authority for making all necessary arrangements for holding the inquiry.

2. THE APPLICATION

2.1 The Application is dated 23rd October 2012 but, for reasons which I need not go into, was not publicised and notified by the Registration Authority until August 2018. It was

originally made on the basis that section 15(2) of the Commons Act 2006 (“the 2006 Act”) applied. Section 15(2) of the 2006 Act provides that it 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.*”

2.2 The justification given for the Application in the application form was that it was believed that the Application Land qualified for registration because many local inhabitants had indulged in lawful sports and pastimes there in the 20 year period from November 1991 to November 2011 and that, until fencing was erected in 2011 and 2012, people were never stopped from entering the Application Land or warned about trespassing. Most people believed that it was “given to the people of the Marsh” by James Williamson (Lord Ashton) who owned the nearby linoleum factory.

2.3 The Application was accompanied by a supporting narrative, a map of the Application Land and the locality relied upon, some 69 completed evidence questionnaires and various photographs.

2.4 The supporting narrative described the boundaries of the Application Land as the Lune Industrial Estate, the cycle path from the end of St George’s Quay (New Quay Road), the footpath leading to the river and an area of scrubland which, in turn, was bordered by a playing field (Coronation Field) owned by Lancaster City Council. The supporting narrative explained that the Application Land was originally owned by James Williamson (Lord Ashton), an industrialist and linoleum manufacturer. A large part of the Application Land was originally used as a waste tip but was subsequently used for sports and recreation by the community. The prevailing view amongst local people was that the Application Land was given to the inhabitants of the area and that it was their right to use it.

2.5 The supporting narrative stated that the Application Land was a mosaic of different habitats with a thin woodland belt to the west together with an area of scrub and brambles, woodland to the south and grassland and some scrub in the middle, part of which area had formerly been used as a football pitch and part as a cricket pitch. There had been numerous entrances to the Application Land (before a large part of it was fenced between November 2011 and

January 2012) and its boundaries had always been extremely porous in terms of access with many entrance points.

2.6 The Application was made on the basis of a locality in the form of the Castle Ward of Lancaster City Council as it had been until the 2003 local elections. The supporting narrative explained that, after this point, a part of the ward nearest to the city centre, bounded by Dallas Road, was included in a new city centre ward. Thus, for over half of the 20 year period (1991-2011) the locality was the local authority ward. This area remained the best locality for the reasons it was chosen in the first place, that is, it was a self-contained unit to the west of the city centre. The supporting narrative went on to describe the locality, its characteristics and its facilities.

2.7 The supporting narrative stated that numerous sports and pastimes were mentioned in the evidence questionnaires and that common uses included walking, dog walking, cycling and picking blackberries. Birdwatching was also an important pastime.

2.8 The supporting narrative further stated that the Application Land had been used without restriction until November 2011 for decades, some people saying for as much as 60 years. There had been only one occasion during the relevant 20 year period when the owners of the Application Land indicated that it was private property. That was about 2003¹ when several notices were put up at some entrances to the Application Land. However, the notices disappeared within a few days and no attempt was made to put them back up or fence the Application Land until November 2011. Only four people who had completed evidence questionnaires were aware of the notices. Because the notices were not enforced and disappeared very quickly, not even the few people who were aware of them thought that they should not be using the Application Land. The majority of people were completely unaware of the notices and had used the Application Land “*as of right*”.

2.9 The Application was in due course supplemented by a number of new statements and evidence questionnaires. In all there were 87 witness documents in support of the Application before the inquiry made up of 16 witness statements provided by those who gave live evidence at the inquiry and 71 further responses mainly in the form of completed

¹ It is clear from the evidence that the date should, in fact, be 2004. Nothing turns on this.

evidence questionnaires but including a number of other forms of statement as well. Mr Barry also prepared a detailed rebuttal (dated 27th November 2018) to the objections made to the Application.

3. THE OBJECTIONS TO THE APPLICATION

3.1 Two objections were made to the Application in 2018, each settled by Addleshaw Goddard LLP. The first was on behalf of Satnam and the second was on behalf of Hurstwood Estates Limited (“Hurstwood”²). I will refer to the objections respectively as “the Satnam Objection” and “the Hurstwood Objection”.

3.2 Satnam do not themselves own any of the Application Land but are promoting its development (together with some adjacent land) in conjunction with the owner of the vast majority of the Application Land, Lune Industrial Estate Limited. Hurstwood own a very small fraction of the Application Land in the form of a thin strip of it (“the Hurstwood Land”) along part of its north east boundary where the Application Land abuts the adjacent industrial estate which is also in Hurstwood ownership. The industrial estate is now called the Lune Business Park but was formerly known as the Lune Industrial Estate and I will use that long established latter name.

3.3 The Satnam Objection was wide-ranging and the contentions raised included the following: that the Application had not identified a locality and/or that the claimed locality had not been shown to have a meaningful connection with the Application Land; that it had not been demonstrated that use of the Application Land had been by a significant number of the inhabitants of the claimed locality; that the claimed use was exaggerated; that the claimed use had not taken place over the entirety of the Application Land; that the claimed use would have appeared to a reasonable landowner to be referable to the assertion of rights of way across the Application Land, with any further use ancillary to the use of rights of way, rather than the assertion of a general right of recreation over the Application Land as a whole; and that the claimed use was not “*as of right*” but forcible. The Satnam Objection also made extensive reference to case law and was accompanied by a body of documentary

² A witness statement from Andrew Charles Park submitted to the inquiry (see paragraph 7.4.1 below) refers to Hurstwood Holdings Limited, rather than Hurstwood Estates Limited. Nothing turns on this discrepancy.

evidence and photographs. I discuss Satnam's arguments as they were pursued at the inquiry, consider the material provided with the Satnam Objection and analyse the application of the relevant case law in due course below.

3.4 The Hurstwood Objection was an altogether shorter document (a letter from Addleshaw Goddard of 21st November 2018) the gist of which appeared to be (the letter is not entirely clear) that the Hurstwood Land had been the subject of commercial activity by occupiers of the industrial estate. The Hurstwood Land is shown (hatched blue) on a plan which was attached to Addleshaw Goddard's letter of 21st November 2018. I return to the Hurstwood Objection later in this report (at paragraph 10.5.1 below).

4. THE SUBSTITUTION OF SECTION 15(3) OF THE 2006 ACT IN PLACE OF SECTION 15(2) AS THE BASIS FOR CONSIDERATION OF THE APPLICATION

4.1 I have already explained that the Application, as originally made, relied on section 15(2) of the 2006 Act and thus on the continuance of qualifying use until the Application was made in October 2012. I have also mentioned that the supporting narrative that accompanied the Application recognised that fencing had been erected around the Application Land at the end of 2011 and that it made reference to the 20 year period from November 1991 to November 2011. Mr Barry explained in the evidence he gave to the inquiry (as to which see paragraph 6.6 below) that he was under the impression until late in the process that section 15(2) of the 2006 Act remained the appropriate statutory basis for the Application if use of the Application Land had continued after the fencing was erected (as it did). He did not appreciate, until he received appropriate legal advice in early 2019, that the use which was required to continue to the time of the Application had to be qualifying use, that is, use "*as of right*". On realising this Mr Barry asked that the Application be amended so that he could rely on section 15(3) of the 2006 Act in the alternative lest it be found that use "*as of right*" had ceased on the erection of the fencing at the end of 2011. The request was made in the alternative because Mr Barry recognised that it was possible that use "*as of right*" might be found to have been brought to an end upon the erection of the 2011 fencing but he considered that the opposite case could be made such that use "*as of right*" had continued to the time of the Application so that section 15(2) was also an appropriate basis for the Application.

4.2 Although Mr Barry's request to amend the Application was first raised well before the inquiry it was not (for reasons which do not need to be explained here) formally determined until the first day of the inquiry when I permitted the amendment to be made. This was uncontroversial not least because the Satnam Objection had proceeded on the basis that the relevant section of the 2006 Act was section 15(3) in any event. Mr Manley understandably raised no objection to the amendment.

4.3 Section 15(3) of the 2006 Act provided, at the relevant time, that it applied "*where-*

- (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
- (b) they ceased to do so before the time of the application but after the commencement of this section; and*
- (c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b)."*³

4.4 If cessation of qualifying use occurred on the erection of the fencing in November 2011 then the Application (having been made in October 2012) was well within time⁴.

4.5 In his closing submissions Mr Ormondroyd indicated that the Applicant recognised that, if he could not succeed in relation to the section 15(3) period, he would also not succeed in relation to the section 15(2) period. Accordingly, he invited me to focus on the section 15(3) period and indicated that no separate substantive consideration of the section 15(2) period was sought. His submissions proceeded accordingly without seeking to argue that qualifying use continued after the end of 2011. I therefore proceed on the same footing and consider matters on the basis of the application of section 15(3) of the 2006 Act alone. That was effectively how the inquiry had proceeded in any event. The section 15(3) period runs from 1991 to the erection of the fencing in 2011. As the supporting narrative accompanying the Application appears to suggest that the erection of the fencing first began in November 2011 the section 15(3) period is to be taken, on this basis, to have begun 20 years before

³ The period of two years referred to in section 15(3)(c) was shortened to one year by section 14 of the Growth and Infrastructure Act 2013 but, by article 8(2) of the Growth and Infrastructure Act 2013 (Commencement No. 2 and Transitional and Saving Provisions) Order 2013, the coming into force of section 14 had no effect in relation to any cessation referred to in section 15(3)(b) of the 2006 Act which occurred before 1st October 2013.

⁴ And would also have been in time had the reduced period of one year been in force at the time.

then in November 1991. However, I do not think that anything turns on the precise identification of a month and I note that when giving evidence Mr Barry dated the first erection of the fencing as December 2011 (see paragraphs 6.5 and 6.6 below⁵). To avoid unnecessary precision, I will take the section 15(3) period to be from the end of 1991 to the end of 2011 and, from this point onwards, refer to this as “the Relevant Period”.

5. THE APPLICATION LAND

5.1 The Application Land lies on the western edge of the built up area of Lancaster. It takes the shape of a trapezium with two sides (the north west and south east) which are roughly parallel and two sides (the south west and north east) which are not. It is of considerable size and extends over several hectares⁶.

5.2 To its north west the Application Land is bounded by a metalled cycleway which leads from the end of New Quay Road in the north to Glasson Dock in the south. As it runs alongside the Application Land, the cycleway is identified on the definitive map as public bridleway 32 (before it becomes bridleway 34 beyond – to the south – of the Application Land). To its south west the Application Land is bounded by a public footpath (footpath 33 on the definitive map) which leads from Willow Lane in the east to the cycleway in the west (before proceeding after that, as footpath 30, to Marsh Point). The south east boundary of the Application Land follows the line of a disused and long since closed railway⁷. To the east of this boundary, falling outside the Application Land, there is a rectangular plot of land. It does not have any formal or usually accepted name but was referred to on occasions at the inquiry as “the Rectangle”. I will adopt that name in this report as a convenient shorthand label. Beyond (to the east of) the Rectangle there is, describing the geography from north to south, a formal public open space located off Willow Lane which consists of

⁵ It is also to be noted that the first relevant invoice in respect of the fencing in question is dated 12th December 2011: see paragraph 7.1.20 below.

⁶ Its area is given as approximately 11.3 hectares in the Satnam Objection although I suspect that this may include some land to the immediate east of the Application Land. The figure of 11.3 hectares corresponds with a figure of 135,000 square yards provided in a December 1997 Health & Safety Risk Assessment (discussed in detail later in this report) for an area of land referred to as “Plot 2” which, on my interpretation of matters, extends not just to the Application Land but also a further plot to its immediate east which I call “the Rectangle”: see paragraph 5.2 of the main text above.

⁷ A report (put in evidence as part of the Satnam Objection) prepared for Lancashire County Council’s Regulatory Committee in December 2014 in respect of applications to add three footpaths affecting the Application Land to the definitive map identifies that the railway closed in 1964.

playing fields and a children's play area and then, further south, a wooded area. The formal public open space is known as Coronation Field. The wooded area to its south is sometimes referred to as Freeman's Wood. However, this name is something of a movable feast; on some maps Freeman's Wood is identified as a linear feature along the footpath 33/30 route I have referred to above; and commonly (as the evidence in this case shows) the name is applied more generally to include the Application Land. Nothing turns on this matter of nomenclature. To its north east side the Application Land is bounded by the Lune Industrial Estate.

5.3 At the inquiry evidence was given by reference to an annotated plan of the Application Land on which various points were marked with letters. It is convenient if I refer to that next. The lettered reference points were derived from a plan which was drawn up by Lancashire County Council to accompany an officer report prepared in December 2014 for its Regulatory Committee in relation to applications to add three footpaths affecting the Application Land to the definitive map ("the Footpaths Report"). I will return to the Footpaths Report in due course. As for the lettered reference points, they are as follows. Point A is at the northern apex of the Application Land where the north west boundary joins the north east boundary and where there was gated vehicular access to the Application Land. At Point A New Quay Road comes to an end as a vehicular highway and onward passage in a southerly direction is then via the cycleway. Point A is also sometime referred to as "Keyline", a business on the west side of the cycleway accessed from the end of New Quay Road. Point B is an internal point within the northern part of the Application Land roughly equidistant between its north west and north east boundaries (and identified in the Footpaths Report simply because it marked a bend in one of the claimed footpaths). Point C is at the northern end of the south east boundary of the Application Land near the location where that boundary meets the north east boundary. Point D lies outside the Application Land on the western edge of Coronation Field. The area between Points C and D lies outside the Application Land in the Rectangle. Point E lies at the junction of the south east boundary of the Application Land with its south west boundary along footpath 33. Point F is at the junction of the south west boundary of the Application Land with its north west boundary at the point where the footpath 33/30 route intersects the cycleway (bridleway 32/34) at a "crossroads".

5.4 The history of the Application Land is associated with the linoleum manufacturing business carried on by the Williamson family (and, in particular, James Williamson who later became Lord Ashton) at Lune Mills to the immediate east of the Application Land. The business became a major enterprise in the late nineteenth century and thrived during the first part of the twentieth century but eventually fell into decline until all industrial activity (latterly carried on under a variety of different corporate ownerships in succession to James Williamson & Son Limited, including Nairn Williamson Limited) ceased around the turn of the century. It appears (from information to be found in the Footpaths Report sourced from online research by its authors) that the Application Land was originally used as a disposal ground for waste from the factory operations before it was turned into a recreation facility with a cricket and football pitch (as well as a cricket pavilion) in the early 1950s. What was formerly Lune Mills is now the Lune Industrial Estate.

5.5 The general features of the Application Land consist of a large open grassed area towards its centre (the former cricket and football pitches which no longer exist as such) with extensive areas of woodland and scrub to each of its sides, particularly the south west and north west sides. That was the overall impression I gained on my site visit. I have had to exercise appropriate caution about what I saw on my site visit given that it took place approaching eight years after the end of the Relevant Period. However, I do not consider that the very broad summary I have just provided of the general features of the Application Land as it stands now is in any way out of step with what I heard at the inquiry, and have read in the written material, about the enduring disposition of those features over the Relevant Period (albeit, of course, subject to incremental change over time).

5.6 I next describe in more detail some of the particular features I saw. The fencing erected at the end of 2011 remains an obvious presence. It is steel palisade fencing of some 6 feet in height and I saw it at the northern and southern ends of the north west boundary (with a large section in between where there was no such fencing and there was no appearance of its ever having been erected there), along the south west boundary of the Application Land and, extending in the same line, along the south west boundary of the Rectangle before returning along the eastern boundary of the Rectangle and across Point D up to the boundaries of the Lune Industrial Estate. Access was possible to the Application Land via the north west boundary in the area where there was no steel palisade fencing and in gaps elsewhere on the boundaries created by individual pales having been removed or, in the

case of a section of the fence near Point D, a panel having been laid flat. I also saw several metal signs which stated “*Warning Keep Out Private Property No Trespassing*”. These were either attached to the steel palisade fence or, on that section on the north west boundary where no such fencing had been erected, on twin metal posts. Most of the signs had been damaged or defaced. I also saw five metal posts, not obviously associated with the palisade fencing and with no signs attached to them, each about four to five feet in height, in the following locations: one on the north west boundary of the Application Land; one just off the rights of way (on the Application Land side of them) at the crossroads near Point F; two along the south west boundary of the Application Land; and one beyond (to the east of) the junction (at Point E) of the south west boundary of the Application Land with its south east boundary, that is, to the south of the Rectangle. I observed old concrete fence posts around the north west, south west and south east boundaries of the Application Land. In general there was very little fencing material in between the concrete posts (a number of which had been impacted by trees) although there were a few stretches of barbed wire in places and there was a decidedly more intact line of mesh wire fencing in between the old concrete posts on the south east boundary of the Application Land although this stopped well short of Point C. I noticed that there were raised mounds along the north west and south west boundaries of the Application Land. The mound along the north west boundary appeared to me, given the tree growth in and around it, to be of very long standing.

5.7 I observed various paths into the Application Land from each of its boundaries, which took advantage of the absence of steel palisade fencing or gaps in the same. There was a very obvious path from near Point D, where the section of the steel palisade fence had been flattened, across the Rectangle to Point C. The area of the Application Land near Point A was impenetrably overgrown but there was access to the Application Land via an obvious path from the Lune Industrial Estate on the northern part of the north east boundary of the Application Land. There were several obvious paths on the Application Land, including one around the central grassed area and others in the wooded and scrub area along its north west boundary, and it was easy to walk around the south west side of the Application Land within the woodland where I saw a rope swing and indications that some soil had been disturbed to create what appeared to be a bicycle course. There were two remnant upright goal posts, surrounded by overgrown vegetation, in the southern part of the Application Land towards its south west boundary and a further single goal post further north. No doubt

the posts marked the position of the former football pitch. I also observed, further north on the Application Land, a concrete base which seemed to me to be in the position where the cricket pavilion would have been. I variously saw blackberry bushes an apple tree and a pear tree.

5.8 As to ownership of the Application Land, I have already indicated that it is owned by Lune Industrial Estate Limited save for the very small part of it, the Hurstwood Land, owned by Hurstwood. Documentation from 1997 onwards (dealt with in detail below) suggests that Lune Industrial Estate Limited is a subsidiary of, or otherwise associated with, a company known as The Property Trust Plc.

6. EVIDENCE IN SUPPORT OF THE APPLICATION

6.1 At the inquiry I heard oral evidence in support of the Application from 16 witnesses. In this section of the report I provide an account of this evidence. I go into a reasonable degree of detail but the account is not intended to be a verbatim one. In general I provide a composite narrative of what a witness said, combining all aspects of their evidence without distinguishing between evidence in chief, cross-examination or re-examination except where it aids clarity to do so.

6.2 **Jon Barry** (the Applicant) of 145 Willow Lane, Lancaster said that he had first become aware of the Application Land in the summer of 1997 and that he had used it ever since though from 1997 to 1999 he lived outside the locality. From January 1999 until June 2002 he lived at his present address. From June 2002 to February 2003 he lived at 16 Cromwell Road. From February 2003 to November 2003 he lived at Portland Street and Sibsey Street. After that he had again lived at his present address. All these addresses were within the locality. His use of the Application Land while living in the locality had thus been from January 1999 to the present day. From January 1999 until June 2002 he used the Application Land about three times a week. Since then he had used it about once a week. His main activity was dog walking. He also used the Application Land for practising (mainly in the central field) his cricket throwing, which he stepped up as summer approached, and some inexpert birdwatching (in the woods and scrub at the sides of the Application Land) on an occasional basis (perhaps once a week in the past but, since 2002, perhaps once a month). He used the whole of the Application Land, coming off the

footpaths depending on what he was doing, including the woods along the south west side, the wooded area along the north west side and the field and scrub area in the east. He would sometimes enter from Point C and then walk along the path on the north east border coming off it into the middle of the field. Sometimes he would enter from Point C and then do some ball throwing with his dogs in the field and then travel towards the woods on the south west or north west sides. On other occasions he would enter by Keyline (Point A) and then walk through the network of paths in the scrubby area in the west part of the Application Land. However, he would also sometimes enter the Application Land from one of the many paths on the south west side or from the corner at Point F.

6.3 Mr Barry said that when he was using the Application Land he would see many other people doing the same thing. Frequently he would see people walking their dogs but he also saw children or young adults using the BMX track on their bikes or small motorbikes along the south west side of the Application Land near to Point F. He also saw people jogging and digging for bottles. Some of the people he knew, from his role as a local councillor (see paragraph 6.5 below), as his constituents.

6.4 Mr Barry said that he did briefly see some signs in the early 2000s. They were much flimsier than the signs erected in 2011, looked like small traffic signs (on round discs), were only present for a short period (perhaps a few weeks) and did not extensively cover the boundaries of the Application Land. There were no signs on the south east side of the Application Land, where Mr Barry frequently gained entry. He could not remember what they said but accepted that they were signs of prohibition. It was not totally obvious that they referred to the whole of the Application Land. He had not contacted the landowner to find out why the signs had gone up. Mr Barry said that he had conducted a new survey in July 2019 of the locations of the posts on which the signs had been placed. It was easy to see them by going round the edge of the Application Land as the posts were about five feet high grey poles. There was a single pole on the north west side of the Application Land, a pole at the junction of the north west and south west sides of the Application Land (at Point F) and two poles on the south west side of the Application Land with a further pole on this side but beyond (nearer to Willow Lane) the point where the south east boundary of the Application Land met the south west. I interpolate at this point that the locations of the poles (or posts) as described by Mr Barry are as I saw them on my site visit (see paragraph 5.6 above). When a photograph forming part of the material provided with the Satnam

Objection (and said to have been taken on 11th September 2005) was put to him in cross-examination in relation to the entrance at Point A, Mr Barry acknowledged that it showed a metal pole which appeared to be about the right height for the poles on which the signs had been mounted.

6.5 Mr Barry said that from May 1999 until May 2019 he was an elected city councillor for the area containing the Application Land, first for Castle Ward and then for Marsh Ward when it was created in 2014. He knew from his time as a city councillor that many local people had used the Application Land over the years, as children and as adults. From 1997 he had always taken a great interest in the Application Land because of his role as a ward councillor and because of the importance of the Application Land to local people. He was very much aware of any signs or fencing being put up in this period. He would have seen them himself or would have been contacted by local users of the Application Land. He could recall that he had had one conversation with someone about the signs but could not remember the extent of the conversation. Apart from the four signs that appeared briefly in 2004 there were no other signs or fences put up between 1997 and when the fence appeared in December 2011. No signs were erected in 1998. The 2011 fence did not stop the Application Land being used but it did much reduce the use, by approaching two thirds. A large length of the north west side remained unfenced (as I saw on my site visit – see paragraph 5.6 above) and the Application Land could be accessed from there. Holes also appeared in the fence on the south east and south west sides. Mr Barry occasionally used these to access the Application Land but mainly used the unfenced section of the north west side for this purpose. He did not feel that he was doing any harm or anything wrong in continuing to use the Application Land after 2011.

6.6 Mr Barry said that the Friends of Coronation Field and Freeman's Wood was a small community group run by local volunteers. It had largely been dormant for some time until the Application, which reflected the previous heavy recreational use of the Application Land, was prepared and submitted in October 2012 as a result of the erection of fencing in December 2011. Mr Barry was a founder member of the group and, of the witnesses presenting evidence at the inquiry, only Sue Ashman, Mandy Bannon and himself were, or had been, members of the group's committee (and neither Sue Ashman or Mandy Bannon had been committee members in 2012). Mr Barry said that during 2012 he, and a small group of volunteers, collected 69 evidence forms from local people who had used the

Application Land and also produced maps and photographs to illustrate the Application Land and the locality defined in the Application. A leaflet drop was carried out of around 400 houses in the Marsh area (Willow Lane and streets off it between Milking Stile Lane and Denmark Street) asking for people who had used the Application Land to complete footpath and village green forms. There was also some press attention and some of the forms arose from this. Later the original group of evidence forms was supplemented with a further twelve plus 30 evidence statements (seven of which were from new people). It would have been easy to have completed more forms but it was thought that there were enough (and there were limitations of time and personnel resources). Mr Barry also explained that he had, until receiving appropriate legal advice in early 2019, relied only on section 15(2) of the 2006 Act and not section 15(3) notwithstanding that he was clear in his own mind that he needed to prove use in the period November 1991 to November 2011 because he had (wrongly) understood that it was sufficient simply that use, rather than use “*as of right*”, had to continue until an application was made. This particular point is no longer of any significance given that the Application is now to be treated as relying on section 15(3) and Mr Ormondroyd no longer seeks any finding in respect of section 15(2) (see paragraph 4.5 above).

6.7 Mr Barry explained that the locality which was relied upon was the area that was Castle Ward pre-2003. The locality was bounded by the River Lune and St George’s Quay, the A6 and Aldcliffe Road in the built environment and formed a distinct locality in the west of Lancaster. It was a sort of cul-de-sac and people had a very clear sense of identity with this region. In 2003 Castle Ward was redefined with the formation of Dukes Ward. This resulted in a few streets in the city centre being removed from Castle Ward. However, as could be seen from the relevant map which he produced, Mr Barry said that this was only a very small part of the ward, perhaps 10% of the addresses. The present population of the the pre-2003 Castle Ward was around 8,000. The population of Castle Ward in 2011 as shown by an ONS search was 7,250. However, Castle Ward as it was in 2011 did not define the whole locality because a part had been lost to Dukes Ward in 2003. On the basis that 10% of the addresses were lost, adding 10% to the population figure of 7,250 gave a figure of 7,975. Mr Griffiths (who gave evidence on behalf of Satnam, considered below) had estimated the population as 8,000 to 10,000 but this was based on the boundaries of Castle Ward in 2017. That ward included parts of the city centre (not part of the pre-2003 Castle Ward) which were high in student numbers. This extra area could be seen on the relevant

map produced by Mr Barry indicating the area removed from the original pre-2003 Castle Ward and was located to the right of the shaded area on that map (which represented the removed area).

6.8 Insofar as it was contended on behalf of Satnam that, as well as being an area known to the law, a locality had to have some independent identity or sense of community, Mr Barry said that he was advised that this was not the correct legal test but nevertheless there were two points he would make in that respect. First, the locality relied on was defined by some very strong boundaries including the River Lune, the Lancaster Canal (which runs alongside Aldcliffe Road) and the A6 road. These clearly defined a cul-de-sac of land in the west of Lancaster. Mr Barry had previously lived (until January 1999) in the east of Lancaster. There was a very different feel about the west of Lancaster. People there had a stronger love of the natural environment. One of the reasons many people lived there was because they liked to walk or cycle along the cycle track to Glasson Dock, walk along the Lune Estuary and use the Application Land. All features were relatively close to people living in the locality. Secondly, Mr Barry said that he was a founder-trustee of the Marsh Community Centre (“MCC”) in 1999. He was currently chair of the trustees. The constitution of the MCC (an extract of which he produced) drawn up in around 1999 (and still currently the constitution) showed that the area of benefit of the MCC was the pre-2003 Castle Ward.

6.9 Mr Barry said that the majority of the Application Land was owned by Lune Industrial Estate Limited. This company, as revealed by searches at Companies House, was ultimately controlled or owned by persons based in Hong Kong.

6.10 Mr Barry took issue with a number of aspects of Satnam’s evidence, and the interpretation they put forward of documents submitted with the Satnam Objection, as follows. First, he said that the claim or implication in their evidence that Plot 1 as referred to in the 1997 Health & Safety Risk Assessment (submitted as part of the Satnam Objection) was part of the Application Land was wrong. Plot 1 as referred to on page 5 of the 1997 Health & Safety Risk Assessment was defined as *“a triangular shaped piece of land ... opposite the Lune Industrial Estate entrance. The northern border of the plot runs parallel to the bank of the River Lune.”* On page 10 of the same document and in one of the accompanying photographs it was noted that there were oil storage tanks on the adjacent

land to the south west boundary of Plot 1. Mr Barry said that he remembered these tanks on the land between Plot 1 and Keyline (as could be seen on an aerial photograph from 2003 that he produced). Plot 2 was the Application Land (except that the Application Land did not include the Rectangle). The 1997 Health & Safety Risk Assessment said on page 5 that Plot 2 was approximately 135,000 square yards. This was 11.3 hectares. The Satnam Objection said that the property which Satnam was promoting (the major part of the Application Land) was “*approximately 11.3 ha of land*”. This clearly corresponded to the size of Plot 2.

6.11 Secondly, Mr Barry said that, in respect of the claim by Satnam (in a witness statement provided by a Mr David Cadman - considered in this report from paragraph 7.2.1 below) that tipping in connection with industrial uses continued on or around the Application Land until 1994 (see paragraph 7.2.3 below), he did not recall any such tipping. When the Ultramark site on the Lune Industrial Estate was expanded in around 1998 he did recall that at that time there was some limited dumping of construction related materials on the area to the south of that site (i.e., the Rectangle). At this point the path from Coronation Field to the Application Land moved south west from its previous location. Insofar as it was suggested that lino offcuts in the area were tipped there after 1991 this was contradicted by publicly available information in that (as shown by extracts from Unilever archives which Mr Barry produced) the successors to James Williamson & Son Limited had moved from lino to wallpaper production in the 1970s. Mr Barry also added that linseed (mentioned by Mr Cadman in his witness statement as a waste material that was dumped on the Application Land: see paragraph 7.2.3 below) was, as he understood it, used in the production of lino, one of the raw materials for which was linseed oil.

6.12 Thirdly, Mr Barry provided a response to the suggestion (also contained in Mr Cadman’s witness statement: see paragraph 7.2.6 below) that fence replacement works were carried out by North West Water in 1998 after they had carried out works on pipes running through the Application Land. He produced information from the “SafeDig” software programme of United Utilities (the successor to North West Water) which showed that there was a sewerage pipe that crossed Plot 1 and ran through the line of a wooden fence (as shown on 2009 photographs which he produced) on that plot. The pipe then continued down the line of the cycle path but did not go over the Application Land at all. There were no pipes which crossed the boundaries of the Application Land. The

correspondence relied on by Satnam (Mr Cadman's letter of 2nd December 1998 to Mr Chan of Property Trust Plc forming part of the documentary material accompanying the Satnam Objection: see paragraph 7.1.8 below) referred to the laying of a new water main "*on the land adjacent to the river.*" This was Plot 1 (as referred to in the 1997 Health & Safety Risk Assessment) and not the Application Land. The "*timber rails and post*" which were referred to as the subject of repairs in March 2001 documentation produced by Satnam (see paragraph 7.1.16 below) were also on Plot 1. Mr Barry produced 2009 Google Earth photographs showing timber rail and post fencing on Plot 1. There had never been any wooden fencing around the Application Land.

6.13 Fourthly, Mr Barry said that he had never seen the sign (advising emergency services of the key location) on the gate to the Application Land near Keyline said by Mr Cadman in his witness statement to have been put there in 1998 (see paragraph 7.2.5 below). There were no photographs of this sign and photographs that there were of the gate did not show any indication of it.

6.14 Fifthly, Mr Barry said that Satnam's evidence suggested that the concrete post and wire fence around the Application Land was maintained consistently up until 2011. However, he had not seen any evidence of such maintenance. Furthermore, various of the concrete posts had large trees growing by or around them which would have made it impossible to attach or re-attach wire to them. The fence looked ancient when he first got to know the Application Land. On the north west side there were concrete posts but no wire; on the south west side there was some old wire (more remaining towards Point E) but loads of gaps and more people entered at Point F in any case; the old fence was in better condition from Point E leading towards Point C on the south east side of the Application Land but it stopped about 30 metres from Point C and there had never been any fence there; and there were no concrete fence posts on the north east side. In 1997 the overall position was that there was some mesh between the posts but there were more gaps than there was fencing and there was no fencing in places where people entered the Application Land. He was not able to recognise as the Application Land a photograph submitted with the Satnam Objection (said to have been taken in 1996 and to be of the Application Land) when the suggestion was put to him in cross-examination that mesh could be seen on the photograph. As to the suggestion made by Mr Cadman in his witness statement that in 1998 he arranged for a 10 foot high earth mound to be built up behind the entrance gate and along two

boundaries of the Application Land (see paragraph 7.2.7 below), Mr Barry said that he was aware that a mound was put up by the gate (presumably in an effort to prevent vehicular access) but he saw no evidence of any more widespread mounding around this time. He did not recall any change in the profile of the mounds to the north west side of the site. There were sizeable trees on the mounds which were consistent with his recollection. Had any such extensive works been carried out in 1998 Mr Barry said that he would have taken steps at the time.

6.15 Sixthly, Mr Barry took issue with Mr Cadman's evidence in his witness statement that a photograph he referred to showed a "sawn off" sign post (see paragraph 7.2.10 below). However, the reality was that all the posts (save for one which was six inches shorter and appeared to have rusted off) were the same height as the one shown in the photograph. Mr Barry produced photographs of one of the posts showing that its top was still painted grey so anybody who had cut it off would, he said, have had to have re-sealed it and painted it afterwards.

6.16 Finally, in relation to the Hurstwood Objection, Mr Barry said that he had considered it by doing his own research by looking at aerial photographs (contained in his rebuttal). He concluded from these that, compared with earlier aerial photographs, one from 2010 showed that some sort of car park or storage activity on the western edge of the industrial estate in the vicinity of the north east boundary of the Application had come to occupy an area which was formerly green but that it did not spill over into the Application Land.

6.17 **Amanda Bannon** of 3 Kennedy Close, Lancaster said that she and her family moved to that address from the city centre in 1997. Before then she had first visited the Application Land on 26th August 1991 to watch her husband play cricket for the Gregson Cricket Club against the John O' Gaunt team. She had sourced the date from the club's website. At that time the cricket pitch on the Application Land was managed and used by the Lancaster Cricket Club's third team as their home ground. It was known as the Marsh Point cricket pitch. Once she lived at Kennedy Close Mrs Bannon used the Application Land for a variety of uses until the fence went up. When her son was about four years old in 2000 they would explore the area on foot, picking blackberries in late summer (once or twice a week), most years until about 2010. They would usually gain access from Willow Lane at Point D and, having been on the Application Land, leave at around Point E where there were various

opportunities to exit. When her son was aged about ten to twelve between 2006 to 2008 she would accompany him, each on a mountain bike, and explore the wooded area in the south west corner of the Application Land which they would access from Point F. Here there were wooden cycle ramps and wooden obstacle courses that her son and his friends enjoyed using when the “big boys” were not there. These were parallel with the footpath alongside the south west side of the Application Land. The ramps had been made by a local father for his sons and the local children from Castle Ward to use. They were a feat of engineering, a local talking point and a great draw for young people in the area. Mrs Bannon and her son saw many children using and helping to build and repair the ramps, including some local children who her son knew from his primary school and who lived in Castle Ward. She and her son also explored the wooded area in the west of the Application Land where there were cycle bumps and hollows moulded into the ground by digging although she had not seen them being created. When her son was twelve in 2008 he would go off with friends, who all lived in Castle Ward, to use the bike ramps independently. He did that for a couple of years until he was fourteen in 2010.

6.18 From 2001 to 2011 Mrs Bannon used to jog along Coronation Field and enter the Application Land from Point D. She would run along the network of footpaths that ran across the central field but also liked to walk through the wooded areas in the south and west parts of the Application Land to cool down in the shade, particularly on hot days in the summer. She never felt uncomfortable running on her own as there were so many people about, dog walkers especially, who she assumed were local because she would see some of the same walkers repeatedly. The dog walkers were often too far away to recognise but she got the impression it was a particular group of people. The size of the group varied depending on the time. Her jogging, which she did about two to three times a week, would take her off the tracks to explore. She was interested in the local environment. In the last couple of years before the fence went up Mrs Bannon would accompany her friend, who lived in Castle Ward, to walk her dogs on the Application Land about once a month. They would enter from Point D, approaching from Coronation Field, and then meander about, crossing the field, going into the woods along the south or west part of the Application Land and leaving at Point A or Point F. Since Freeman’s Pools had been built in 2008 Mrs Bannon and her husband had enjoyed birdwatching in the area and had become members of the RSPB. Before the Application Land was fenced off they would, having usually entered at Point E, explore various parts of it, including woodland, scrubland and grassy

areas, leaving at Point A. They used the whole of the Application Land for birdwatching and had seen a variety of birds there. This activity took place once a week or once every two weeks. On average she would visit the Application Land once a week and there were lots of other local people doing all sorts of activities there including birdwatching, walking (many with dogs) and jogging. There were also children and young people playing and riding bikes such as BMXs. She had not seen drawing or painting on the Application Land. She probably would have seen other activities such as informal football, cricket and picnicking but she had not ticked these on her evidence questionnaire.

6.19 Mrs Bannon did not remember seeing any fences or signs preventing her from using the Application Land before the fences went up in 2011. There had been concrete posts there in 1997 but she had never noticed, and did not recall, wire mesh with barbed wire on top. She never noticed any signs in 2004 and did not see any until 2011. If she had seen signs in 2004 she would have taken note of them if they were prohibitive and would have remembered them. She had not seen any industrial tipping continuing into the 1990s on the Application Land. She had seen litter on the Application Land from time to time but was not sure that what she had seen amounted to fly tipping. Mrs Bannon had not, save for some recent litter picking, gone on to the Application Land since 2011 because she was not confident of her legal position.

6.20 **Gill Aitken** of 16 Cromwell Road, Lancaster said that she lived at 145 Willow Lane, Lancaster from 1990-2002 before moving to her present Cromwell Road address. She used the Application Land frequently, between six and ten times a week, when she lived at Willow Lane and, after she moved to Cromwell Road, used it at least two to three times a week. She continued to use the Application Land at present. Mrs Aitken said that she entered and exited the Application Land from a wide range of points: the south east side (Points C to E) from Coronation Field where there were two entry points at Point C; a range of paths (five or six) on the south west side (Points E to F); and a range of paths (three or four) from the north west side (Points A to F) as well as via the gateway at Point A opposite Keyline. She did not have a set route but mixed and matched it according to her mood. Sometimes she would go through the woods and scrub and, at other times, she would access the Application Land from a single footpath and then meander around it at will, throughout its southern, western and eastern areas. Sometimes she would enter and leave the Application Land by the same point but, at other times, she would enter and leave by

different points. She had no fixed route. She used all the paths on the Application Land, including a network of paths in the wooded/scrubland areas, but also wandered around the rest of the Application Land. Mrs Aitken was primarily dog walking (going on both a morning and afternoon walk) but she would also do quite a bit of birdwatching (which she had been very keen on in the early days) and, in season, she would pick blackberries. She also used to train her dogs, using the field for this purpose and hiding things for the dogs to find in the woods.

6.21 Mrs Aitken said that most days she met other people on the Application Land, walking, walking dogs, jogging, having picnics, birdwatching, riding bikes or motorbikes or playing with remote control helicopter toys (the last mentioned use having been seen quite a lot throughout the Relevant Period but not since the fence had gone up). These were uses she saw frequently. Walkers and joggers seemed to weave about and they used the grass in the central area and the unmarked paths in the woods; she had seen both adults and children on bikes, not riding through the grass but everywhere else, as well as children on bikes on the ramps; the dog walkers were not a group but just people who walked dogs. She knew some of them. She had also seen photography, drawing and painting, football and kite flying taking place on the Application Land. Drawing and painting, which she had not seen often, had been in the middle, grassy area. She could pretty much guarantee passing people on any of the areas where she was walking. Like her, people were not confined to the worn paths. Given the number of people she would meet on a daily basis on the Application Land, Mrs Aitken said that it was clearly used regularly by many local people. A number of them she knew to live in or around the Marsh area and Castle Ward more generally. She would say that probably over 50% of those she saw on the Application Land were people she knew from the locality (Castle Ward). A few users she saw would park their cars at Coronation Field or Keyline but most walked to the Application Land.

6.22 A few signs on metal posts had appeared along the south west side of the Application Land and one or two on the north west side. She could not remember when this was nor could she recall how many there had been but there may have been five or six. They said something like “private” but she could not recall exactly what and they disappeared very quickly, maybe after a week or two. It was not clear where they meant was “private” as the Application Land behind the signs could be accessed at many other points where there were no signs. Mrs Aitken did not think to stop going on to the Application Land in consequence

of the signs. She had not seen any signs at any time prior to the ones in question. At some point the gateway opposite Keyline acquired a gate and a large pile of rubble behind it. She assumed it was to dissuade the motorbikes which sometimes used the field (coming in from Keyline and, latterly, from the industrial estate) and thought that perhaps the council was responding to complaints from dog walkers about risks to them and their dogs. It did not occur to her that the gate was to dissuade walkers as this would have made no sense given that the Application Land was easily accessed via many other routes, including just a few yards down from the gate. From the time she started using the Application Land there had been a few short patches of very old, broken down mesh fencing with bits here and there of rusty barbed wire. The fencing looked rusty and old then. It was within the Application Land itself and in no way prevented access or the ability to walk where one wished. Mrs Aitken assumed it was the remnants of fencing from the days of the lino factory. She never saw any repairs to it. She had never seen any industrial tipping on the Application Land in the 1990s.

6.23 Mrs Aitken said that she continued to use the Application Land regularly (around two to three times a week) after fences went up around December 2011 until October 2012 and beyond, primarily for dog walking but also birdwatching. She tended to access the Application Land from the north west side (between Points A and F). On this side there was an extensive area with no fencing and there were a few paths that led into the woods and from there to the field. She regularly met others who were using the Application Land in a similar way. She did see that signs had been erected but there were several access points where there was no sign and the fence was not continuous. She felt that the Application Land was still common land and that she was doing no harm whatsoever despite what the signs said.

6.24 **Jennifer Stephenson** of 112 Westbourne Road, Lancaster said that between 1979 and 1987 she lived at 12 Jefferson Close and that from 1992 until the present she had lived at her current address. She regularly walked on the Application Land in the period when she owned a dog, from 1992 to 2000. She did this most evenings during the lighter months and every weekend. She usually crossed Coronation Field and entered at Point C to access the open cricket field area and the surrounding woods and wild areas. She walked all over and around the field and on the many tracks into the woodland beside the open field. She mostly used the woodland near to the south west side and the networks of paths there. She also

used to walk along the north east side with her dog. Sometimes, but not frequently, she would leave at Point A, walk down the cycle track to Point F and then enter the Application Land on the south west side. After 2000 she visited the Application Land all year round for birdwatching or blackberrying in the season. She was a life member of the RSPB. Her estimated usage then was about twice a week on average. She would use the whole of the Application Land for these activities but went more into the tree and scrub areas. She used the areas at the back of the factories (north east side), the south west side and the south east side, where a lot of the blackberry bushes were. There were fewer blackberries on the north west side. Mrs Stephenson stopped using the Application Land after the fence went up in December 2011. Prior thereto, she had not seen any fencing or any sign indicating that there was no open access. She believed that it had always been understood that the Application Land was freely available to all for walking and recreational purposes.

6.25 While she was walking she frequently met on a regular basis other dog walkers who were similarly making use of the field and the woods. She also saw other people who were equally enjoying the area. These included families bringing children to the safe open space to run around, children riding BMX bikes or small scrambler bikes, footballers or people playing cricket, joggers, occasional pony riders and, on many weekends, adults flying model helicopters. She had seen other bird enthusiasts on the Application Land. She had seen some photography, but not a lot, on the central grassy area looking to the trees on the south west of the Application Land. She knew one lady, a dog walker, was local because she lived on Willow Lane. Mrs Stephenson sometimes also took her elderly friend, who lived on Jefferson Close, with her when she was dog walking or picking blackberries. They frequently saw other people engaged in blackberrying, mainly in the overgrown areas at the edge of the field. There were several places in the trees where rope swings were hanging for children's play and the edges of the field amongst the trees were popular for BMX riders to try their skills on the uneven ground. These areas were in the woods near the south west side of the Application Land.

6.26 **Margaret Harrison** of 89 Sibsey Street said that she had lived at that address since 2003 before which (from 1982 to 2003) she lived at Cavendish Street. When she lived at Cavendish Street, she used the Application Land every day for dog walking. In the summer she used to take her children, when they were between the ages of four or five and eleven, into the field to play football, fly kites and watch the model aircraft. At the time the model

aircraft club were using the Application Land they would be there a couple of times a week. Many other families in Cavendish Street also took children on to the Application Land. When her children were older (over eleven) they would often go to the Application Land with their friends in the holidays. There were tree swings for them and all sorts of attractions. She and her children roamed all over the Application Land. Since 2003 Mrs Harrison had used the Application for dog walking every two to three weeks (in chief) or at least once a week (in cross-examination). She had generally gone there and then come back rather than passing through it as part of a longer route. Before 2003 she normally entered the Application Land at Point C from Coronation Field. After 2003 it was usually from Point A or from the side between Points A and F and sometimes from Point E. Mrs Harrison said that her morning dog walks (she walked before and after work) were always a circuit, following a well walked route. Dog walkers would generally use the circuit route. She would meet people and they would walk round together. Nevertheless, she liked to vary what she did using routes criss-crossing the Application Land.

6.27 The Application Land was open and it could be entered from all sorts of places. She had never been told not to use the Application Land until the fences went up in late 2011. She did not recall seeing any signs before that but did remember seeing posts (about three or four feet in height) going up, a couple down the side A to F and a couple down the side E to F. When it was “Williamson’s Field” there was never anything to say “no trespassing”. There were old concrete fence posts but no upkeep of the fencing took place although there was mesh in places. It had deteriorated over time and had been in better condition in the early 1990s than it was later on. There were loads of ways through the fencing. She could not recall any running repairs to it at the beginning of the 1990s.

6.28 There were people who regularly used the Application Land – for dog walking, walking and collecting wood. Mrs Harrison had seen a lot of birdwatchers there. She would see people all over the Application Land. People who used it were from the Marsh, Abraham Heights, Aldcliffe, Willow Lane and Fairfield. She could not say who the users were or what their addresses were but she recognised lots of them (or their dogs) by sight. Dog walkers generally used the circuit route. It was not a group but the same people going on the Application Land at the same time.

6.29 **Margaret Thompson** of 7 Greythwaite Court, Lancaster said that she had lived at that address since 1991 before which she had lived at Willow Lane until 1962. She had used the Application Land as a recreation area all her life and had played on the main field there and the wooded area at the back in her childhood. Since her return to Lancaster in 1991 Mrs Thompson resumed using the Application Land to walk her dogs on an almost daily basis all year round. She would get to Point E, walking on the footpath, and then, shortly after that point, turn right up the embankment on the south west side of the Application Land into the woodland. She would pick apples, pears and blackberries on the Application Land. There were apple and pear trees near to Point E but also around the perimeter of the field, except on the south east side. Blackberry bushes were also mainly on the south west, north west and north east sides, bordering on the open area. Children had built ramps for their bikes near Point F. Mrs Thompson used to use these as a dog agility course for the dog she had from 2001 to 2013. Her route would continue across the woodland into the clearing and the western and eastern areas of the Application Land and she would leave at Point A to get on to the Quay if she wanted to come back via the river, or circle round to about Point F near to Freeman's Pools, before returning via Point E and then Willow Lane.

6.30 Mrs Thompson regularly saw many other people on the Application Land with dogs and children, including, on several occasions, teenagers using the wooded area with mountain bikes. She had also seen people in the cleared area in the middle of the trees for picnics in summer and model aeroplanes flying around the tops of the trees from the centre field. In the woods there were often people walking through from one side to the other, presumably to reach the cycle path on New Quay Road but other people were just hanging around looking at birds in the tree tops and taking photographs. She had seen photography generally taking place on the Application Land, not in a formal way but by people using cameras rather than mobile phones. She would regularly see people picking blackberries in the season. As far as she could see, Mrs Thompson said that hardly anyone stuck to the paths a few yards off Willow Lane. People tended to wander across the open area in the middle of the Application Land. She mainly saw people entering and exiting the Application Land on its south east side across Coronation Field and north west side with people walking along the north east area of the Application Land to reach New Quay Road. There were never any set routes that she could see. It had always just been a piece of public land available to walk around. There were some better trodden areas but people did not stick to these. The Application Land was known as a public amenity for children to run

around in and work off excess energy and as a little area of peace and quiet to wander around by many people Mrs Thompson knew.

6.31 Mrs Thompson only saw fences around 2011, giving the impression that people were being stopped from using the woodland. There was a big gate at the end of New Quay Road but that had been there for a long time and was, she thought, to stop vehicles. It was chained and locked but it did not stop pedestrians because there was a clear way to walk around the edge which everyone used. There was just earth there with no vegetation because it was used so much.

6.32 **Susan Ashman** of 3 Greythwaite Court, Lancaster said that she had lived at that address since the house was built, having moved there in 1988. Before that she had lived on Marsh Street for eight years. She had come to the area as a student at Lancaster University in 1978. Since she began living on the Marsh she had used the Application Land freely for walks (for general fitness, health and leisure) and blackberrying and was of the belief that it was common land and therefore for the general public to use without restriction, having been given to the area by the people who had owned the nearby factory. To her the Application Land and Coronation Field were one linked area available for public use. She had never seen any signs to indicate any restriction on access to the area around the Application Land. She was not aware of any fencing at all. On average she had used the Application Land weekly throughout the time she had lived at Greythwaite Court. She used to go blackberry picking there every year. Most often she entered from the south east side of the Application Land and would pick blackberries on the south west side, working round to the area with Freeman's Pools. If she was blackberrying her route would take her where the blackberries were but she tended to stick on the path unless she was blackberrying. She picked blackberries every year, probably doing this about a couple of times. Sometimes she would retrace her steps to get home but at other times she would carry on to the Quay, leaving the wood after a walk at Point A if she wanted to walk by the river or back through the industrial estate. She particularly used to do this when picking fruit near the Keyline area. One year she took her daughter to pick blackberries on the north west side of the Application Land and was horrified to see that someone had cut all the bushes back and she was completely confused by the signs which had gone up in, she thought, 2011. Mrs Ashman said that whenever her family visited she and they would go through the Application Land to the river and her brothers used to run about amongst the trees and bushes around its south west

side. She also regularly walked through the wood with her daughter who also enjoyed hiding amongst the trees. Her daughter was born in 1989 and went to the Application Land with her from about the age of two to nine (roughly 1991 to 1997). When her daughter was older than nine she would go to the Application Land with her friends on her bike around a couple of times a month when the weather was nicer.

6.33 Mrs Ashman said that she and her daughter would always see other people wandering through the trees with their dogs and other parents with children on bikes also riding off the path into the woodland areas. Some of the areas were used like skate parks but for bikes. They had also often heard people using quad bikes in the area. Football and cricket were activities which she had seen on Coronation Field rather than the Application Land. She did not claim to have seen drawing, painting, kite flying or photography on the Application Land. She had started using it because she saw other people going on to it and walking around all over. She said that nobody seemed to stick to any particular path but agreed when cross-examined that the very well worn routes were the ones the dog walkers used, as far as she understood.

6.34 **John Harvey** of 105 Westbourne Road, Lancaster said that he had lived at that address from 1978 to the present day and that, ever since moving there, he had known the Application Land as Freeman's Wood. He went there very regularly many weekends and in the summer evenings with his son on their bikes until about 1990. From 1991 to date he would go walking and birdwatching with his wife. This would be, on a rough average, about once a fortnight. They also looked after a dog and they had taken it to the Application Land from about 2011. This was once every three weeks or so on average. It could be part of their way along to the river. They also used to take their granddaughters walking with them sometimes. This would have been from about 2000 until 2007, about once a week, visiting the Application Land when *en route* to the river. Hide and seek was a popular activity for them. Mr Harvey said that he would enter the Application Land in various ways from all around it, sometimes from Point F at the crossroads, sometimes from Point A at Keyline and anywhere between Points A and F as well as from the footpath on the south west side of the Application Land. Once on the Application Land he was never one to stick to the footpaths although paths did tend to form and there was a sort of circular one. If a ball was thrown off the path for a dog and it did not bring it back, it was necessary to go off the path to retrieve it. He had seen dogs and dog walkers all over the field. He was a

member of the RSPB and would walk through the Application Land with his binoculars on his way to the River Lune to watch the estuary birds but he would watch birds on the Application Land on his way to or from the river. He would walk in from the football field (Points D and C), walk all over the scrub (in both the east and west areas of the Application Land) and under the trees (on the south west side) to watch the birds and take photographs before leaving at Point A by Keyline to go to the River Lune. Nobody ever confronted him to say that he should not be there or that he needed permission. He was not even confronted once the fence went up. There was nobody there to confront him. He had seen the concrete posts but not any wire between them except some rusted wire which had become semi-detached from the posts. He had not seen repairs to the wire. He imagined it had fallen into disrepair when the factory ceased. He did not recollect seeing any signs in 2004 and probably would not have taken much notice of them anyway.

6.35 There were usually many people on the Application Land: lots of people walking, running and loads of dog walkers, which must have been the most common activity. He assumed that the people with the dogs were local but he did not necessarily know them. He saw children playing in the scrub and families picnicking. He mostly saw people on the south west side. This was probably the most popular part of the Application Land for birdwatching. It was easy to access before the fence went up. There were also people riding bikes and BMX bikes. Children had built the most amazing BMX track with elevated platforms and things in the corner of the Application Land by Point F. It was there for a long time and was a huge construction. It had ramps, ditches and high level platforms which he thought were quite dangerous. The ditches had been dug as far as he could tell. There were also people with motorbikes using the main field. He had seen people picking blackberries at the margins between the scrub and the open land, probably on the north west side of the Application Land and not elsewhere to his recollection. However, he now realised that he and his wife had picked their blackberries on the public footpath outside the Application Land (round about Point E). He had not seen cricket, football, kite flying, rounders, drawing or painting on the Application Land.

6.36 **Phil Boothman** of 20 Dallas Road, Lancaster said that he had lived at that address since October 1991 before which he had lived at Victoria Place in the centre of Lancaster between October 1989 and October 1991. Having moved to the centre of Lancaster with two dogs, he soon discovered nearby land on which to exercise them. His (and the dogs') most

popular location was the fields, scrubland and woodland of the Application Land which soon became a favourite place for family activities. He would walk on the routes and chuck a ball in the open space for the dog to bring back. Dog walking on the Application Land could be a couple of times a week but it might be that for a period of six weeks he would go elsewhere. He took his grandchildren (who did not live in the locality) there to play ball games, fly kites, picnic and generally enjoy the freedom that the space gave them. They had played rounders. They had picked blackberries on the perimeter where the grass stopped. His eldest grandchild was born in 1991 and he had other grandchildren born in 2000, 2004 and 2006 so the use he referred to started in the early 1990s and had continued since then. He had taken all his grandchildren on the Application Land at various times, once, or perhaps twice, a summer. On two occasions in the early days they used one set of the old football goalposts for informal friends and family football matches. This would probably have been in the late 1990s. He had seen others doing the same. On another occasion he took his eldest grandson to the Application Land to practise with his mini-motorbike. There was a craze at the time for these bikes and soon several others were using the area in the same way. He and his wife also enjoyed walking the fields and woods to watch birds and other wildlife. They criss-crossed the area using paths or just walking randomly where the undergrowth would allow. The birdwatching was something they just did when they were walking on the Application Land; they did not go there just to birdwatch. At other times they would specifically go to Freeman's Pools to birdwatch. At various times he saw model aeroplane flying, kite flying, games of rounders and informal family cricket on the Application Land. He had seen someone drawing and painting on one occasion, near the old goalposts. He had seen photographs being taken reasonably regularly. More often than not there were people engaged in activities similar to those he had mentioned. He saw other dog walkers, often the same dogs and owners. They walked on the paths. The Application Land had been, and still was, a well used place.

6.37 Quite often Mr Boothman and his family would approach the Application Land from Willow Lane, entering it most often around Point E, as the car could be parked quite near but more often, if they were going there by car, they would park near Point A. In either case they would enter and leave by the same route. At other times their use of the Application Land would be part of a longer walk from their home to the estuary or, after their creation, to Freeman's Pools for bird watching. It appeared to Mr Boothman that others they met were local having arrived on foot, and from other parts of the city, having

arrived by car. Mr Bootham was astonished when work commenced on the erection of fences around the Application Land (in 2011) and felt that the well established public use had set up custom and practice that should not be ignored. He had seen concrete posts previously but did not recall seeing any maintenance of the fence and had not seen any signs.

6.38 **Manjeet Lamba** of 42, Regent Street, Lancaster said that he had used the Application Land from 1981 to the present day. He accessed it randomly from several points including from Keyline (Point A) into the woodland areas (north west and south west sides) and from the footpath between Points E and F, turning right into the Application Land, or, if having first walked along the river to Marsh Point, turning left into the Application Land. He would primarily be walking with his binoculars for birdwatching. He would use the whole of the Application Land, its south, east and west areas, spending two to three hours each time maybe two to three times per week. Before he retired in 2010 his visits were primarily at weekends, sometimes twice a day and primarily at dusk but he also went at about 9 or 10 am. From 1981 to 2006 Mr Lamba would be walking on his own but since 2006 he would be walking his dog while birdwatching. Nobody had said he could not use the Application Land. Before 2011 it was possible to walk all over the place without encountering any fences. In 1981 the old concrete fence posts were present but there had never been any continuous wire fence which had been maintained throughout. He had never seen any maintenance work or any evidence of it. He did not see any signs telling him to keep out.

6.39 Mr Lamba often used to see other people on the Application Land including other birdwatchers and dog walkers. Sometimes there would be nobody else there but at other times there would be a number of people (each acting as separate individuals, not in a group). He knew that the birdwatchers he saw regularly (five separate individuals) were local and he became friends with them. They lived in Castle Ward. Four had given evidence (including the two witnesses preceding him) and one was not a witness. The other people he saw were mainly dog walkers. He assumed that they were local because he could not imagine that they would come from out of the area to walk their dogs. From 2004 he began to recognise individual dog walkers because he had seen them often before. They were local people and he got talking to them and found out where they lived. There were between half a dozen and a dozen dog walkers that he saw regularly. A couple of people he would meet in similar locations but otherwise the dog walkers' use was fairly haphazard and he

would tend to meet people all over the place. In the earlier years (1985 to the late 1990s) there were children from the Marsh who had built BMX ramps in the woods on the south west side of the Application Land. These had been dismantled by 2000 (a date he could not be really sure of) but the BMX use went on for a while afterwards. There were loads of children on their bikes. Mr Lamba said that there would also be people on the Application Land who were walking and taking in the ambience of the area. The use had dropped since the fence went up because it was harder to gain access. He had seen rounders or mucking around with bats and balls (but not cricket) on the Application Land once out of every six occasions when he went there. He observed drawing and painting less frequently, on at least half a dozen occasions each year. This was quite often on the south and west areas of the Application Land. He did not recognise the people in question. He had seen photography with cameras in the south, west and east sides of the Application Land.

6.40 **Warwick Hardy** of 22 Fair Elms, Lancaster said that from 1989 to 2010 he lived at 6 Horrocksford Way in Castle Ward. During that time he walked two dogs on the Application Land every day. This tended to be in the early morning, about 7 to 8am. He would walk down the path along the side of the Application Land from Points E to F and make his way on to the Application Land from various points on the path. There was a big muddy ditch but there were locations where it was possible to get across into the wood without getting muddy. He would make his way through the trees and scrub to the open area. He was not following paths but just going anywhere through the trees in the south of the Application Land following the dogs. In the open area he would play with the dogs. In the early 2000s he also took his grandson at times and had a kickabout with a ball in the open area while he was walking the dogs. Sometimes he would do a longer walk to the river and come back through the Application Land entering at Point A and then make his way across to the open area before heading home by cutting across to Point E or sometimes via Points C and D to visit his daughter in Forest Park. Point A to Point B was a bit overgrown but it was possible to get through. There were no fences or signs until the very intimidating fence was put up in 2011.

6.41 Young people had made an adventurous cycle place out of planks and platforms, all self-build, in the area of the wood between Points E and F but nearer to Point F. It had taken a lot of ingenuity and was well made. It looked great fun and was a terrific place. From time to time, usually during the school holidays, he would see teenagers using it. On his

early morning dog walks he would always see the same blokes, about half a dozen, walking their dogs before they went to work. They would walk in a similar way to him. Their routes varied. He also saw people cycling, not *en route* to anywhere but teenagers on mountain bikes in the area of the old football pitch at the weekends.

6.42 **Julie Clarke** of 12 Jackson Close, Lancaster said that when she moved to Lancaster with her husband, Simon, in 1993 they lived at 149 Willow Lane. Simon's mother (who lived on Coverdale Road) always used to take her blackberrying on the Application Land. They went into the wood from somewhere along the boundary of the Application Land between Points C and E where there was a path in the scrub and then they would walk all around in the south area. They used to pick blackberries there and then they would come out on the field. Mrs Clarke could remember walking across the big open area. They would come back in various different ways, either wandering down the boundary (but on the Application Land) between Points A and point F or circling back to Point C and leaving over Coronation Field. They would go blackberrying two or three times a year in season. In 2002 Mrs Clarke and her family moved to her present address. From there they used to take their children blackberrying with them. They went blackberrying with Simon's mother and the children most years until 2011, spending a couple of hours on an afternoon when the weather was nice. They also picked apples in the south part of the Application Land. It was possible to walk, and they did walk, all through the woods on tracks, not really footpaths, which people had made but when with the children they would stick to the main track. They would mainly walk in the southern triangle of the Application Land between Points C, E and F and the open area but they would also walk from Keyline up to there and then pick blackberries at the back of Coronation Field. The Application Land was open with no fences and signs and they felt that they were perfectly entitled just to go there and pick blackberries. It was free land for public use. At Point A the hump did not discourage entry to the Application Land because there was a worn path between it and the gate.

6.43 They would always see people with dogs and children on bikes on the Application Land, not confined to paths or any particular areas. Children and adults also used to ride trial bikes on the Application Land. They started using the area where the football and cricket pitch had been in the 2000s if not before, using the flat area as a scramble track. The children had a rope swing (with a tyre) on the Application Land near Point F which could be accessed from a little footpath up over a hump near Point F as the crossroads was

approached. A platform to swing off had been built out of a load of old pallets. The rope swing was always there until the fence went up. Mrs Clarke's boys had had a couple of goes on it in about 2004/5/6 but there were always other children on it. She could also remember children on bikes going up and over the humps that they had built near the swing. Her impression was that many of the children she saw on the Application Land were from the Marsh Estate. She would see them around locally in their Willow Lane school uniforms and then recognise them later when she saw them on the Application Land. She did not remember seeing anyone arrive at the Application Land by car. Mrs Clarke had seen model aircraft but these had been on Coronation Field and not on the Application Land.

6.44 **Peter Crooks** of 15 Leighton Drive, Lancaster said that he and his wife moved to that address in 1994 having previously lived at 9 Castle Hill for a year after moving to Lancaster from Liverpool. As a keen birdwatcher he regularly visited the Application Land from 1993 to 2011. The frequency of his visits varied over this period. They were most frequent in the bird breeding season (April to July) when he might visit more than once a week. On average he would say that he visited weekly. He usually approached from Willow Lane, entering the Application Land at Point C or Point E and leaving at Point F or Point A, or he would do a circuit and both enter and leave at Point C or Point E. At none of these points were there signs preventing his entry. Between 1997 and 2000 he was an observer for an atlas of breeding birds in Lancashire and, as such, was responsible for visiting the Application Land. He would visit at least once a month and usually much more frequently during the birds' breeding cycle between April and July. To observe the different bird activities in this cycle (song, courtship, carrying food and fledging) he would go off the defined paths into the wooded areas in the south of the Application Land or in amongst the thick growing gorse or hawthorn in the western section of the Application Land between Point F and Point A not far from the north west boundary. He would go wherever he thought there was something of interest to be seen. By "defined paths" he meant the network of routes criss-crossing the Application Land that had been worn away by use. He would also follow the internal edge of the wooded areas on a circuit to observe birds coming out of the woodland into the open field (the old football and cricket pitches) to feed and collect food for their young. Mr Crooks also said that he walked on the Application Land with his wife and children at times. After 2011 he still visited the Application Land although less frequently. Since then he had tended to access it through the unfenced part of the north west side. There were gaps in the fence but he was reluctant to use these. Because of the large break in the

fence line it was not at all clear to him that access to the whole of the Application Land was being denied.

6.45 There were many regular dog walkers using the Application Land and letting their dogs off their leads into the woods so Mr Crooks said that he would usually visit early in the morning at approximately 6 to 8am when disturbance would be minimised. He would still see dog walkers even at that time, perhaps up to ten. He got the feeling that most dog owners in the Marsh area (of which there might be hundreds) would use the Application Land as there was a lot of space to give dogs a decent run around. As well seeing dog walkers, Mr Crooks would, on those occasions when going to the Application Land with his wife and children, also see other people using the Application Land for many different activities including birdwatching, walking for pleasure, picking blackberries, taking photographs and families or young people playing informal football (in the form of a kickabout) and informal cricket in the summer holidays. He also saw children playing hide and seek and dens in the woods. He had not seen rounders, painting, drawing, kite flying and picnicking. He had seen photography on a few occasions. The Application Land was very well used by people of all generations.

6.46 **Daniel Haywood** of 32 Cavendish Street, Lancaster said that he had lived at that address since 2002 and before then he had lived at 23 Ashfield Avenue from 1996. He had used the Application Land from 1997 to the present day. His use was almost entirely for birdwatching and observing other wildlife but he also used the Application Land for fresh air and exercise. Between 2005 and 2012 he contributed to a birding blog in respect of a “patch” which included the Application Land. From 1997 to 2012 he used the Application Land at least once a week. At times he would visit it twice a day, particularly during spring and autumn. His visits could be at any times during the day from dawn (including 4-5am in late spring) to dusk depending on what he was doing with his day. Presently he used the Application Land about once a month as he was now devoting less time to birding. In the period from 1997 to 2012 he entered the Application Land from every side (the south east, south west and north west sides). When the fence went up he accessed the Application Land from the unfenced part of the north west side and from holes in the fence on the south west and south east sides. He often entered and left the Application Land by Keyline, usually by the side of the gate where there was free access. When he was birding he used all parts of the Application Land extensively except for the middle part which he used less often. He

was slowly checking all the nooks and crannies in the woodland and scrub areas. This was to find the breeding, wintering and passage bird life throughout the seasons. He used the woodland in the south and the scrub in the west as well as (though a little less than the other areas) the scrub in the east.

6.47 Mr Haywood said that he did not seek permission to use the Application Land and nobody prevented him from using it. Before the fence went up he was of the general impression that there was access for all and that there were no restrictions on use. He had heard from other local people that it was a common of some sort. There were some relict pieces of fence. He had assumed that this very old fencing must have been erected to keep balls in (given the sporting history of the Application Land) rather than to keep people out. He did not see any signs that prevented access. When the (new) fence went up he was upset because he thought that he had a right to enjoy the Application Land as a common and there did not seem to be any reason for its erection in terms of the development of the Application Land. And he could not see that it did any harm for him to enter the Application Land. There was no development activity there, he was not inconveniencing anybody else or compromising his safety so he continued periodically to enjoy the wildlife on the Application Land.

6.48 He often saw people walking their dogs on the Application Land. He noticed them particularly because dogs would frighten birds away. He would generally see multiple dog walkers on any given visit. They were people he recognised mainly by sight as local residents and often they seemed to be using the Application Land in its entirety rather than simply passing through. There were well worn paths but desire lines had changed over the years and there was always a criss-cross of paths such that all parts of the Application Land could be accessed for birding to within ten metres without going through undergrowth. It was very easy to get around. In season he would see people blackberrying; blackberries grew all over the Application Land and he had done some blackberrying himself, just picking as and when he came to them. He would also see children playing, often on bikes. These people would be fair weather users whereas he and the dog walkers would be there in all weathers. He had not seen drawing, painting, rounders, photography, football, cricket, picnics or kite flying on the Application Land.

6.49 **Karen Kendrick** of 32 Forest Park, Lancaster said that she had lived at that address since 2001. Before then she lived at 6 Horrocksford Way for one year with her parents. And before that again she had spent significant periods of time in the holidays (she worked as a teacher) at her parents' house on Kennedy Close and then Horrocksford Way. She had walked various dogs that she had had (having had them through to 2011) on the Application Land since 1982, with a short gap from 1983 to 1989 (when she was living elsewhere), until the fence was put up. There was nothing to say that people could not go into the Application Land. There were no signs or fences and nothing to climb over or through. She would not have gone there if she had thought it was not allowed. She wondered why the fence was suddenly put up but stopped using the Application Land then because she realised that her presence was no longer welcome and she did not want to be prosecuted. She would walk into the Application Land from the corner of Coronation Field via Points D and C and wander around in the trees on the little paths that people had made by walking there. There were lots of such tracks which was why she thought it was all right to walk there and saw so many other people. She would walk across to Point F or Point A. She would often walk a rough circuit of the Application Land in this way or she would come in at Point A. She saw people in and out of there all the time so she thought that it was all right to go in. It was a bit rugged but she could just get in. She walked or wandered all over the Application Land on a daily basis with her dog. She would throw a ball for the dog and when it got interested in something else she would have to go and retrieve it. If the weather was worse she would stay on the path. Mrs Kendrick said that she was a primary school teacher and that she would collect resources such as leaves and nuts for activities with the children. When her own child was young (roughly from 2003 to 2010/11) she would make walking on the land an interesting nature walk, looking for things like mushrooms, animal tracks and so on. This would take place about four or five times a year. When her son was older (roughly from 2006 to 2010/11) they would go in through the trees with his friends to play football and cricket on the open area in the middle.

6.50 There was an area between Points E and F but closer to Point F where children had built a BMX ride. They could be seen adding to it and changing it. Children were always riding on it. In the middle where the grass was short and it was flatter they rode mini motorbikes round and round, like on a track. The Application Land was a busy place. Mrs Kendrick would see other dog walkers and walkers, people running and riding bikes, families picnicking, children playing, people playing games like football (which were children's

kickabouts that she saw weekly and more at weekends) and French or family cricket (probably seen about four or five times in a summer) and flying little aeroplanes and kites. She had not seen drawing and painting. She had seen rounders on Coronation Field. In autumn there were people picking blackberries on the Application Land. On most occasions when she was on the Application Land she would see other people there. Who was there and what they were doing would depend on the time of the year, the time of the day and the weather. Because the Application Land was open along its sides the use was not confined to any particular area. Her impression was that the other users were also from nearby. They mainly arrived on foot.

6.51 **Jon Carter** of 8 Milking Stile Lane, Lancaster said that he had lived at that address since 2007 though between 2009 and 2012 he lived temporarily in Canada, returning in December 2012. From 1991 to 1996 he lived at numerous addresses in Lancaster, two of which were within Castle Ward. For the eleven years after that (1996 to 2007) he lived on Sibsey Street. Apart from his three years in Canada, he visited the Application Land regularly from 1988 to 2011. He had been a keen birdwatcher since childhood and currently worked for the RSPB at Leighton Moss Nature Reserve where he was the visitor experience manager. He started visiting the Application Land in 1988 when he first moved to Gerrard Street, soon after leaving college. He began taking part in the Wetland Bird Survey in 1990 and continued to do so until 2009 when he left to live and work in Canada. When he lived on Gerrard Street and Sibsey Street the most interesting route to get to the shoreline (to see wetland birds) was straight through the Application Land where he could spot non-wetland birds for his own interest. The Application Land provided excellent habitat for a rich diversity of birds. Sometimes Mr Carter's visits to the Application Land were very frequent, fluctuating from weekly to nearly every day in spring and autumn. He had visited at least two or three times a month throughout the whole period. For much of the time his visits were more frequent than that. Between 1991 and 1995 he was also an observer for the Atlas of Breeding Birds of Lancaster, gathering breeding records from a grid square which included the Application Land. Whenever he was birdwatching on the Application Land Mr Carter would enter at Point C or different points along the south west side, depending on the type of birds he was looking for. He would cut across the field to leave by the north western side, or head towards the north east side, using an exit into the industrial estate south of Point A. He might also cut across the field and scrub area towards

the cycle track just north of Point F. In all the 21 years (1988 to 2009) he had visited the Application Land he did not remember seeing any signs telling him not to enter.

6.52 Mr Carter said that he would prefer to do his bird watching either very early in the morning (4:30am in the spring) or at the end of the day (all year round) when birds were most active. He explored all of the Application Land going “off piste” away from the footpaths into rough areas where birds might be. For example, he had crawled in the leaf litter between Point E and Point C to observe woodcock, a very elusive bird. The footpaths he referred to were well worn routes created by use. Throughout the period there were fairly well worn routes from Point C to Point A and from Point C to Point E. However, other paths existed seasonally or varied in their route as old routes were blocked by vegetation and new ones were formed by use. People had wandered all over the Application Land.

6.53 The Application Land was well used by people. In the summer lots of children were to be seen playing in the wooded areas, making swings, etc., riding scramble bikes over the BMX tracks or playing football on the field. In respect of the latter there were substantial posts for the goals (with remnants still being there now – as I saw on my site visit: see paragraph 5.7 above) and regular five a side games. This was probably in the early 1990s. He still saw informal kickabouts. Mr Carter also saw plenty of dog walkers and people picking blackberries in September. He had not seen rounders or painting and drawing. He had seen photography and there was one person, fixated on landscape, who was doing this almost every time he went to the Application Land. He saw other birdwatchers occasionally. There was a handful of regulars. Others were infrequent and not necessarily from the locality. The Application Land was much used by people living in Castle Ward. There were regular dog walkers who Mr Carter recognised as neighbours. He assumed others were from the local area because there were no parking facilities and the Application Land was not advertised as a destination. People mainly arrived on foot.

6.54 In addition to hearing at the inquiry the evidence described above, I have read all the written evidence in support of the Application. It gives a picture of use of the Application Land which corresponds with that provided by the live evidence, describing activities both seen and participated in there such as walking, dog walking, jogging, children’s play, birdwatching, nature appreciation, blackberry picking, bicycle (including BMX) riding,

football, cricket, rounders, picnics, kite flying, model helicopter flying, photography and painting/drawing.

7. EVIDENCE IN OPPOSITION TO THE APPLICATION

7.1 Documentary and photographic evidence

7.1.1 In considering the evidence in opposition to the Application I begin with the documents and photographs relied upon by Satnam (which in most part are those originally submitted with the Satnam Objection). In summarising this material, I start with the documents, which I deal with in chronological order.

7.1.2 The relevant documents begin in 1997 which appears to be when Lune Industrial Estate Limited acquired the Application Land (as referred to in Mr Cadman's witness statement: see paragraph 7.2.2 below). The first such document is a letter of 27th August 1997 from Mr Cadman (identified in the letter as D. Cadman, industrial property manager of Thetis House, New Quay Road, Lancaster) to North West Water Limited in relation to the riverside rising main, Lancaster. Mr Cadman confirmed in the letter that he was the managing agent for Lune Industrial Estate Limited, the owner of the land to which the letter related, and that, prior to any works commencing, North West Water should contact Mr Cadman's office to advise of the duration of the proposed works and also to arrange for access.

7.1.3 The next document in chronological order is an invoice for £4,700 dated 21st November 1997 from a building contractor, Mandraw Properties Ltd., addressed to Lune Industrial Estate Ltd., for the demolition of an old pavilion and ground clearance. The invoice relates to the old cricket pavilion associated with the former cricket pitch on the Application Land (the base of which I saw on my site visit: see paragraph 5.7 above).

7.1.4 There then comes the 1997 Health & Safety Risk Assessment which I have already mentioned. This was prepared by an environmental consultancy for The Property Trust Plc in respect of waste ground at the Lune Industrial Estate, New Quay Road, Lancaster and is dated 2nd December 1997 (following a visit on 14th November 1997). The area assessed extended in total to approximately 150,000 square yards consisting of two

separate plots, a small plot of some 15,000 square yards (Plot 1) and a much larger plot of some 135,000 square yards (Plot 2). The report stated that the two plots were owned by The Property Trust and managed on site by the Lune Industrial Estate manager, Mr David Cadman. Plot 1 was described as *“a triangular shaped piece of land ... located opposite the Lune Industrial Estate entrance”*, the northern border of which *“runs parallel to the River Lune”*. It is clear from this description that Plot 1 is not part of the Application Land. It consists of a different piece of land which is located on the north west side of New Quay Road and which has no physical connection with the Application Land. However, Plot 2 does encompass the Application Land. It is described as being located on the southern side of the industrial estate and much of it is said to be *“overgrown with brambles”* but *“a large area has been retained as sports fields providing football and cricket pitches”*. The 1997 Health & Safety Risk Assessment expressed the understanding that the latter were used and maintained by a local team. It noted that the old pavilion had been demolished.

7.1.5 The 1997 Health & Safety Risk Assessment stated that the boundaries of the waste ground assessed were *“unprotected”* and allowed *“open access to the public.”* It also stated *“[t]he boundaries to both plots of land are marked with various broken fences with large stretches of fence missing in many places”* with the consequence that *“members of the public gain access to the land for recreational purposes.”* Further, *“[t]here are no direct security measures in force to protect the plots of the land.”* The main access to Plot 2 was via a locked gate at its north east corner (i.e., Point A) but *“Plot 2 could be accessed by pedestrians at many points along its boundaries and this appears to be common practice, resulting in many unofficial well worn paths.”* The 1997 Health & Safety Risk Assessment stated that prevention of unwanted access would require a complete new security fence and it was likely that the cost of this would not prove to be a reasonably practicable solution. A security firm could be hired but it was also unlikely that this would prevent the local public from gaining access.

7.1.6 Various recommended actions were set out in the 1997 Health & Safety Risk Assessment. These included: giving consideration to repairing the fencing or removing the hazard where broken boundary fencing could cause injury or pose a tripping hazard; and considering erecting signs along all boundaries of the plots warning that the land was private and that access was only permitted with permission from the site manager

on behalf of The Property Trust. It was also recommended that consideration should be given to providing heath fire beaters near access points.

- 7.1.7 Following the 1997 Health & Safety Risk Assessment, there is a faxed letter of 7th April 1998 from Mr Cadman (who is described on the fax heading in the same terms as in the letter of 27th August 1997 - industrial property manager of Thetis House, New Quay Road, Lancaster) to a representative of Property Trust Plc (R. Allen) which referred to the outstanding matter of health and safety on that company's land in Lancaster. The letter asked Mr Allen if he would like Mr Cadman to get estimates for the works required and whether he could carry on with the minor works, i.e., signs, etc. Mr Allen replied by a fax of 27th April 1998 on headed paper bearing the name Property Trust Management Services Limited and signed by him on behalf of Lune Industrial Estate Ltd. The fax stated that they would like Mr Cadman to carry out a number of works, including the erection of signs and the provision of heath fire beaters, as recommended in the 1997 Health & Safety Risk Assessment, and to provide a quotation for dealing with the broken boundary fencing. No quotation is in evidence and there is no further documentation in the form of any invoice (or other record) which evidences the erection of the signs.
- 7.1.8 Next comes a letter of 2nd December 1998 from Mr Cadman to Mr N. Chan of Property Trust Plc. The letter stated that a few months previously North West Water had laid a new water main "*on the land adjacent to the river.*" All the works had been satisfactorily completed but it was necessary to get North West Water back to erect a new fence where they had damaged the existing one. The letter went on to state that, with regard to "*the main area of land*", the only thing that had happened since contact was last made was that there had been gypsies on the land but they had been removed within a couple of days. Apart from that, there had been no other problems. The letter mentioned that steps were being taken in an effort to prevent any further entry on to the land by gypsies over the Christmas period.
- 7.1.9 On 9th December 1998 a Health & Safety Audit Report ("the 1998 Audit Report") was produced for Property Trust Plc by the same consultancy which had carried out the 1997 Health & Safety Risk Assessment and as a follow-up to that earlier piece of work. The 1998 Audit Report noted that there had been no changes to the property since the

1997 Health & Safety Risk Assessment. It identified that on-site management was the responsibility of Mr David Cadman who was the manager of the Lune Industrial Estate. There was then mention of a series of more specific matters which are relevant for present purposes.

- 7.1.10 First, the 1998 Audit Report noted that the access gate to Plot 2 was secured by wire. It stated that it was understood that locks to secure the gate were regularly vandalised. An earth mound was located across the access road behind the gate to prevent access for vehicles for fly tipping. The 1998 Audit Report commented that, while this was an understandable measure, it would also prevent easy access for emergency vehicles and it was recommended that consideration be given to removal of the earth mound.
- 7.1.11 Secondly, the 1998 Audit Report stated that, at the time the audit was carried out, work was in progress on a site on the industrial estate adjacent to the south east corner of the property. It appeared that this work had included site clearance and there was evidence of heavy plant vehicles having deposited rubble, including large lumps of concrete, from the land clearance on a section of ground along the eastern boundary. As there was no boundary fencing in this area, it was not possible to determine if this was Property Trust land. It was recommended that this was investigated to ensure that the area was left safe in view of the *“easy access for the public”* to the site.
- 7.1.12 Thirdly, the 1998 Audit Report reiterated the recommendation in the 1997 Health & Safety Risk Assessment that signs be provided along the boundaries of both plots warning that access was restricted to authorised persons.
- 7.1.13 Fourthly, the 1998 Audit Report stated that it was understood that local sport teams no longer used the sports field but a model helicopter club regularly made use of Plot 2 to fly model helicopters and planes. It was recommended that, as there were inherent hazards of this use to the public, it should be formalised and the club be required to provide an indemnity for The Property Trust in the event of an accident.
- 7.1.14 Fifthly, the 1998 Audit Report noted that the suggestion that fire beaters be provided at entrance points had not been implemented although it was recognised that, if provided, the beaters could be subject to vandalism or theft.

- 7.1.15 Overall, the 1998 Audit Report concluded that poor progress had been made in implementing the recommendations in the 1997 Health & Safety Risk Assessment.
- 7.1.16 The documents next record that in March 2001 The Property Trust Group paid a building contractor (Mandraw Properties Ltd.) £472.06 for some repair work. Mandraw's letter of 9th March 2001 enclosing their invoice of the same date (addressed to Lune Industrial Estate Ltd.) referred to the repairs as being "*to the boundary fence on the road side of the land on New Quay Road*". The materials involved were specified as "*timber rails & post, woodstain.*" The labour charge was for 26 hours. The covering letter for the invoice (curiously dated 29th January 2001 although there is what appears to be a receipt stamp on it dated 26th March 2001) from Mr Cadman to Mr Allen of Property Trust Plc also referred to "*repairs to the timber fencing*".
- 7.1.17 In 2003 in a letter of 13th August 2003 from Mr Cadman to Mr Chan of Property Trust Plc it was stated that there had been a small problem on the land retained by Property Trust in that two cars and one van had been burnt out there by persons unknown. Mr Cadman stated that he had arranged for them to be removed and had instructed a JCB to go on site with a view to making some obstacles to try to alleviate the problem.
- 7.1.18 Matters then advance in the documents to 2004. On 9th January 2004 Mr Cadman sent Mr Chan of Property Trust Plc a letter which stated that there were problems at that moment with quad bikes using the land retained by Property Trust and mentioned that Mr Chan had been informed the previous year of burnt out vehicles on the land as well as motorcycles using it. The letter pointed out that last September Mr Cadman had requested that Property Trust checked its public liability insurance cover regarding responsibility should an injury occur but unfortunately there had been no reply. The letter asked for a response as soon as possible as there appeared to be a lot of activity on the land at that time. A handwritten note has been added to the bottom of the letter (possibly by Mr Chan and addressed to "*Dale*" or "*Dave*") which stated that "*[t]hose guys shouldn't be there. Please call me to discuss.*" Mr Chan replied to Mr Cadman in writing by a letter (on the letter head of Property Trust Management Services Limited) dated 16th January 2004 which stated that the company's insurers had been notified regarding the problems with quad bikes. It went on to say that they had been advised

by their broker that some signs saying “*keep out, private land*” should be put up. The letter asked Mr Cadman to organise a few of these to be put up around their “*sites*”.

7.1.19 In turn, Mr Cadman replied by letter of 29th January 2004 which enclosed an estimate for the costs involved together with a brief description of the works required and asked for further instructions from Mr Chan. The estimate referred to in the letter was dated 28th January 2004 (from Mandraw Properties Ltd. to Lune Industrial Estate Ltd.) and described the works as: “*remove a burnt out car from the ‘cricket pitch’ and dispose of at a registered site*” at a cost of £50 excluding VAT; “*secure the boundary gate next to Unit 1 in a closed position by welding bars to the gate*” at a cost of £60 excluding VAT; and “*excavate a total of eight post holes around the perimeter of the land, dispose of the debris on site, provide and install a total of eight aluminium ‘Keep Out – Private Property’ signs on box section metal posts, concreted into the post holes*” at a cost of £459 excluding VAT. It concluded by stating that “[*w*]e trust we have interpreted the requirements correctly”. A handwritten note on the estimate (possibly again added by Mr Chan) with reference to the last item stated “*to add ‘trespassers will be prosecuted’ if less than £250.*” A handwritten note dated 2nd February 2004 on the letter of 29th January 2004 (possibly again added by Mr Chan) recorded an instruction that the works were to “*go ahead*”.

7.1.20 There is then a gap in the documentary material adduced by Satnam until the end of 2011 at which point there is a series of three invoices beginning with one dated 12th December 2011 and followed by two others of 16th January and 20th February 2012. The invoices, which were from VMC Developments Ltd., building contractors, and were addressed to Nelson Chan of The Property Trust Group, recorded the carrying out at the Lune Industrial Estate, Lancaster of works consisting of site clearance and the erection of a security fence at a total cost of £47,600. The fence is the steel palisade fence already referred to (and described in paragraph 5.6 above). An email of 25th January 2012 from VMC to Mr Chan noted that there had been some damage to the fencing in that someone had attempted to loosen the posts. The matter had been reported to the police as criminal damage. A later invoice of 28th January 2014 from Andrew McClements and addressed to Mr D. Cadman itemised that it was for “*repairing vandalised pallisade [sic] fencing on land at the end of new quay rd [sic]*” in the sum of £260.

7.1.21 The Satnam Objection also contained the Footpaths Report prepared for the consideration of Lancashire County Council's Regulatory Committee on 17th December 2014 in respect of three applications made by the Friends of Coronation Field and Freeman's Wood under the Wildlife and Countryside Act 1981 ("the 1981 Act") to add to the definitive map three footpaths affecting the Application Land. The applications were for: a footpath (route 1) from New Quay Road to Willow Lane Recreation Ground (i.e., Coronation Field); for a footpath (route 2) from New Quay Road to public footpath 33; and for a footpath (route 3) from the junction of public bridleways 32 and 34 and public footpaths 30 and 33 to the Willow Lane Recreation Ground. Route 1 crossed the north east part of the Application Land (from Point A) before proceeding from the point at which the course of the former railway was reached on the south eastern edge of the Application Land (Point C) in a south easterly direction across the Rectangle to reach the eastern edge of the Willow Lane Recreation Ground at Point D. Route 2 followed route 1 to the south eastern boundary of the Application Land at Point C before proceeding along the course of the former railway line on the south eastern boundary of the Application Land to footpath 33 to the south of the Application Land (at Point E). Route 3 proceeded from the crossroads junction of the existing definitive rights of way south of the Application Land (Point F) and then crossed the south west part of the Application Land before leading further across its centre to join up with routes 1 and 2 at Point C after which it which it led (as described above) south easterly across the Rectangle to reach the Willow Lane Recreation Ground at Point D. The Footpaths Report recommended that orders be made in respect of all of the routes on the basis that rights of way on foot were in each case reasonably alleged to subsist under section 53(3)(c)(i) of the 1981 Act. I understand that an order has been made but that it has not been submitted for confirmation.

7.1.22 The Footpaths Report was naturally directed at evidence for the claimed footpaths but there is material contained in it in the form of consideration of map and aerial photograph evidence which has a bearing on the present Application. I summarise some of this material next. I concentrate not on the evidence of the claimed routes as such but on points in the Footpaths Report which more generally paint a picture of the Application Land, suggest access points to it and, insofar as this is the case, provide any indications of use of the Application Land going beyond the claimed rights of way. By way of setting historical context, I note that the County Council's investigations of

the map evidence show clearly that a cricket and football pitch had come into being on the Application Land in the 1950s.

7.1.23 Turning to what the Footpaths Report had to say about aerial photographs, it is convenient to start with its consideration of one such photograph said to be from the 1980s. The Footpaths Report commented in this respect that the cricket and football pitches still appeared to be maintained and that the land appeared to be open with numerous tracks clearly visible across and around it, suggesting regular use was being made of it. It also stated that access appeared to be available on to the Willow Lane Recreation Ground. Points at A, E and F were said to be either not shown or unclear on the photograph so it was not possible to say whether access was available from those points. In respect of an aerial photograph from 1988 the Footpaths Report stated that, although route 1 between Point C and Point D was not shown, there was a clearly visible worn track further north (leading from the playing field to the Application Land). Again, it was not obvious whether access was available on to the claimed routes at Point A, Point E or Point F.

7.1.24 Various observations were made in the Footpaths Report on a series of aerial photographs from the 2000s (no such photographs from the 1990s were considered). In respect of an aerial photograph from 2000 the Footpaths Report said that the football and cricket pitches were less clearly visible (than previously), suggesting that they were no longer maintained as such. A visible track was said to exist from Point A although it was not possible to see whether it was gated. Route 1 between Point C and Point D was said not to be visible although a worn track was clearly visible further north which appeared to provide access to the Willow Lane Recreation Field. Further, it was said that a number of worn tracks that did not coincide with the claimed footpath routes appeared to exist across the land.

7.1.25 Commenting on a 2003 aerial photograph the Footpaths Report stated that the former cricket and football pitches were still visible but did not appear to be in use or maintained for their original purpose. A route was said to be visible from Point A to Point B. The Footpaths Report also referred to a clearly visible route to the edge of the Willow Lane Recreation Field although well to the north of the claimed footpath route between Points C and D. It further stated that a route could be seen across the football

and cricket pitches but this was straighter and more direct than the claimed route (route 3). Moreover, it was said that a significant number of other worn tracks, apart from those which corresponded in part to the application routes, could be seen across the site.

7.1.26 In examining a 2006 aerial photograph the Footpaths Report observed that tree cover across the site appeared to have increased from previous years. It was said that access at Point A was visible although it was not possible to see whether it was gated and most of the route between Point A and Point B was no longer visible. The route between Point C and Point D was said to be visible for the first time as a worn track and this looked to have replaced the worn track that was previously evident to the north east. A worn route was said to be visible coming out of the trees east of Point F and extending to Point C although not corresponding with route 3. The Footpaths Report commented that there were also a significant number of other worn routes across the site apart from such parts of the claimed footpath routes as were visible; and the cricket and football pitches were no longer marked out but were clearly being used as there were a number of worn tracks on and around them.

7.1.27 The Footpaths Report observed variously in respect of a 2010 aerial photograph that the route between Points A and B still existed and that the route between Points C and D could clearly be seen. It commented that the latter route had remained in the same place in the four years since the previous aerial photograph and the fact that it was clearly visible suggested that it received regular use.

7.1.28 In a passage of analysis in the Footpaths Report it was stated that there would appear to be sufficient use as of right of the claimed routes for the relevant period (taken to be 1992 – 2012) although the *“Committee may have concerns about whether the same line was used over that time. Wandering at will cannot establish a public right.”*

7.1.29 The evidence forms which supported the applications for the claimed footpaths have not been put in evidence before the inquiry save to the extent of five forms which were completed by two respondents, Bryan Maudsley and James Salkeld. These were submitted by Mr Manley, on behalf of Satnam, at the beginning of the inquiry. Mr Maudsley completed two forms and Mr Salkeld three. The forms contained a question which asked whether the person completing it had ever seen notices such as *“private”*,

“no road”, “no thoroughfare” or “trespassers will be prosecuted” or on near the claimed way which was the subject of the form. If so, it asked the respondent to state what the notices said and mark their location on the plan attached to the form. In respect of the form he completed, for route 1, Mr Maudsley stated that there *“was some”* [sic] at a point which he marked on the attached plan as being on the south west boundary of the Application Land *“but local people took exception and they disappeared.”* In respect of the form he completed for route 2, Mr Maudsley answered that there were *“occasional signs”* (without further detail) and he marked the location of three such signs on each of the north west and south west boundaries of the Application Land. Mr Salkeld answered, in respect of the form he completed for route 1, that there were signs stating *“private no public access”* which he had seen *“about 7 years ago”* (his form was completed in 2012) and which he marked on the plan accompanying his form as being three in number on the south west boundary of the Application Land. Mr Salkeld gave the same answer in respect of the form he completed for route 2 and marked the same three locations on the plan accompanying his form. He also marked the same three locations for *“signs”* he had seen *“about 7 years ago”* on the plan accompanying the form he completed for route 3.

7.1.30 Satnam also submitted various photographs of the boundaries of the Application Land and plans produced for the purposes of their opposition to the Application. The photographs are said to have been taken at various dates although, in general, there is no explanation of how the photographs have been so dated. It is not necessary to provide details of the photographs or plans at this point in my report but I do make further reference to some of them below as and when it is convenient to do so.

7.2 Mr Cadman’s statement

7.2.1 At the inquiry Satnam relied on a witness statement of Mr David Cadman (of Manor Barn, Manor Farm, Slyne, Lancaster) dated 12th August 2019. Mr Cadman was too unwell to attend the inquiry. I next summarise the main points of his statement as they appear in that document. I comment on the reliability of the statement in later sections of my report. What follows at this point simply records matters as expressed in Mr Cadman’s own words.

- 7.2.2 Mr Cadman had been responsible for the day to day management of the Application Land since 1980 until his retirement in 2008 but had maintained an involvement with it thereafter. Between 1986 and 1997 the Application Land was owned with the adjacent Lune Industrial Estate (“the Estate”) by Condale Properties Limited and Shiregreen Property Co. Limited. Mr Cadman managed the Estate and the Application Land during that period. In 1997 Lune Industrial Estate Limited became the owner of the Estate and the Application Land.
- 7.2.3 Mr Cadman also ran his own building company, Mandraw Limited, from 1986. (I observe at this point that Mandraw Limited would appear to be Mandraw Properties Ltd. as referred to in the documentation – see, for example, paragraphs 7.1.3 and 7.1.16 above). The Application Land was fenced off at that time. Until manufacturing ceased on the Quayside in 1994 the Application Land was used principally as an area for the disposal of waste (such as ash and linseed) from the Estate. When Williamsons ceased linoleum manufacturing operations, the Estate was developed but the Application Land was left open although fenced off. It subsequently became overgrown. Part of the Application Land had been used as the sports ground of Nairn Williamson Limited. There was a cricket ground and cricket pavilion, which was semi-derelict when Mr Cadman first became involved with the Application Land in 1980. Lancaster Cricket Club was permitted to use the cricket ground at weekends by an informal verbal agreement and did so for a period of four to five years. Mr Cadman served notice in about 1995 that the club needed to cease its use. The sports pitches thereafter remained unused but were cut every six months or so until they gradually became uneven and unplayable grassland. The cricket pavilion was demolished in November 1997 (see paragraph 7.1.3 above for reference to the relevant invoice).
- 7.2.4 Mr Cadman stated that there had been constant issues of trespass, vandalism and fly tipping on the Application Land since around 1985. However, these activities were not tolerated and numerous measures were taken in response in order to prevent access by the public and maintain the security of the Application Land. These measures included erecting, maintaining and repairing fences and erecting signs around the perimeter of the Application Land. In respect of the boundary fencing, repairs were regularly undertaken on a running basis but, as he was operating on a shoestring budget, the repairs would entail patching up the existing fences where damaged and making good

from existing materials. It often took time to gain approval for any major expenditure. As a result, the fencing around the Application Land comprised a mix of old and new fencing. However, it was always aimed to maintain a clear boundary fence around the Application Land to deter and prevent unauthorised access. In respect of the signs, Mr Cadman produced a plan which indicated the position of signs before the 1997 change of ownership (the plan being labelled "*before Property Trust took over*"). The plan showed four locations on the north west boundary of the Application Land and two locations on its south east boundary.

- 7.2.5 In early 1998, in response to the 1997 Health & Safety Risk Assessment, Mr Cadman carried out a number of the recommendations including repair of the fencing around the Application Land and the erection of signage along all boundaries warning that the Application Land was private and access was only allowed with permission of the site manager. He also arranged for a sign to be displayed on the main entrance gate advising the emergency services of the location of the key to gain access.
- 7.2.6 Around 1998 the Water Authority completed some works on the Application Land in relation to the 15 inch pipes which ran through it and, after that, they replaced the palisade fence which they had damaged with a new one. This was along the boundary of the Application Land with the adjacent cycleway. In this respect Mr Cadman referred to his letter of 2nd December 1998 to Mr Chan which I have already mentioned in paragraph 7.1. 8 above.
- 7.2.7 Around the same time, Mr Cadman also arranged for a 10 feet high earth mound to be built up behind the entrance gate and along the boundaries of the Application Land, in locations shown on a plan he exhibited, to prevent unauthorised access by vehicles for fly tipping. The exhibited plan shows the mounds to be located along the whole of the north west and north east boundaries of the Application Land.
- 7.2.8 In 2001 the fencing on New Quay Road was repaired, as referred to in the correspondence and the relevant invoice (which I have already referred to in paragraph 7.1.16 above). In 2003 Mr Cadman found three vehicles which had been burnt and left in the open field in the middle of the Application Land. He arranged for these to be removed (as referred to in the letter which I have described in paragraph 7.1.17 above)

and instructed a contractor to create earthwork obstacles at the three entrances to the Application Land to prevent further unauthorised access.

7.2.9 In 2004 Mr Cadman discovered the unauthorised use of quad bikes on the open field and he arranged for damage to the fencing around the boundaries of the Application Land to be repaired and for new warning signs to be installed around the perimeter of the Application Land (as referred to, he stated, in the correspondence which I have dealt with in paragraphs 7.1.18 and 19 above). Photographs which he exhibited, said to have been taken in September 2005, of the west of the Application Land and the New Quay Road entrance showed, Mr Cadman stated, the remains of some of this fencing. The photographs show temporary blue and orange plastic mesh fencing supported on wooden poles alongside part of the cycleway to the north west of the Application Land.

7.2.10 In April 2011 it became clear that damage to fencing and signage was severe and that patch repairs could not be continued for much longer. Mr Cadman referred to photographs of a sawn off and damaged sign post and a damaged barbed wire fence. From December 2011 to February 2012 a brand new palisade security fence was erected on the boundaries of the Application Land to replace the old fencing. (The relevant invoices are referred to in paragraph 7.1.20 above). In January 2012 there had been an attempt to bring down part of the new fence which was reported to the police as criminal damage (see paragraph 7.1.20 above for the relevant email). Vandals also continued to damage signage on the perimeter of the Application Land and Mr Cadman exhibited photographs taken in March 2012 showing this damage. Following advice from the landowner's planning consultant in May 2012 palisade fencing was put up along the New Quay Road boundary to try to deter and prevent further access to the Application Land. This was later vandalised and repaired. There was then further vandalism to the fences at the end of New Quay Road which was repaired in January 2014 (in which respect Mr Cadman referred to the invoice which I have described in paragraph 7.1.20 above).

7.2.11 Any use of the Application Land for truly recreational purposes had been rare and sporadic. Mr Cadman had never seen what he himself would describe as regular or general recreational use.

7.3 Mr Griffiths's evidence

- 7.3.1 The only witness who gave live evidence by way of objection to the Application was Mr Colin Griffiths, a director of Satnam of 17, Imperial Square, Cheltenham, Gloucestershire. Mr Griffiths produced a witness statement and a statutory declaration. He did not give any evidence in chief to add to these documents but was simply tendered for cross-examination. I summarise the contents of Mr Griffiths's witness statement first, before turning to his statutory declaration, incorporating any salient points emerging in cross-examination into my summary.
- 7.3.2 In his witness statement Mr Griffiths said that Satnam was appointed by Lune Industrial Estate Limited to promote the development of the site containing the Application Land (but also including the Rectangle) under a joint venture agreement and thereafter to sell it on for that purpose. Satnam had been involved in that exercise since 2010. Mr Griffiths said that dense scrub and woodland had covered a lot of the Application Land, especially at its boundaries, for as long as he had known it. He understood that the Application Land had become overgrown following the cessation of manufacturing at the Quayside (believing the factory use to have ceased in 2001). Mr Griffiths provided some background history in relation to planning matters affecting the Application Land and said that he had discussed outline redevelopment proposals affecting it with planning officers in 2010. He said that he had visited the Application Land on a number of occasions since 2010 but, on each occasion where he had noticed people on the Application Land, they had been in its centre in the general location of the footpath routes which were the subject of the applications under the 1981 Act, having apparently gained access by those routes. He also said that he would have visited the Application Land two to three times prior to the signing of the agreement with Lune Industrial Estate Limited in 2010 but had not looked at his diary to check this. He had not needed to attend for the purpose of the surveys carried out but would have gone there, if he was in Lancaster, to acquire his own knowledge. Visits could have been outside normal working hours because, if he was staying away from home, he would utilise most of the time available to him. Mr Griffiths said in his statement that it was reasonable to assume that the population of Castle Ward in its pre-2003 form was (basing himself on the combined population of the present Marsh Ward and Castle Ward) in the region of 8,000 – 10,000. He was happy in cross-examination to agree that the population was

about 8,000. He exhibited a map showing the addresses of those providing evidence in support of the Application and a spreadsheet consolidating the evidence given by those persons.

7.3.3 Turning to Mr Griffiths's statutory declaration, this contains some material which consists of opinion or submission (and, in places, conjecture) and I do not report such matters here as evidence although I have taken the opinions and submission into account in arriving at my conclusions. So far as evidence is concerned, Mr Griffiths described (by way of a plan he produced) those boundaries of the Application Land where the concrete posts of the original fence remained, where chain link mesh was still intact and where barbed wire remained present. He said that substantial amounts of building rubble, bricks and stones were visible on the Application Land with the main area for this being close to the south west boundary. He also said that there was evidence of illegal, unauthorised or anti-social activity (fires/burning of items, alcohol bottles/cans and the like). The central area of the Application Land was overgrown but mowed periodically by contractors acting for The Property Trust. The margins of the Application Land were very overgrown. Scrub cover had got increasingly worse but even in 2008/9/10 there was quite a lot of scrub in broadly the same areas. There were various blackberry bushes on the Application Land but some appeared inaccessible. Routes across the Application Land were well marked but there were no signs of use of the whole of the Application Land. Mr Griffiths stated in his statutory declaration that the southern part of what he referred to as the Application Land (but was in fact marked on a plan he produced as the Rectangle) had been used, as Mr Cadman had stated, for tipping into the early 1990s. Linoleum and concrete blocks had been tipped here. As Mr Cadman had said in his statement, this area was at one time cinders. Mr Griffiths said that he believed that the qualification "*southern part*" (Mr Cadman having referred to the Application Land as a whole – see paragraph 7.2.3 above) may have come from his speaking to Mr Cadman. But he (Mr Griffiths) also knew himself that the Rectangle had been used for tipping. Mr Griffiths said that his reference to linoleum and concrete blocks may also have come from his meeting with Mr Cadman. On a recent visit to the Application Land on 12th August 2019, when he had spent approximately two hours there, Mr Griffiths did not see any other person on the Application Land.

7.3.4 Mr Griffiths also stated in his statutory declaration that, given Mr Cadman's failing health and the prospect that he would not be able to attend the inquiry, he had visited Mr Cadman to discuss the latter's statement. Matters described by Mr Cadman were also familiar to Mr Griffiths from his first involvement with the Application Land in 2007 (a date he must have picked up from the office filing system). Mr Griffiths instanced the breaking down of fences and the removal or defacing of signs (but the familiarity of his he referred to here was to the 2011 fence and signs). He stated that there had been a constant pattern of maintenance and repair of fences and signs as Mr Cadman had described. The erection of the fence in 2011 had been on the advice of a planning consultancy but it was advice he supported. Repairing the old fence had been a losing battle. The Property Trust had paid for this. They (not Satnam) were responsible for property maintenance. The signs referred to by Mr Cadman all bore a message of "private/keep out/no admittance to the public" and had been located where Mr Cadman described and on the dates he had given. The fence that Mr Cadman had referred to when he stated that the Application Land was fenced off in 1986 (see paragraph 7.2.3 above) was the original concrete post and chain link/barbed wire fence. The same fence was the subject of Mr Cadman's reference (see again paragraph 7.2.3 above) to the Application Land being left open although fenced off. A new gate was erected at New Quay Road in 1996. It replaced an earlier wooden gate which had been vandalised. The new gate was metal and of more robust construction. Mr Cadman had confirmed that there was no easy or available access into the Application Land alongside the new gate in 1996.

7.3.5 The fencing repairs that Mr Cadman referred to as having been carried out in 1998 following the recommendation of the 1997 Health & Safety Risk Assessment (see paragraph 7.2.9 above) were a mixture of repairs, some large, some small, to various parts of the fence rather than any one particular part of it. The signs referred to by Mr Cadman as having been erected at this time stated clearly that the Application Land was private and that no unauthorised public access was allowed. The separate sign on the gate at New Quay Road confirmed this message. The works carried out by the Water Authority mentioned by Mr Cadman (see paragraph 7.2.6 above) were evidenced by the photographs of blue and orange plastic mesh fencing which Mr Cadman had exhibited. When it was pointed out to him in cross-examination that these photographs were said to have been taken in 2005 (see paragraph 7.2.9 above) when the Water

Authority works were in 1998, Mr Griffiths said that he might have misunderstood what Mr Cadman had told him. One of the earth mounds which Mr Cadman had said were put up in 1998 (see paragraph 7.2.7 above) was shown on a photograph looking towards the Application Land from the service yard of an occupier (Howdens) on the adjacent industrial estate. The quad bike problem that Mr Cadman had described (see paragraph 7.2.9 above) had occurred over the space of a couple of years, with varying regularity, until the earth mounds were erected.

7.4 Mr Park's statement

7.4.1 A witness statement from Andrew Charles Park of Hurstwood Holdings Limited ("Hurstwood") of Bridge Street Chambers, 72 Bridge Street, Manchester was also supplied to the inquiry. Mr Park stated that he was the managing director of Hurstwood. Hurstwood had, since 2005, owned land at the Lune Industrial Estate which it was promoting for development. A small proportion of this land fell within the area which it was sought to register as a town or village green. This is what I have already called the Hurstwood Land: see paragraph 3.2 above.

7.4.2 Mr Park said that, as a result of Hurstwood's development interests, he was very familiar with the area and the Application Land. Over the years he had visited it over two dozen times. On these visits he had rarely seen the public on the Application Land and, when he had, they (typically dog walkers) had solely been using the public paths. Use had been limited to the public footpaths which ran adjacent to and through the Application Land. He was not aware of the Application Land having been used by the public for recreation and struggled to see how it had been as it was very rough land and, as far as he was aware, had always been bounded by brambles and thick scrub in addition to fencing.

7.4.3 From June 2011 to June 2014 part of the Hurstwood estate closest to the Application Land boundary had been used and occupied by Supa Skips under licence with activity on the adjacent site being undertaken for several years.

8. CLOSING SUBMISSIONS ON BEHALF OF SATNAM

8.1 Introduction

8.1.1 In this section of the report I provide an account of the main submissions made in closing by Mr Manley on behalf of Satnam. Mr Manley advanced these by reference to four propositions.

- (1) The Applicant had failed to identify a qualifying locality.
- (2) The Applicant had failed to demonstrate use of the Application Land by a significant number of the inhabitants of the claimed locality.
- (3) The character and extent of the use was not such as to bring to the attention of a reasonable landowner that recreational use of the Application Land as a whole was being asserted “*as of right*”.
- (4) The use was contentious.

8.2 Proposition 1: that the Applicant had failed to identify a qualifying locality

8.2.1 In respect of this proposition it was submitted that it was wrong to approach matters (as the Applicant had done) on the basis that a locality could be established simply by identifying an administrative or other area known to the law. In *Paddico (267) Ltd v Kirklees Metropolitan Council*⁸ Sullivan LJ was clearly of the view⁹ that the pre-2000 approach to the meaning of locality had survived. His judgment also revealed that a locality was defined by a community of interest on the part of its inhabitants¹⁰. In *Mann v Somerset County Council*¹¹ HHJ Owen QC (sitting as a Judge of the High Court) accepted that a qualifying locality: had to have a real or credible relationship with the land in question; and had to be credible in the sense that it was one from which inhabitants might be expected to come to enjoy that land. This was consistent with the decision in *Cheltenham Builders Ltd v South Gloucestershire District Council*¹² where it was said (by Sullivan J) that a locality had to be “*a sufficiently cohesive entity*”¹³.

⁸ [2012] EWCA Civ 262.

⁹ At paragraph 27.

¹⁰ At paragraph 29.

¹¹ [2017] 4 WLR 170.

¹² [2003] EWHC 2803 (Admin).

¹³ At paragraph 45.

8.2.2 It was therefore submitted that in a pure locality case such as the present the locality had to be a legally recognisable area that had a clear cohesive community that had a credible relationship with the claimed land (and that, if this was wrong, it was tantamount to saying that any administrative area known to law would qualify in such a case).

8.2.3 It was plain that Castle Ward was an area known to law, but it had not been demonstrated that it was a qualifying locality. In reality the Applicant had never gone beyond noting the existence of, and activity associated with, the Marsh Community Centre. The fact that most localities as areas known to law would contain facilities such as shops, places of worship, public houses and community or other centres was almost a universal truth. It did not, however, demonstrate a qualifying locality.

8.2.4 Mr Manley made it clear, however, that, were I to conclude that Castle Ward was a qualifying locality, he did not take any point in relation to the changes in the boundary of the ward.

8.3 Proposition 2: that the Applicant had failed to demonstrate use of the Application Land by a significant number of the inhabitants of the claimed locality

8.3.1 In respect of this proposition it was submitted that “*significant number*” was a concept that was relative to the size of the claimed locality and, while the concept was essentially one of impression, the Applicant needed to demonstrate that the Application Land was in use - as a whole - over the claimed period by the community as a whole. It was fully accepted that this did not require a spread of users over the whole locality and it was acknowledged, as a matter of common sense, that users would tend to be drawn from areas closer to the Application Land. Nonetheless, the use had to be consistent with use by the community of the claimed locality. This test had been failed.

8.3.2 The ward had circa 8,000 inhabitants but only 69 evidence questionnaires were originally filed which the Applicant had attempted to bolster by filing additional questionnaires but, ultimately, questionnaires from only 90 people were filed, i.e., marginally over 1% of the locality. That did not self-evidently suggest use of the Application Land by the wider community. In effect, almost 99% of the claimed

community were not users of the land (which was consistent with the evidence which showed that most users were dog walkers comprising a group of up to a dozen people). Moreover, only 16 people gave evidence, again a low number if one was claiming general use by a community of circa 8,000 people. In reality, what had come through was an attempt to register the land by a small group of committed users. A final point to note was that the evidence did not reveal use of the Application Land regularly by the community but rather use of paths by dog walkers (wider use appearing to be relatively limited).

8.4 Proposition 3: that the character and extent of the use was not such as to bring to the attention of a reasonable landowner that recreational use of the Application Land as a whole was being asserted “as of right”

8.4.1 In respect of this proposition it was submitted that Mr Park, the managing director of Hurstwood, had been familiar with the Application Land over many years. He acknowledged use of the Application Land by local people but said that it had been confined to the well worn routes that crossed it. Mr Griffiths’s experience was the same; he had visited the Application Land on various occasions between circa 2010 and the present day but had only seen use of the paths. The use these two men had seen was consistent with much of the Applicant’s case.

8.4.2 Mrs Harrison walked the Application Land daily between 1982 – 2003 and then only every two or three weeks post-2003 (although there was no reason to assume the pattern of use of the land was different pre-and post-2003). She said she walked the well walked paths and, so far as she observed, so did the other walkers she saw who she recognised. Mrs Ashman’s evidence was consistent with this - she stuck to the paths unless she was blackberry picking. Her experience was that other walkers and joggers tended to use the well established paths. Mrs Stephenson used the paths, albeit she wandered more generally to pick blackberries. Mr Boothman saw walkers with dogs - the same group - using the paths across the site. Much of Mrs Clarke’s use was of the “main track”. Mr Lamba saw dog walkers - the same half dozen to a dozen people – and he said a couple had a fixed route but others did not. Mrs Kendrick walked her dogs - sometimes she would stick to the paths but at other times she would not. Others, of course, had said they walked their dogs at will and had no route.

8.4.3 As was usual in a town or village green case, the evidence was not altogether clear but the cautions in relation to the reliability of oral evidence based on recollection expressed in the case of *Gestmin SGPS SA v Credit Suisse (UK) Ltd*¹⁴ needed to be applied. The evidence of those who said that dog walkers and walkers/joggers tended to stick to the established paths was to be preferred. This was for three reasons.

- (1) It tallied with the evidence on the ground - the paths were very well worn.
- (2) It tallied with the physical reality of the Application Land - many areas were impassable due to dense foliage/nettles. There were, of course, woods but the established paths led through them and it was not the experience of the birdwatchers who went into the woods to be discreet that dog walkers frequented the woods.
- (3) It was consistent with the applications to amend the definitive map to record three footpaths.

8.4.4 Thus it was submitted that the principal use of the Application Land was by dog walkers who comprised a recognisable cohort of up to one dozen people and who generally stuck to the paths. There were, no doubt, some who wandered more freely, but they appeared to have been very few. Walking by a small number of people - with or without dogs - along well worn routes would not of itself appear as an assertion of a right in respect of the whole of the Application Land. Rather, it was more consistent with the assertion of footpath rights (the very rights claimed in the applications to modify the definitive map). It was correct that such a pattern of behaviour was not automatically to be disregarded as part of a town or village green claim but that was only the case insofar as, in all the circumstances, it was to be seen as being part of a wider recreational use of the land in question by the claimed community. That did not arise in the present case for the following reasons.

- (1) There were some other uses of the Application Land which could not be qualifying uses because they were not lawful, e.g., riding motorbikes/scramble bikes across the central areas. Similarly, the creation of the BMX area was not lawful - it involved damage to the Application Land by way of digging ditches and placing potentially waste materials in the form of pallets, etc. on it. The same point could be made of the rope swing.

¹⁴ 2013] EWHC 3560 (Comm).

- (2) There clearly was use of the Application Land by a handful of birdwatchers but they used the woods and they sought to be inconspicuous. In some cases their use was very early in the morning or around dusk. That was not a use that in reality would tend to make itself known to a reasonable landowner.
- (3) There would otherwise be a very odd conflict of evidence. Some people suggested kickabout football and knockabout/French cricket were played on the central areas. But others said they never saw such uses. It was difficult to see why the Application Land would host these uses given that it was not particularly even and a very good playing surface was available on the adjacent Coronation Field. The probability was that, if such uses did occur, they were very infrequent or sporadic at best. The same point could be made about the alleged use of the Application Land for painting and drawing, taking photographs and having picnics. Many of the evidence questionnaires alleged these activities but many witnesses said that they never saw them. It was clear, on the other hand, that some blackberry picking took place in August/September each year along the margins of the Application Land and some of this was outside its boundaries.

8.4.5 It was therefore submitted that the character and extent of the use, taken as a whole, was not such as to suggest to a reasonable landowner that the inhabitants of the chosen locality were asserting a right generally to use the Application Land for sports and pastimes. The Application Land was an urban fringe area that was not in agricultural use. Some issues with trespass were inevitable. In this case the use was focused upon use of the paths. Other use was very limited and, in the case of the birdwatching, often deliberately discreet to avoid alarming the birds. Use beyond the footpath type of use was relatively trivial and sporadic.

8.5 Proposition 4: that the use was contentious

8.5.1 In respect of this proposition it was submitted that there was no reason to disbelieve the witness statement provided by Mr Cadman. The key points to be taken from it were as follows.

- (1) The Application Land was fenced off in about 1986.
- (2) Since around that time there had been constant problems with trespass and fly tipping. The site fencing was maintained in 1996. Why, it was asked (with reference

to the photograph put to Mr Barry in cross-examination – see paragraph 6.14 above), would some fencing around the Application Land be intact then but all the rest broken?

- (3) Mr Cadman said that he undertook running repairs to the fencing in the 1990s, albeit on a shoestring budget. It was known that in 1998 he required North West Water to replace damaged fencing (probably on Plot 1) and that in 2001 the timber fencing on Plot 1 was repaired at a cost of £472.06. Why, it was asked, if Mr Cadman was actively seeking to keep Plot 1 secure, would he not seek, as best he could, to keep Plot 2 secure? A strong gate was erected at the Point A access to Plot 2 and earth was mounded up behind it so attempts to secure Plot 2 were clearly employed, and burnt out vehicles were removed from Plot 2 in 2003.
- (4) Mr Cadman said that in 2004 he again arranged to repair fencing around the Application Land and eight warning signs stating “*Keep Out - Private Property*” were erected. These were aluminium signs on metal posts; suggestions that they were flimsy were not credible. The signs appeared to have lasted between one and two weeks before they were vandalised. This was no more than a continuation of the persistent vandalism that Mr Cadman noted and which was referred to in the 1997 Health & Safety Risk Assessment and 1998 Audit Report.

8.5.2 It was submitted that Mr Cadman’s evidence should be believed and that, if it was, then plainly use of the Application Land was by force. People had said that the fencing was in a universally poor state in the 1990s but the evidence suggested that that was not correct. It was undoubtedly repeatedly vandalised over that period but people would be aware of the vandalism and would have known that it was occurring because an element did not like what the fencing was, by its very existence, saying, namely “Keep Out”. The bunding and the front gate only reinforced that.

8.5.3 Regardless of the foregoing, the 2004 signage was itself enough to defeat the Application. The Applicant had been forced to acknowledge the existence of this; some of the posts still remained. The footpath application evidence questionnaires of Mr Maudsley and Mr Salkeld told all that was needed to be known about the effect of those signs. Both men knew what the signs meant, as did others. As Mr Maudsley stated, “*local people took exception [to them] and they disappeared.*” Local people took exception to being clearly told that they could not enter the Application Land.

Even Mr Barry accepted in cross-examination that he knew that the signs were signs of prohibition. Their removal was simply a continuation of a war waged by a group of anonymous locals who sought to trash any attempt to secure the Application Land. Mr Barry's attempt to suggest they were not effective because they were not placed around the whole boundary was not the point; he knew, by his own admission, they were prohibitive signs. The suggestion, made for much the same reason, that the 2011/12 fencing/signage was ambiguous was risible.

- 8.5.4 The obligation on the landowner was to take reasonable steps to bring to the attention of users that their use was contentious. The 2004 signs did exactly that. They did not have to be replaced. It was clear that any replacements would have had a similar fate. It was not the job of a landowner to treat his site as if he was besieged but rather it was his job to take reasonable steps to communicate to trespassers that they were not welcome. The 2004 signs did just that.

9. CLOSING SUBMISSIONS ON BEHALF OF THE APPLICANT

9.1 Introduction

- 9.1.1 In this section of the report I provide an account of the main submissions made in closing by Mr Ormondroyd on behalf of the Applicant.
- 9.1.2 As I have already mentioned in paragraph 4.5 above, the submissions recognised that, although the Application, as amended, relied formally on section 15(2) and (3) of the 2006 Act in the alternative, if the Application could not succeed in relation to the section 15(3) period, it would also not succeed in relation to section 15(2). I was therefore invited to focus on the section 15(3) period and the submissions were made on the basis that the Applicant did not seek any separate substantive consideration of the section 15(2) period. Mr Ormondroyd did not make submissions contending that qualifying use continued after the end of 2011.
- 9.1.3 The submissions also made it clear (as had been mentioned in opening by Mr Ormondroyd) that the Applicant did not seek the registration of the Hurstwood Land if it was actually the subject of commercial activities as part of the Lune Industrial Estate.

It appeared to the Applicant that those activities did not in fact extend to the Hurstwood Land but, should I conclude otherwise, I was invited simply to modify the boundary of the Application Land accordingly.

- 9.1.4 The three live issues remained those that I had identified at the beginning of the inquiry, namely, the sufficiency of recreational use of the Application Land for lawful sports and pastimes, whether use had been “*as of right*” and whether use had been by a significant number of the inhabitants of the locality.

9.2 The amount of use

Introduction

- 9.2.1 It was submitted that the Applicant’s witnesses had come up to proof and that the test for registration in respect of the amount of use had been easily met. The Applicant’s evidence had not been significantly damaged in cross-examination and in some respects has been strengthened or expanded. No inconsistencies between statements made to the inquiry and statements made elsewhere had been flushed out and there had, in general, been no attempt even to suggest that levels of use claimed were exaggerated or otherwise greater than those which actually took place.
- 9.2.2 It was true, as was usually the case, that different users had given evidence of different uses or patterns of use. That was readily explicable by reference to the fact that different people would do, see and, perhaps more to the point, remember different things. That was the advantage of hearing live evidence from 16 different witnesses, supplemented by written material from many more. Between them they built up a picture of the overall use of the Application Land which was unmistakably one of general recreational use.
- 9.2.3 A further helpful feature of the case, when it came to assessing the evidence, was the relationship between the Application Land and the claimed locality. It was very likely, by the simple facts of geography, that users came from the locality. Direct evidence of use from live witnesses was of course clearly and expressly confined to such users. In terms of use seen, there was only very limited evidence of people arriving by car. Anyone coming on foot was very likely to have been from within the locality. This

perception corresponded with the remarks of various witnesses that they recognised some of the other people they saw on the Application Land by sight as residents of the locality. Unusually, therefore, most of the use observed could be categorised as qualifying use alongside the more direct user evidence.

Quality of use

- 9.2.4 It was unrealistic to contend (as in the Satnam Objection) that any recreational use had been ancillary to use of the paths crossing the Application Land. Games such as cricket or football could never be referable to footpath use, while children playing, birdwatchers, blackberry pickers and those engaged in creative pursuits (painting, drawing, photography) were not inclined to stick to defined routes. Furthermore, and importantly, these uses took place on both the open and wooded/scrubby parts of the Application Land according to the nature of the use.
- 9.2.5 There was ample evidence, tested and not undermined by cross-examination, of such uses being made of the Application Land. The oral evidence was strongly supported by the written evidence in respect of cricket, football, children playing, birdwatching, blackberry picking and drawing/painting/photography. Appendices were submitted enumerating such uses and setting out extracts from the written evidence. So far reference was made to only the most impeccable examples of recreational use. Satnam appeared to take exception to walking, with or without dogs, and any cycle use that might be associated with the construction of ramps, etc. near Point F. Even excluding these uses altogether, there was a sizeable body of evidence of recreational use. Notably, anyone who was present on the Application Land during the Relevant Period for any length of time was aware of such use taking place by the local community. Even if Satnam were entirely right in their stance on walking and cycle use, the test for registration was still met.
- 9.2.6 Contrary to Satnam's apparent position, the vast majority of the evidence of dog walking use did qualify as evidence of lawful sports and pastimes. Some dog walkers no doubt did follow well worn paths for some or all of the time, otherwise tracks would not have been worn away. However, there remained a clear body of evidence of dog walkers departing from the worn tracks when on the grassy area: Mrs Aitken meandered

around the Application Land at will, used all the footpaths at different times but also wandered around the rest of the Application Land; Mr Hardy was not following paths but just going anywhere through the trees in the south of the Application Land following the dogs; Mrs Stephenson walked all over and around the field; and Mrs Thompson noted that people tended to wander across the open area in the middle of the Application Land and that there were some better trodden areas but people did not stick to these.

9.2.7 It could not therefore be concluded that dog walkers and other walkers generally followed the worn paths which existed. Insofar as they were following the network of paths through the wooded or scrubby areas, that in itself was indicative of a recreational use, not a right of way use. The paths formed a dense network well described by Mr Haywood when he spoke of a criss-cross of paths allowing access to all parts of the Application Land to within 10 metres without going through undergrowth. It was also relevant to recall that the routes had shifted over time; this again was not indicative of a right of way use. Mr Haywood observed that the desire lines had changed over the years. As Mr Carter said, there were fairly well worn routes from Point C to Point A and from Point C to Point E but other paths existed seasonally or varied in their route as old routes were blocked by vegetation and new ones were formed by use; and people had wandered all over the Application Land.

9.2.8 These careful observations from two people who used the land intensively and knew it intimately were particularly valuable because, although some worn paths might remain on the Application Land, they were not representative of the position before 2011. Following the erection of the fence and notices there was direct evidence (from witnesses who then ceased using the Application Land) and indirect evidence (such as Mr Barry's estimate of a two thirds reduction) of a decline in use. This was to be expected as the fences and signs gave the Application Land a very uninviting aspect. As Mr Griffiths acknowledged, the density and coverage of the scrub had got worse over the years since 2010. Before the fence went up, the Application Land functioned and was perceived as an extension of Coronation Field, with many users taking access via Point C. Incidentally, it was to be noted that there was a more pronounced and obviously circular track on the central field, some evidence of which remained today. It appeared this was created by motorbikes, not walkers. Accordingly, it did not support

the conclusion that dog walkers simply walked a single loop or circuit of the open land. Any circuits that were walked appear to have been much more approximate and variable. Even if a user had entered by a particular point, walked round the Application Land on the network of worn paths, and then exited, that use should, on the facts of the present case, be treated as recreational use. The network of paths criss-crossed and altered throughout the period such that the “circular” route would vary on different days and at different points in the 20 year period. This was very far from the situation in *Laing Homes Ltd v Buckinghamshire County Council*¹⁵ where defined footpaths had been registered around the edges of three agricultural fields.

9.2.9 This submission was supported by the case law which established the proposition that user of tracks should not be left out of account or disaggregated from the other evidence, but should be looked at along with all the other evidence “in the round” in order to reach a view as to whether the user of the land as a whole was for lawful sports and pastimes. The Applicant respectfully adopted the observations made in the case of *Oxfordshire County Council v Oxford City Council*¹⁶ where Lord Hoffman said in the House of Lords that: “[i]f the area is in fact intersected with paths and clearings, the fact that these occupy only 25% of the land area would not in my view be inconsistent with a finding that there was recreational use of the scrubland as a whole. For example, the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flower beds, borders and shrubberies on which the public may not walk.”¹⁷

9.2.10 These words were particularly apt to apply to the “*paths and clearings*” which made up the accessible parts of the Application Land, although all told they would seem to account for well over 25% of the site area. The scrub and wooded areas were, of course, a part of the attraction of the Application Land from a recreational point of view – whether for expert birdwatchers interested in their value as habitat or for users seeking a varied natural environment for aesthetic reasons. The use of tracks and paths to access those areas was referable to a use of the Application Land as a whole for recreation.

¹⁵ [2003] EWHC 1578 (Admin).

¹⁶ [2006] UKHL 25.

¹⁷ At paragraph 67.

9.2.11 At first instance in *Oxfordshire*¹⁸ Lightman J had provided “*sensible suggestions*”¹⁹ for the consideration of evidence as follows: “[i]f the track or tracks is or are of such character that user of it or them cannot give rise to a presumption of dedication at common law as a public highway [i.e. because there was not a constant defined route in the same place throughout the period], user of such a track or tracks for pedestrian recreational purposes may readily qualify as user for a lawful pastime for the purposes of a claim to the acquisition of rights to use as a green. The answer is more complicated where the track or tracks is or are of such a character that user of it or them can give rise to such a presumption...walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green).”²⁰

9.2.12 These remarks were a persuasive starting point only. In particular, it had since been established that even walking on a defined track which followed a consistent route, and which could give rise to dedication as a public highway, might amount to “village green” use rather than “highway” use. See *Allaway v Oxfordshire County Council*²¹ where the inspector had found that “*the principal activity, walking, took place primarily on paths*”²². He recommended registration in reliance on some of that use. The court rejected a challenge to registration based on an argument that walking on paths should have been excluded from consideration altogether²³.

9.2.13 The only use which had to be set aside on this account was use which truly amounted to an attempt to get from A to B, with no other recreational content. Evidence of such use had been very limited, no doubt precisely because the Application Land was on the

¹⁸ [2004] EWHC 12 (Ch).

¹⁹ Lord Hoffman’s characterisation in the House of Lords [2006] UKHL 25 at paragraph 68.

²⁰ At paragraph 102.

²¹ [2016] EWHC 2677 (Admin).

²² At paragraph 35.

²³ At paragraphs 51-58.

settlement edge. As such, none of the witnesses had described use of it as a short cut for practical purposes (e.g., to school, work, shops). The Application Land was on the way to other recreational amenities (the cycleway and routes leading on from there, and, since 2008, Freeman's Pools). Some had used the Application Land as part of a longer route or recreational trip. However, the footpath alongside it provided an alternative and more direct route to those destinations. As such, where people used the Application Land to get to a destination, this use often appeared to have been combined with a recreational visit to the Application Land itself. That accorded with what one would expect. It followed that the majority of the dog walking and other walking evidence could be included as evidence of lawful sports and pastimes, further bolstering the Applicant's case in that regard.

9.2.14 Some reference had been made to the footpath applications. What was notable was the limited overlap between those users giving evidence in support of the present Application and those giving evidence in support of the footpath applications. Witnesses had not, as sometimes happened, been cross-examined with reference to footpath questionnaires they had completed. This was presumably because those very few witnesses who did also complete a footpath questionnaire had referred to it and clearly differentiated their village green and footpath evidence. The full evidence for the footpath applications was not before the inquiry. It was, however, instructive to refer to the comments of the officer who carefully reviewed that evidence in the Footpaths Report: *"[t]here would appear to be sufficient use as of right of all the sections of the route during this period although Committee may have concerns about whether the same line was used over that time. Wandering at will cannot establish a public right."* "Wandering at will" and other forms of recreational use were precisely what was relied on in the instant case.

9.2.15 In relation to the lawfulness of the use of the BMX track near Point F, the first point to be made was that cycling had not been confined to the BMX ramps although, as the most eye-catching feature, they had drawn most comment and attention. Various witnesses had made it clear that recreational cycling took place in other parts of the Application Land too. Secondly, however, there was no reason to regard use of the BMX ramps as "unlawful" in the relevant sense. Doubtless it, and the creation of the ramps, was technically a trespass. That did not prevent a use from being "lawful",

however, or no village green could ever be registered. The adjective “lawful” was intended to exclude criminal offences only: see *Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust v Oxfordshire County Council*²⁴. It was somewhat far-fetched to suggest that the creation of the ramps would amount to an offence of criminal damage. It was certainly very far from the facts of *Fitch v Fitch*²⁵ in which users had trampled down grass intended for a hay crop, thrown the hay about and mixed gravel with it. In this case the ramps did no appreciable damage to the owner’s land, did not prevent or interfere with any current use of the owner’s land (there was none) and did not even render the land more difficult to use or develop in the future. It appeared that the ramps were finally removed in 2011/12 with the erection of the fence. The creation of the ramps would also not amount to a breach of the Victorian Statutes if the land were a registered green. Even if it did involve disturbance of the soil (which was far from clear), it was done with a view to the better enjoyment of the Application Land for recreational use, not as an interruption to that use. Materials used in the construction of the ramps were not waste because they were not being disposed of on the Application Land but used to construct something. They were not waste at the time they were on the Application Land. There was thus no reason to exclude any element of cycle/BMX use on the basis that it was “unlawful”.

Quantity of use

9.2.16 The term “a significant number” was considered by Sullivan J in *Alfred McAlpine Homes Ltd v Staffordshire County Council*²⁶ where he said: “I do not accept the proposition that significant ... means a considerable or a substantial number ... ‘significant’, although imprecise, is an ordinary word in the English language and little help is to be gained from trying to define it in other language ... It is necessary to ask the question: significant for what purpose? In my judgment the correct answer is ... that what matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local

²⁴ [2010] EWHC 530 (Admin) at paragraph 90.

²⁵ (1797) 2 Esp 543.

²⁶ [2002] EWHC 76 (Admin).

community for informal recreation, rather than occasional use by individuals as trespassers."²⁷

9.2.17 In that case, there was a total of 16 witnesses, of whom six could speak to the entire 20 year period, and also written evidence²⁸. The locality that was claimed was the town of Leek (population 20,000) and the neighbourhood had 200 occupants²⁹. Sullivan J deprecated an attempt to suggest that this evidence was insufficient to show use by a "significant" number of people of either area: "[it] is quite unrealistic to refer simply to the six witnesses or to deal with the matter on the basis that they are only six out of 20,000 or one out of 200, and that such numbers are not significant. I accept that, if all of those six witnesses had said that they had not seen others on the land over the 20-year period, then it would be difficult to see how six out of 20,000 or one out of 200 could be said to be significant. But the fact of the matter is that they did not give such evidence: they were able to give evidence, not merely about what they did themselves, but what they saw others doing on the meadow over the 20-year period."³⁰ And "[i]t is difficult to obtain first-hand evidence of events over a period as long as 20 years. **In the present case there was an unusual number of witnesses who were able to speak as to the whole of the period.** More often an inspector at such inquiries is left with a patchwork of evidence, trying to piece together evidence from individuals who can deal with various parts of the 20-year period."³¹ (Mr Ormondroyd's emphasis).

9.2.18 The "significant number" requirement would be satisfied provided that the use of the land for recreational purposes was "more than trivial or sporadic": *Leeds Group Plc v Leeds City Council (No.1)*³² per Sullivan LJ³³; *Leeds Group Plc v Leeds City Council (No.2)*³⁴ per Sullivan LJ³⁵, Tomlinson LJ³⁶ and Arden LJ³⁷. The Applicant's evidence clearly met this test. Mr Ormondroyd was not aware of any authority for the proposition

²⁷ At paragraph 71.

²⁸ At paragraphs 25 and 36.

²⁹ At paragraphs 15 and 16.

³⁰ At paragraph 72.

³¹ At paragraph 73.

³² [2010] EWCA Civ 1438.

³³ At paragraph 31.

³⁴ [2011] EWCA Civ 1447.

³⁵ At paragraphs 22 and 23.

³⁶ At paragraph 32.

³⁷ At paragraph 33.

advanced by Mr Manley that “*significant number*” was a concept relative to the size of the locality.

9.2.19 Satnam’s main argument was that the use was largely confined to a small group of dog walkers and birdwatchers. That represented a narrow and partial approach to the evidence.

9.2.20 First, it was clear from the evidence that the range of activities extended far beyond birdwatching and dog walking. It was likely that dog walkers were the single most common user group, as they were with practically every modern village green, because of their propensity to walk at regular intervals in all weathers. That did not mean that the many other types of recreational use could be ignored.

9.2.21 Secondly, the written evidence showed that the groups of people directly engaging in these activities was large. 45 out of 87 evidence questionnaires/statements recorded dog walking as something the respondent or his/her family had engaged in; 24 out of 87 in respect of birdwatching. The evidence questionnaires themselves were not a full summary of all users from the locality across the 20 year period. They were generated from a leaflet drop of just 400 households in 2012, plus a little supplementary work in later years. More could have been generated but (as Mr Barry explained) it was thought that the group had enough, and there were also time and personnel limitations on the part of what was an entirely voluntary concern. The number of leaflets delivered was very small compared to the overall size of the locality and evidently would take no account of those who used to use the Application Land but had since moved away, etc. Even this fuller written evidence could thus only be regarded as a representative sample of those using the Application Land.

9.2.22 Thirdly, cross-examination of the Applicant’s witnesses had not established the “small group” point. Early witnesses (Mrs Aitken and Mrs Bannon) were asked about the “group” of dog walkers in general terms and were unable to identify the extent of this group. This was indicative of a large number of people, not all of whom were known to each other. Later witnesses were asked about other users who they recognised. In this context witnesses were able to give an estimate of numbers. Mr Lamba (who generally went around 9-10am for a few hours) thought that there were half a dozen to

a dozen dog walkers he would see regularly enough to exchange greetings with and Mr Hardy (who himself walked regularly between 7 and 8am) thought that there were perhaps half a dozen of these. The questions asked were different from the question of how many people in total the witness had seen on the Application Land and therefore generated different responses. It was understandable that people regularly going on the Application Land at a certain time would come to recognise others also regularly going on there at that time for dog walking. This, however, did not capture anyone who regularly went on the Application Land at a different time or who went on the Application Land at variable times. In any event, the evidence amounted to the witnesses' seeing at least six dog walkers an hour regularly present on the Application Land, day in, day out. Such a pattern of use could not be described as trivial, sporadic or as occasional use by individual trespassers, even before other types of use were factored in.

9.2.23 Mr Lamba was also the source for Satnam's argument that there was only a handful of birdwatchers. He said that he knew of four birdwatchers who he thought had given evidence to the inquiry, plus one other who was not a witness. That was before the later evidence of Messrs. Crooks, Haywood and Carter. So that expanded the number to at least eight regular, committed birdwatchers. That was before more occasional/less serious birdwatchers were factored in. Again, this represented general use by anyone in the local community with an interest in the recreational opportunities afforded by the Application Land, not occasional use by individual trespassers.

9.2.24 Satnam's arguments in the present regard could be contrasted with what its own evidence showed. The 1997 Health & Safety Risk Assessment in particular noted that "*members of the public gain access to the land for recreational purposes*" and that "*Plot 2 can be accessed by pedestrians at many points along its boundaries and this appears to be common practice, resulting in many unofficial well worn paths.*" This represented a clear acknowledgment that general recreational use of the Application Land was apparent to the landowner on reasonable inquiry. In other words, it was far beyond the "*trivial and sporadic*" level prescribed by the *Leeds* cases.

9.2.25 Mr Griffiths's involvement with the Application Land only began with any seriousness in 2010. There was no evidence that he visited on any more than a handful of times

before the end of the Relevant Period in 2011, and no reason why he should have done so. Satnam had produced no photographs of the interior of the site dating from this time, although it had produced later photographs. This suggested that any preliminary surveys were brief and did not generate a photographic record, let alone supporting reports. There would have been no reason for Mr Griffiths to attend on such cursory survey work. Furthermore, there was no evidence that he had had any meetings relating to the Application Land (which he said might have given rise to an associated visit outside working hours) beyond that held with planning officers in summer 2010. He had chosen not to check his work diary for the period to clarify how often or when he had visited the Application Land. His observations about the condition of the Application Land and levels of use had therefore to be “*treated with a measure of circumspection*” (using a phrase from Satnam’s skeleton argument). That was even more so in the case of Mr Park who was not present to be cross-examined. Even making these allowances, however, it was apparent from the handful of visits Mr Griffiths had made since 2010 that he had nevertheless seen people in the centre of the Application Land in the general location of the alleged footpath routes. He honestly admitted that this was the accurate way to characterise what he had seen, and that he could not say that they were in fact on the footpaths, just in that general location. Even the most cursory presence by the representatives of the landowner on the Application Land was accordingly sufficient to bring to light evidence of recreational use. Overall, it was submitted that this element of the test for registration was clearly met in the present case.

9.3 “As of right”

Introduction

9.3.1 There was no issue of any use being *clam*; it was not suggested by Mr Manley that early morning birdwatching fell into this category. Use for organised cricket matches in the early part of the relevant period may have been *precario*, although Satnam’s evidence on this point was so confused that it was difficult to be sure. The main burden of Satnam’s case had, however, been the suggestion that use had been *vi* by reason of signs and fences erected by the landowners.

9.3.2 There was a factual issue to be resolved in respect of this suggestion. The Applicant's position, clearly supported by all of the live witness evidence, was as follows.

- (1) The Application Land was never fenced or physically defended against recreational users until 2011. The only such work that was done was directed at preventing vehicles from entering the land. Historic fence posts and fragments of wire prevented no obstacle to entry.
- (2) A limited number of signs were erected on only one occasion in the Relevant Period, namely in 2004. They did not clearly indicate which land they referred to and were in any event not present for long.
- (3) Fencing was erected in late 2011/early 2012, accompanied by some signs.

9.3.3 In establishing what had been done over the period, the Applicant gratefully adopted the wise approach commended by Leggatt J in *Gestmin* of relying on documentary evidence first and foremost. The submissions which followed therefore dealt with the documentary evidence first, before assessing the witness evidence in the light of what could be ascertained from the documents. Finally, the law was applied to the facts as they had emerged from that process.

Documentary evidence

9.3.4 Mr Ormondroyd submitted that Mr Chan, with whom Mr Cadman had corresponded, appeared to be the agent or representative of the ultimate owner, an absentee landlord/investor based in Hong Kong. The fact that the owner was an investor based in Hong Kong was, of course, irrelevant as far as the criteria for registration were concerned, but it appeared highly relevant to the question of what was done to maintain the Application Land in the relevant period. The pattern of correspondence was that Mr Cadman would write to Mr Chan (or occasionally others at The Property Trust) to update them on events and/or to seek authorisation to carry out work. Quotations for work and invoices were from Mandraw Properties Ltd. which presumably was the building company which Mr Cadman had said (referring to Mandraw Limited) he had run from 1986 onwards. The record of correspondence appeared complete; at least, seemingly trivial items had been retained suggesting that this was the normal procedure.

- 9.3.5 Letters and documents from Mr Cadman appeared to have been annotated by Mr Chan on receipt. On the quotation from Mandraw for various works in 2004 an annotation which appeared to be in Mr Chan's handwriting, asked for the words "*trespassers will be prosecuted*" to be added to the signs due to be erected on site "*if less than £250*". The quotation was for £459 without those words. It appeared that Mr Chan/The Property Trust kept a very tight rein on expenses, quibbling over the cost of four extra words on a sign. This was consistent with the ownership of the Application Land by an absentee landlord with no interest in the site other than as a financial asset. The concern (until 2010/11) was to minimise the holding cost.
- 9.3.6 The submissions then turned to the detail of the documents. The first relevant exchange was that relating to the works by North West Water. The crucial paragraph here was that in Mr Cadman's letter of 2nd December 1998. I have already referred to this letter in paragraph 7.1.8 above. The paragraph in question in the letter referred to the laying of "*a new water main on the land adjacent to the river*". Mr Cadman had had to get the Water Authority back to erect a new fence where they had damaged the previous one. He then went on to comment on "*the main area of land*" where nothing had happened save for an incursion of gypsies. This clearly related the works to "*the land adjacent to the river*" (which the Application Land was not) rather than "*the main area of land*". The latter appeared to be a reference to Plot 2 from the 1997 Health & Safety Risk Assessment, i.e., the Application Land plus the Rectangle. So the Water Authority's fence repairs were not on the Application Land at all, according to the letter.
- 9.3.7 The above position was entirely consistent with the fact, evidenced by the "Safedig" plans, that there was no water or sewerage pipe crossing the boundary of the Application Land, but there was one crossing the (fenced) boundary of Plot 1. Plot 1, unlike the Application Land, faced on to a public highway and it would be consistent with the concern about gypsy occupations to want to keep it securely fenced.
- 9.3.8 These documents gave no support to the idea that the Water Authority repaired an existing fence to the Application Land, as was initially claimed by Satnam. Mr Griffiths (informed, to some unknown extent, by Mr Cadman) sought to rely on the photographs showing plastic mesh fencing. These were dated 11th September 2005; on what basis this was claimed was unclear. However, if that was their date, they could not

realistically relate to anything done by the Water Authority in 1998. In any event, the suggestion that they amounted to an attempt to fence the Application Land was somewhat difficult to follow.

- 9.3.9 The second series of documents related to the two health and safety documents. Mr Ormondroyd's closing submissions set out what the 1997 Health & Safety Risk Assessment had to say about public access to the land and the condition of fencing. I have provided an account of this in paragraph 7.1.5 above and do not repeat it here. It was submitted that there appeared to be a concern that members of the public could be injured while using the land (thus presumably giving rise to a liability on the part of the owner). The solution of re-fencing the land was discounted as the cost of such would prove not to be a reasonably practicable solution; instead it was proposed that signage be considered along with other measures such as consideration being given to the provision of heath fire beaters at the points of access. In respect of fencing it was proposed that consideration was given to repairing the fence or removing the hazard it posed.
- 9.3.10 Mr Ormondroyd's closing submissions then dealt with the exchange of correspondence between Mr Cadman and Mr Allen on 7th and 27th April 1998 which I have set out in paragraph 7.1.7 above. The submissions highlighted that there was no quotation in respect of the requested fencing works and argued that it appeared that there was no ongoing agreement as to the maintenance of the fencing (otherwise there would have been no need to request a specific quotation). In contrast to other instances, there was also no invoice from Mandraw for doing any of the works. It might be significant that the recommendation was simply to "*consider*" putting up signs and providing fire beaters.
- 9.3.11 The indications that no action was, in fact, taken were picked up by the 1998 Audit Report (see paragraphs 7.1.9-15 above). This recorded that there had been no changes to the property since the original risk assessment. It identified that the responsibility for management was with Mr Cadman. It recorded that the heath fire beaters recommended in the previous report had not been provided, and appeared to accept as a reason for this that, if provided, they could be subject to vandalism or theft.

- 9.3.12 The 1998 Audit Report noted that construction was going on on the industrial estate adjacent to the south east corner of the property and stated that it would appear that this work had included site clearance and that there was evidence of heavy plant vehicles having deposited rubble, including large lumps of concrete from the land clearance on a section of ground along the eastern boundary. This appeared to relate to the Rectangle and would correlate with what Mr Barry remembered about the expansion of the Ultramark Factory in that location.
- 9.3.13 The 1998 Audit Report reiterated the earlier recommendation as to signs, without giving any indication that signs had ever been erected. It did not blame vandalism for the removal of signs. It concluded that poor progress had been made in implementing the recommended actions detailed in the previous report. Had signs been erected and then torn down, it was surprising that this was not mentioned – such an event would have constituted a mitigating factor (as the threat of vandalism/theft seemed to have been in relation to the fire beaters) and/or a circumstance to take into account in making a new recommendation. Instead the old recommendation was “*reiterated*” and the conclusion was one of “*poor progress*”. The documents read as a whole therefore indicated that no signs were erected in 1998 – and certainly that the fences were not repaired or subject to general running repairs.
- 9.3.14 The third series of documents related to a fence repair in 2001 (see paragraph 7.1.16 above). The invoices and letter referred to “*repairs necessary to the boundary fence on the road side of the land on New Quay Road*”. The materials were timber rails and post and woodstain, and 26 hours labour was involved. The dating of the documents was peculiar as the forwarding letter was dated January, but the two invoices³⁸ were dated March. In any event, these documents appeared clearly to relate to Plot 1 which (1) was on New Quay Road (2) had a “*road side*” edge and (3) had clearly been fenced with timber post and rail fencing. There was no physical or other evidence of timber fencing on the Application Land.
- 9.3.15 Further information could be gleaned from the existence of these documents. First, there did not appear to have been any general retainer to repair fences. The amount at

³⁸ There is, in fact, one invoice, the contents of which are also set out in a letter (each dated 9th March 2001).

stake was small, even at 2001 values, yet a separate invoice was raised. Secondly, the concern once again was to defend the road side frontage of Plot 1 – presumably from incursions by gypsies or joy riders. A timber post and rail fence would not stop access by pedestrians. Mr Ormondroyd submitted that it was the fact that Plot 1 was, with its road frontage, more vulnerable to incursions by gypsies or joy riders (with Plot 2 being defended by a mound of earth behind the gate) which answered the question Mr Manley had raised in his closing submissions (see paragraph 8.5.1(3) above).

9.3.16 The fourth series of documents related to the presence of vehicles on the Application Land in 2003/4. On 13th August 2003, Mr Cadman reported to Mr Chan the presence of three burnt out vehicles on “*land retained by Property Trust*” and explained that a JCB would go on site to create obstacles (see paragraph 7.1.17 above). On 9th January 2004 a further letter (see paragraph 7.1.18 above) raised the issue of quad bikes and referred back to the previous correspondence, observing that: “[w]e did, in September last year, request that your Public Liability Insurance cover was checked regarding responsibility should an injury occur but unfortunately we have not had a reply” The response was somewhat sclerotic even on a subject close to the heart of Property Trust/the owner – avoiding any possible liability in connection with its land.

9.3.17 Mr Chan’s annotation, addressed to “Dale” or possibly “Dave” read as follows (see paragraph 7.1.18 above): “[t]hose guys shouldn’t be there. Please call me to discuss.” The concern was thus with users on quad bikes or other vehicles. By 16th January 2004 Mr Chan had notified the insurers about the quad bikes. He wrote back to Mr Cadman (see again paragraph 7.1.18 above): “[w]e have been advised by our broker that we should put up some signs saying ‘KEEP OUT, PRIVATE LAND’. Could you please organise a few of these to be put up around our sites.” Mr Cadman wrote back on 29th January 2004 (see paragraph 7.1.19 above) with a quotation for removal of a further burnt out car (£50), securing the boundary gate (£60) and for eight aluminium “Keep Out – Private Property” signs (£459). This was subject to Mr Chan’s annotation noted above.

9.3.18 Notably there was no reference to fencing repair in any of these documents and the quotation specifically stated at the bottom: “*trust we have interpreted the requirements correctly*”. Had there been a further requirement, related to fencing, it would surely

have been mentioned given the apparently trivial amounts of money being charged separately. The effort was again concentrated on excluding vehicles from the Application Land and on protecting the owner from any liability or excess holding costs in respect of his investment asset. Interestingly, the request was for eight signs around “*our sites*” (plural), which suggested that not all eight of the signs might have been placed at Plot 2/the Application Land.

- 9.3.19 There were a number of photographs included in Satnam’s documents. None of these photographs showed effective repairs to fencing having been carried out or signs having been erected. The nearest that they came to this was one photograph (said to have been taken in 2006³⁹) showing a small amount of barbed wire attached to a concrete post. This only extended in one direction from the post. As such it was unclear who put it there and what the purpose might have been – perhaps to dissuade quad bike or motorcycle users.
- 9.3.20 The plan purporting to show six signs “*before Property Trust took over*” (see paragraph 7.2.4 above) clearly could not be a contemporaneous plan of the location of those signs from the title alone. It appeared simply to be an annotated plan prepared by Mr Cadman for the purposes of the present case. In any event, there was no indication of when before 1997 these signs were said to have been present and what they were supposed to have said.
- 9.3.21 The documentary evidence, read as a whole, thus supported the Applicant’s summary of matters as set out above. The only clear documentary evidence of signs actually being erected was in 2004, in response to use by quad bikes/vehicular incursions. There was no evidence of fence repair to the Application Land and the inference could be drawn that no fencing repair was going on, as when it did occur (at Plot 1) it was invoiced for. Certainly there appeared to have been absolutely no concern on the part of Mr Cadman, Mr Chan or anyone else about recreational use of the Application Land *per se*, and no indication that there was to be any attempt to contest or interrupt it. All the efforts in that respect were directed at vehicular users and gypsies.

³⁹ My interpretation of the index to the bundle containing Satnam’s documents is that the relevant photograph (at page 105 of that bundle) is said to have been taken in 2003 but nothing turns on this.

Witness evidence

- 9.3.22 The evidence of the Applicant's witnesses was wholly consistent with the picture painted by the documents. All of the witnesses who were asked were clear that the old concrete and wire fence had become defunct for large parts of its length well before the Relevant Period. They were not aware of any attempts to maintain it. None of the witnesses was aware of any signs other than the 2004 signs; none of the written evidence pointed to any such signs either. Importantly, this was the picture consistently across witnesses who ceased to use the Application Land after the 2011 fencing and signs went up, and those who did not. It also included the evidence of Mr Barry, a local politician or aspiring politician throughout the period of his involvement with the Application Land, who was alert to any developments such as the erection of fences or signs.
- 9.3.23 The suggestion (in Satnam's skeleton argument) that local people had been mistaken about the virtual absence of signage and fencing did not stand up. It became clear that it did not stand up when the exercise of putting documents to Mr Barry in cross-examination showed that they did not support Satnam's version of events so that the exercise was not thereafter repeated with other witnesses.
- 9.3.24 Mr Cadman's original statement contained numerous confusing assertions, which could not be reconciled with the documentary evidence. Mr Griffiths's attempts to clarify matters on behalf of Mr Cadman added a further layer of confusion, not least because, when questioned, he did not seem clear on what Mr Cadman had actually said by way of clarification or amendment of his earlier statement. Mr Ormondroyd looked at the evidence given in some detail to compare it to the documents.
- 9.3.25 As for Mr Cadman's evidence that the Application Land was used principally for disposal of waste (such as ash and linseed) until manufacturing ceased in 1994 (see paragraph 7.2.3 above), the date of 1994 was unexplained; the old Williamson's factory closed in 2001. By that time (and since the 1970s) it was not making linoleum so why it should be disposing of linseed was not clear. There was absolutely no evidence of tipping over the Application Land (or the Rectangle) in aerial photographs from the

1980s or 2000s, which could be compared with an aerial photograph from the 1960s which was different⁴⁰.

9.3.26 The concept that the whole of the Application Land was tipped up until 1994 was frankly ludicrous. Mr Griffiths (see paragraph 7.3.3 above) narrowed this down to a reference to the “*southern part*” of the Application Land – Mr Griffiths “*believed*” this qualification “*may*” have come from Mr Cadman (albeit that it did not appear in that part of his evidence purporting to clarify/expand on Mr Cadman’s evidence). However, the plan attached (which was not one of Mr Cadman’s plans but on a base prepared and used by Mr Griffiths) actually did not relate to the Application Land at all, but the Rectangle. Reference was then made to tipping linoleum (production of which stopped in the 1970s) and concrete blocks; and there was a further reference to cinders. In any event, Mr Griffiths himself had always been aware of tipping on the Rectangle (but how he was aware of this, and what period it was said to relate to, remained a mystery). This evidence was garbled almost to the point of incomprehensibility; it was hard to know who was saying what, and why.

9.3.27 There was no documentary support for the amended version of events in respect of agreements to allow tipping, planning or other authorisations for waste disposal, or any records of how and when the tipping was capped. More specifically, there was no record in either the 1997 Health & Safety Risk Assessment or the 1988 Audit Report of recent waste disposal on this area (which although not covered by the Application was covered by those documents as part of Plot 2). Tellingly (particularly in the light of Mr Griffiths’s reference to concrete blocks) there was reference in those reports to construction works at Ultramark. This supported Mr Barry’s recollection that some limited amounts of rubble were placed on the Rectangle when this happened, causing the access route to Point C to move south west. It was also consistent with the evidence of other witnesses who accessed via Point C throughout the period, none of whom mentioned having to cross an active tip to get there.

9.3.28 It was unclear what was meant by Mr Cadman’s reference (see paragraph 7.2.3 above) to the Application Land being “*fenced off*” when linoleum manufacturing operations

⁴⁰ The reference here is to the aerial photographs in the Footpaths Report.

ceased. Insofar as it suggested that the Application Land was “*fenced off*” in 2001 (when the factory ceased operation) there was no documentary evidence to support that.

- 9.3.29 Mr Cadman’s references (see paragraph 7.2.4 above) to repairs to boundary fences being undertaken on a running basis, to the fencing being a mix of old and new and to maintaining a clear boundary fence to deter and prevent unauthorised access had no support in the documents, which showed no concern to prevent access as far as pedestrians were concerned. The repairs claimed seemed to be insubstantial in the extreme as Mr Cadman talked about (see again paragraph 7.2.4 above) a “*shoestring budget*” and use of “*existing materials*”. The kindest complexion that could be put on all this was that Mr Cadman sought on one or two occasions to reuse some barbed wire from the decayed fencing to block off access points used by quad bikes/motor bikes.
- 9.3.30 Mr Cadman claimed (see paragraph 7.2.5 above) that he undertook the works detailed in the 1997 Health & Safety Risk Assessment despite evidence from the documents to the contrary. He even claimed to have repaired the fence, despite there having been a request for a quotation for this work which was apparently never provided. The claims about work done were highly unlikely to be true.
- 9.3.31 Mr Cadman claimed (see paragraph 7.2.6 above) that the Water Authority repaired a palisade fence which they had damaged on the north west side of the Application Land. This was completely contrary to the contemporary correspondence and what was known about the location of the pipes in this area. This appeared to be a blatantly misleading statement based on a misreading of the correspondence by Mr Cadman or someone assisting him to draft his statement.
- 9.3.32 Mr Cadman claimed (see paragraph 7.2.7 above) that a 10 feet high earth mound was erected around 1998 along two boundaries of the Application Land. This was a bizarre claim given the physical evidence on site, and one completely unsupported by the documents. It was not referred to in the health and safety reports (unlike the mound behind the gate referred to there) and there was no quotation, correspondence or invoice in respect of what would have been a massive piece of work. This claim simply served as an illustration of how far the evidence had deviated from the truth.

- 9.3.33 Insofar as it was implied by Mr Cadman’s statement (see paragraph 7.2.8 above) that fencing repairs on New Quay Road in 2001 related to the Application Land, that was inconsistent with a true reading of the documents.
- 9.3.34 Mr Cadman claimed (see paragraph 7.2.9 above) that the fencing was repaired in 2004 alongside the erection of signs. The documents from that time very clearly demonstrated what was requested by the insurance broker, and why, and what was quoted for by Mr Cadman. This did not include repairs to the fence. Again, this appeared to be an exaggeration based on a misreading of the documents. As well as, incorrectly, claiming support from the documents, Mr Cadman also bizarrely claimed support from 2005 photographs but how or why they provided such support was unclear.
- 9.3.35 On the whole, therefore, the evidence could be given very little weight as it appeared to be intrinsically unreliable and inconsistent with the known history as revealed in the documents. It should be noted that it always erred, as compared with the documents, on the side of Satnam’s case. It had been strongly influenced in one way or another by the exigencies of fighting the Application, in just the way Leggatt J cautioned against in *Gestmin*. Furthermore, it had not been tested at the inquiry, was not even in the form of a statutory declaration, and insofar as it came by way of Mr Griffiths, was also hearsay.
- 9.3.36 The claim (evidenced only by Mr Cadman’s say-so – see paragraph 7.2.3 above) that the Application Land was “*fenced off*” in 1986 had, accordingly, also to be viewed with extreme scepticism. It was inconsistent with the recollections of users from that time.
- 9.3.37 Finally, it was necessary to address Mr Cadman’s claim (see paragraph 7.2.10 above) that the decision to fence in 2011 was because patch repairs could not be continued for much longer. Mr Griffiths similarly tried to dress up the 2011 fence as an attempt to save maintenance costs – a strange claim given that there was no evidence of any money being expended on maintenance of the concrete and wire fence for the preceding 20 years, or longer. In reality what had changed in 2011 was that the owners had decided to take active steps to promote the Application Land for redevelopment. The focus changed from minimising holding costs to maximising the prospect of redevelopment. It was clearly realised that recreational use by the public – which had been tolerated for

so long – was then a threat to redevelopment of the Application Land (whether by way of footpath or village green applications, or by way of objections in the planning process). The owners were advised to assert their ownership more actively, and to take steps to contest and interrupt use by local people as best they could. That is what they finally did, and the present Application was, of course, the result.

The law applied

9.3.38 The relevant question was whether the 2004 signs were sufficient to render use of the Application Land contentious. The general test for establishing whether the user was *vi* was stated by Morgan J in *Betterment Properties (Weymouth) Ltd v Dorset County Council*⁴¹ as follows:⁴² “[a]re the circumstances such as to indicate to the persons using the land, or to a reasonable person knowing the relevant circumstances, that the owner of the land actually objects and continues to object and will back his objection either by physical obstruction or by legal action? For this purpose, a user is contentious when the owner of the land is doing everything, consistent with his means⁴³ and proportionately to the user, to contest and to endeavour to interrupt the user.”⁴⁴

9.3.39 The Court of Appeal explained⁴⁵ that, under the test, an owner could successfully render user contentious in two ways. First, that could be done by actually communicating his objection to the users. This did not happen in the present case as hardly any of the witnesses were aware of the 2004 signs, which seemed to have been present for a few days only. Regular users who would have reacted to them given their beliefs about the Application Land simply did not recall seeing them. Those who were aware of them (of the witnesses giving evidence, only Mr Barry and Mrs Aitken; of the other witnesses, hardly any) found them ambiguous as to precisely what land they referred to and/or on whose behalf they had been erected. That was not an unreasonable stance in the context

⁴¹ [2010] EWHC 3045 (Ch).

⁴² The same test was applied in *Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust* [2010] EWHC 530 (Admin) at paragraphs 18 and 22, and in *Betterment Properties* in the Court of Appeal [2012] EWCA Civ 250 at paragraphs 40-52 per Patten LJ, at paragraph 91 per Sullivan LJ and at paragraph 98 per Carnwath LJ.

⁴³ The relevance of the owner’s means was doubted by HHJ Waksman QC in *Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust* ([2010] EWHC 530 (Admin) at paragraph 22) but that qualification was not of any particular relevance in the present case, as the owners were not understood to have been impecunious.

⁴⁴ At paragraph 121.

⁴⁵ [2012] EWCA Civ 250 at paragraph 48.

of the Application Land and the limited coverage and information provided by the signs.

9.3.40 The second way the owner could render user contentious, and the route which had to be relied on by Satnam here, was by complying with an “*objective test*”⁴⁶. The question for those purposes was whether the landowner did everything reasonably proportionate to alert users that they were trespassing and that the owner objected, and continued to object, to their use.

9.3.41 In that respect, the “*nature and content of the notice, and its effect, must be examined in context*” (per HHJ Waksman QC in *Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust*⁴⁷). The context, in this case, included the undisputed former recreational use of the Application Land, which (in the absence of any indication to the contrary) indicated to local people that it was available for their use. The Application Land was easily accessed from various points, which was a further indication in that direction. Furthermore, in terms of proportionality, the recreational use was sufficiently intense to be mentioned in formal assessments commissioned by the landowners. As such, something more was required than the 2004 signs if the landowner wished to render the use contentious. The signs did not cover all, or even a majority, of the entrance points and were not clear as to who had erected them. They were not accompanied by a fence or other means to indicate clearly to what land they applied. Furthermore, the fact that the signs were soon removed and not replaced completely failed to communicate a continuing objection from the owner.

9.3.42 It was not surprising that this was the result of the owner’s actions, because the documents showed no desire to contest recreational use at all. No money was spent on fencing and what appear to have been the cheapest possible signs were erected. The aim was not to stop use for lawful sports and pastimes, but to satisfy the insurance broker and discourage vehicular use. A proportionate response, once it became apparent the signs had been removed, would have been to do any one or more of the following:
(1) fence the Application Land;

⁴⁶ Per Patten LJ in *Betterment Properties* [2012] EWCA Civ 250 at paragraph 48.

⁴⁷ [2010] EWHC 530 (Admin) at paragraph 22.

- (2) re-erect the notices or use more secure notices such as those used in 2011 – which were still present despite the evident anger they had provoked;
- (3) issue a public notice in the paper as to the ownership of the Application Land and as to the owner’s objection to the use of it by the public;
- (4) instruct employees or security contractors to be present on the Application Land for a time and to turn people away.

9.3.43 None of these steps would have been particularly difficult or expensive given the size of the Application Land and its potential value for development. Some further response was clearly proportionate in the context of the Application Land, its history and the extensive nature of the use made of it. As a consequence, the landowner had clearly not done enough to render use contentious.

9.4 Locality

9.4.1 The locality relied on in this case was Castle Ward. The boundaries of this ward were reduced slightly in 2003 by the inclusion of a small area in the new city centre Dukes Ward. Throughout the Relevant Period, however, the ward remained in existence and with a consistent identity.

9.4.2 The leading case on “locality” was now *Lancashire County Council v Secretary of State for Environment, Food and Rural Affairs*⁴⁸. The Court of Appeal’s decision had been appealed to the Supreme Court, but not in relation to the locality points (in respect of which permission to appeal was refused). It confirmed that an electoral ward could be relied on as a locality even if the boundaries had changed during the relevant period, as long as the community identified by the locality had not “*significantly changed*” as a result of the boundary changes⁴⁹. It was plain that there had been no such significant change here.

⁴⁸ [2018] EWCA Civ 721

⁴⁹ At paragraph 71.

- 9.4.3 *Lancashire* had also finally laid to rest the so-called “*spread*” argument, confirming that there was no requirement for any particular distribution of users around the locality⁵⁰.
- 9.4.4 None of the foregoing points appeared to be contentious. In particular, there had been no evidence or submission to the effect that the change in 2003 caused a significant change so as to prevent reliance on Castle Ward. It was accepted by Satnam that nothing turned on the change.
- 9.4.5 Instead, it had been contended that a locality had to be an identifiable community (which, it was argued, had not been shown) or that it was necessary for there to be a credible relationship between the land and the locality.
- 9.4.6 As to the first iteration of the submission, there was no general requirement to prove that the locality described by the electoral ward was an identifiable community, beyond the fact that it was identified by the law as an electoral ward. In other words, it was the law which had to identify the community in question. As long as a locality of a relevant type was selected, that was enough. An electoral ward was an example of an area which was defined, by the law, as being referable to an identifiable community. A conservation area, for example, was not, because it did not represent the identification of a community by the law: *Paddico*⁵¹.
- 9.4.7 As was apparent from the Court of Appeal’s decision in *Lancashire*, an applicant and a decision-maker only needed to consider the question of the identity of the community described by the boundaries of the locality where those boundaries had changed: “[w]as there, or not, a continuous, identifiable locality in existence throughout the relevant 20-year period, notwithstanding the boundary changes? ... Carnwath LJ referred [in *Paddico*] to the concept of an ‘identifiable community’ remaining in existence. The sense of this, as Ouseley J emphasized (in paragraph 24 of his judgment), is that the community in question must not have significantly changed.”⁵² Satnam

⁵⁰ At paragraphs 74-80.

⁵¹ [2012] EWCA Civ 262 at paragraphs 29 and 62.

⁵² [2018] EWCA Civ 721 at paragraphs 70-71.

rightly did not make the point here that the boundary change in 2003 constituted a significant change in the area, or community, identified by the locality.

- 9.4.8 Satnam had provided no support for the claim that, in each case, the applicant had to go behind the law's identification of a locality and effectively establish afresh that such was indeed an identifiable community. This claim was inconsistent with the rejection in *Paddico* of a conservation area as a locality. If Satnam's test were right, then it would be a question of fact in each case to determine if the conservation area did or did not encompass an identifiable community.
- 9.4.9 If the submission was persisted in, then support might be drawn from *R v Suffolk County Council Ex p Steed*⁵³ and *Cheltenham Builders*⁵⁴ but care should be taken when it came to relying on these cases. They both pre-dated *Oxfordshire*, where Lord Hoffmann explained that the requirement in a "locality" case was for "a locality defined by legally significant boundaries"⁵⁵. Furthermore, both cases were concerned on their facts with entirely arbitrary areas not known to law at all. They provided little or no assistance on the approach when, as here, a legally recognised area of a sort that was acceptable in principle was relied on.
- 9.4.10 One also searched in vain in *Paddico* and *Mann* for any extra requirement on an applicant to prove an identifiable community. It was the law which had to identify the community in question, not the applicant in a particular case. The nearest one got was in the remarks of Carnwath LJ in *Paddico*, where he observed of Holy Trinity Parish that it "was at least an identifiable community with a credible relationship with the green."⁵⁶ These *obiter* comments did not impose any requirement beyond the selection of an administrative unit of the correct type, and (as pointed out above in relation to *Lancashire*) this was not how they had been interpreted. In *Mann*, Mr Laurence seemed to have taken the point that there was a further requirement of "community" in a locality case (see the summary of competing submissions which referred to "the suggested

⁵³ (1996) 71 P & CR 463 (Carnwath J at first instance).

⁵⁴ [2003] EWHC 2803 (Admin).

⁵⁵ [2006] UKHL 25 at paragraph 27. And Carnwath J's view in *Steed* was particularly shaped by a pre-*Oxfordshire* approach which introduced concepts of what "a town or village green, as generally understood" might be ((1996) 71 P & CR 463 at page 476), above and beyond the actual requirements in the statute.

⁵⁶ [2012] EWCA Civ 262 at paragraph 62.

*additional requirement of a locality, namely, ‘community’*⁵⁷). This submission was, however, rejected by the judge, who found in that case that even polling districts of an electoral ward could qualify as localities.

9.4.11 “*Cohesiveness*” was not a relevant test in a locality case but, if it were relevant, the test was passed in the present case in any event.

9.4.12 As to the second iteration of Satnam’s “*locality*” argument, there was certainly some support for the propositions that the locality had to be credible in the sense of being a credible place where users might come from (clearly met here on the facts) and one with some relationship to the land. See *Mann*, recognising these aspects of Mr Laurence’s submissions⁵⁸. The requirement for a “*credible relationship*” was the basis for excluding super-large localities like counties, as also explained in *Mann*, where the counties of Surrey and Somerset were excluded for that reason⁵⁹. Here, the county of Lancashire would probably fall foul of the same objection. The locality selected, however, was not at all excessive in size at around 8,000 inhabitants. This was illustrated by the ready acceptance of localities such as Yeovil (*Mann*⁶⁰, population c45,000), Sudbury (*Steed*⁶¹), Bristol City and South Gloucestershire (*Cheltenham Builders*⁶²) and, indeed, the Scotforth East Ward in *Lancashire*⁶³ itself.

9.4.13 Finally, however, Satnam’s legal arguments in this respect were entirely academic. There was copious evidence that the chosen locality did describe an identifiable community, both in terms of physical and social geography.⁶⁴ That evidence had gone entirely uncontested and entirely unchallenged.

9.4.14 It was accordingly requested that I reject Satnam’s arguments on the present issue, and its other arguments, and recommend registration.

⁵⁷ [2017] 4 WLR 170 at paragraph 95.

⁵⁸ [2017] 4 WLR 170 at paragraph 97.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ (1996) 71 P & CR 463 at page 477.

⁶² [2003] EWHC 2803 (Admin) at paragraph 86.

⁶³ [2018] EWCA Civ 721 at paragraph 66 *et seq.*

⁶⁴ In the material and references provided by Mr Barry.

10. FACT FINDING AND ANALYSIS

10.1 Introduction

10.1.1 At the beginning of the inquiry I identified as the three main issues in the case whether there had been sufficient recreational use of the Application Land for lawful sports and pastimes, whether use had been “*as of right*” and whether use had been by a significant number of the inhabitants of the locality.

10.1.2 Those remain the main issues and this section of my report is structured accordingly.

10.2 Assessment of the evidence in relation to use

Overall assessment

10.2.1 It was my clear impression that all the witnesses who gave live evidence in support of the Application did so honestly and to the best of their recollection. It was not suggested to any of them by Mr Manley that they were exaggerating their use of the Application Land and I did not detect any exaggeration in what I was being told. Moreover, nothing that was said by them about their use of the Application Land struck me as anything other than plausible. I do not consider that cross-examination exposed any significant inconsistencies in the accounts of individual witnesses. And I do not think that there is any particular force in the submission that different witnesses, in some respects, gave evidence of different uses or (perhaps more relevantly) of having seen different uses. The submission was directed at the extent to which particular activities would have occurred rather than to the question of witness credibility as such. But, insofar as it is relevant to that latter question, I accept Mr Ormondroyd’s submission that differing accounts are readily explicable by reference to the fact that different people will do, see and, perhaps more to the point, remember different things. I do not consider that there is any striking anomaly in the accounts provided.

10.2.2 In making my assessment of the oral evidence in support of the Application, I have borne in mind Leggatt J’s observations in *Gestmin* on the reliability of witness recollection. Nevertheless, it seems to me that there is a distinction between the type of

commercial case which formed the factual context for those observations where what was in issue was “*witnesses’ recollections of what was said in meetings and conversations*”⁶⁵ in relation to particular past events rather than, as typically in a village green case, recollection of a pattern of recreational behaviour (and associated observation) repeated over the course of several years.

10.2.3 There is in the present case also a substantial body of written witness evidence in support of the Application by way of completed evidence questionnaires and written statements. This material has not been able to be tested by cross-examination and it cannot command the full weight of evidence which has been so tested. However, it seems to me, having considered the written evidence and applying appropriate caution in considering it, that it is consistent with the oral evidence I heard about use of the Application Land and supportive of it. I take it into account and give it due weight.

10.2.4 I much prefer the tested oral evidence I heard in support of the Application in relation to use of the Application Land to the witness evidence put forward by way of objection to the Application on this matter which, save for limited evidence from Mr Griffiths, was not able to be tested. I return to this point in paragraph 10.2.6 below. I also consider that the documentary evidence adduced by Satnam, rather than casting doubt on the evidence of use of the Application Land from witnesses supporting the Application, supports that evidence of use in an important respect. I return to this point in paragraph 10.2.7 below.

10.2.5 In short, I accept the live evidence I heard in relation to use of the Application Land from witnesses supporting the Application.

10.2.6 By way of overview, before I descend to further detail, I state at the outset that I consider that the live evidence in support of the Application, considered as a whole, paints a clear picture of abundant use of the Application Land generally for lawful sports and pastimes over the Relevant Period. That picture is corroborated by the written evidence in support of the Application.

⁶⁵ [2013] EWHC 3560 (Comm) at paragraph 22.

10.2.7 I do not think that there is any evidence of substance produced in objection to the Application which falsifies the picture of use that I have just described or casts doubt on the reliability of the evidence of use from those supporting the Application. As for the witness evidence by way of objection to the Application, I cannot accept Mr Cadman's untested written evidence (see paragraph 7.2.11 above) that any use of the Application Land for truly recreational purposes was rare and sporadic. That contradicts the tested oral evidence in support of the Application. I also have serious reservations about Mr Cadman's statement more generally and I am unable to accept it as reliable. It is a confused document and is inconsistent with contemporaneous documents in several important respects. I largely agree with the criticisms made of it by Mr Ormondroyd in his closing submissions. I return to this matter at paragraph 10.3.17 below. The direct evidence that Mr Griffiths was able to give in relation to his observations of use of the Application Land over the Relevant Period was limited and nothing in it leads me to doubt that the Application Land was well used for recreational purposes over that period. Mr Griffiths did not give any account of what he saw on those few occasions (two or three, but not otherwise detailed by date or time) when he "would have" (see paragraph 7.3.2 above) visited the Application Land prior to 2010 and, in relation to visits thereafter, he had on occasions noticed people in the centre of the Application Land in the general location of the claimed footpaths. I can give no more than very limited weight to Mr Park's evidence insofar as it relates to use of the Application Land (see paragraph 7.4.2 above) as it is untested and inconsistent with the tested evidence in support of the Application.

10.2.8 As for documentary material adduced by Satnam, confirmation that recreational use of the Application Land was common practice in the first part of the Relevant Period is found in the 1997 Health & Safety Risk Assessment. This stated that "*members of the public gain access to the land for recreational purposes*" and noted that "*Plot 2 can be accessed by pedestrians at many points along its boundaries and this appears to be common practice, resulting in many well worn paths*" (see paragraph 7.1.5 above). I also mention at this point the interpretation (which I have no reason to doubt) of the aerial photographs which were examined in the Footpaths Report. This document (although put in evidence by Satnam) was not, of course, a landowner-commissioned one but it does contain an objective and independent assessment of evidence which concluded that aerial photographs revealed a significant number of tracks on the

Application Land (apart from the footpath routes which were the subject of the definitive map modification applications) in both the 1980s and the 2000s (see paragraphs 7.1.23-27 above). This is entirely consistent with the live evidence I heard in relation to routes on the Application Land (see paragraph 10.2.20 below). The Footpaths Report also made it clear, from analysis of the aerial photographs, that there was always a clearly visible route from Coronation Field to the Application Land (see again paragraphs 7.1.23-27 above). This is also wholly consistent with the live evidence from the witnesses in support of the Application that this was a common means of access to the Application Land.

10.2.9 I do not consider that the level of use of the Application Land after the fence and notices went up in 2011 provides any clear guide to the pre-2011 level of use. Three of the witnesses I heard, Mrs Bannon, Mrs Stephenson and Mrs Kendrick, stopped using the Application Land after 2011 (see paragraphs 6.20, 6.24 and 6.49 above). Mr Barry said that he thought that use had reduced by approaching two thirds (see paragraph 6.5 above). Mr Lamba said that use had dropped since the fence went up because it was harder to gain access (see paragraph 6.39 above). Mr Hardy described the 2011 fence as very intimidating (see paragraph 6.40 above). A reduction in use after 2011 is exactly what would have been expected. It cannot be suggested that that reduced use after 2011 seriously calls into question levels of use before then.

10.2.10 I said in paragraph 10.2.6 above that I consider that the live evidence in support of the Application, considered as a whole, paints a clear picture of abundant use of the Application Land generally for lawful sports and pastimes over the Relevant Period and that that picture was corroborated by the written evidence in support of the Application. As there is no evidence of substance to contradict that impression, I find accordingly. I expand on my reasoning below.

Further detailed reasoning

10.2.11 I cannot accept the submission that the picture which emerged from the evidence was one of a small number of dog walkers whose use was focused on worn routes, with only trivial and sporadic use beyond that, such that the appearance to a reasonable landowner

would have been the assertion of footpath rights rather than village green rights. I consider that this is far from a fair assessment of the evidence overall.

10.2.12 I accept Mr Ormondroyd's submission that, even if, as contended for by Mr Manley, there were to be left out of account in assessing use relevant to the establishment of a new green both walking (with or without dogs) and BMX use in the south western part of the Application Land, there would nevertheless still be a sizeable body of recreational use to be taken into account. To my mind the live evidence I heard, supported by the written evidence, shows, and I so find, that a good deal of use was made of the Application Land over the Relevant Period for activities such as informal games of football and cricket on the central open areas, children's play, birdwatching, blackberry picking, the flying of model helicopters/aeroplanes, kite flying, picnicking and photography. I mention in relation to birdwatching, addressing Mr Manley's submission that there was only a handful of birdwatchers, that I find that the seriously dedicated birdwatchers probably were to be counted in single figures but I have little doubt (and also so find) that birdwatching was also an activity pursued by others on the type of inexperienced and more occasional basis described (see paragraph 6.2 above) by Mr Barry⁶⁶.

10.2.13 I do not think it is necessary for me consider whether the recreational use just described would on its own have supported registration of the Application Land as a whole. It seems to me that it would be an artificial exercise to subtract dog walking, or simply walking, on the Application Land from the overall pattern of its recreational use. And as it is, for reasons I explain in more detail below, I do not consider that there is any good reason to discount any significant part of the evidence that I heard in relation to dog walking or, simply, walking on the Application Land. I do not do so. I have no doubt that the overall use of the Application Land for recreational purposes went well beyond that which was "*so trivial and sporadic as not to carry the outward appearance of user as of right*"⁶⁷ and was, indeed, "*of such amount and in such manner as would*

⁶⁶ In addition to the several live witnesses who gave evidence of birdwatching the written evidence discloses, by my counting, 16 others who engaged in this activity on the Application Land and 58 who had seen others birdwatching.

⁶⁷ The words are those of Lord Hoffman in *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [2000] 1 AC 335 at page 357.

reasonably be regarded as being the assertion of a public right”⁶⁸. The right so asserted in this case was, I find, one of recreation over the whole of the Application Land and the case for registration is amply supported by the use evidence.

10.2.14 Turning to more detail, I do not think, as contended for by Mr Manley, that the evidence shows that dog walking on the Application Land was the preserve of only a small group. The source in the live evidence I heard of this submission was the evidence of Mr Lamba and Mr Hardy. Mr Lamba said (see paragraph 6.39 above) that the other people he saw on the Application Land were mainly dog walkers. From 2004 he began to recognise individual dog walkers because he had seen them before. There were between half a dozen and dozen dog walkers that he saw regularly. Mr Lamba had set times for visiting the Application Land (primarily at dusk but also about 9 or 10am). Mr Hardy said (see paragraph 6.41 above) that on his early morning dog walks (which tended to be about 7 to 8am) he would always see the same blokes, about half a dozen, walking their dogs before they went to work. This evidence does not justify the conclusion that the total number of dog walkers on the Application Land was small. It simply shows that at particular times of day the number of regular dog walkers at such times was limited. As Mr Ormondroyd submitted, this evidence does not capture any dog walker who regularly went on to the Application Land at different times or who went there at variable times.

10.2.15 The overall impression that I received from the live evidence was that dog walking was a common activity on the Application Land indulged in by significant numbers. I so find. Mr Barry walked a dog on the Application Land and (see paragraph 6.3 above) frequently saw others doing the same thing. Mrs Bannon (see paragraph 6.18 above) never felt uncomfortable on the Application Land because there were so many people about, dog walkers especially, who she assumed were local because she would see some of the same walkers repeatedly. She did not recognise the dog walkers but got the impression it was a particular group of people but the size of the group varied depending on the time. Mrs Aitken (see paragraph 6.21 above) met other dog walkers who were not a group but just people who walked dogs, some of whom she knew. Mrs Stephenson

⁶⁸ The words are those of Lord Hope in *Lewis v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11 at paragraph 67.

(see paragraph 6.25 above) frequently met other dog walkers on a regular basis. Mrs Harrison (see paragraph 6.26 above) met other dog walkers with whom she walked. Mrs Thompson (see paragraph 6.30 above) regularly saw other people on the Application Land with dogs. Mrs Ashman (see paragraph 6.33 above) would always see other people wandering through the trees with their dogs. Mr Harvey (see paragraph 6.35 above) saw loads of dog walkers on the Application Land and said that this must have been the most common activity there. Mr Boothman (see paragraph 6.36 above) saw other dog walkers, often the same dogs and owners, when he was on the Application Land. Mrs Clarke (see paragraph 6.43 above) would always see people with dogs on the Application Land. Mr Crooks (see paragraph 6.45 above) said that there were many regular dog walkers who used the Application Land and, even on his early morning visits (at approximately 6 to 8am), he would still see dog walkers, perhaps up to ten and that he got the feeling that most dog owners in the Marsh area would use the Application Land as there was a lot of space to give dogs a decent run around. Mr Haywood (see paragraph 6.48 above) generally saw multiple dog walkers on any given visit to the Application Land. Mrs Kendrick (see paragraph 6.50 above) found the Application Land a busy place and saw, inter alia, other dog walkers. Mr Carter (see paragraph 6.53 above) saw plenty of dog walkers including regulars who he recognised as neighbours.

10.2.16 The use of the Application Land by dog walkers in significant numbers is confirmed when the written evidence is taken into account and combined with the live evidence. Of the total number (live witnesses and the others) of persons (87) providing evidence, 45 of those individuals had themselves used the Application Land for dog walking whereas 78 people had observed this use⁶⁹.

10.2.17 I add at this point that I think that there is force in Mr Ormondroyd's submission that, even if attention were restricted to a pattern of regular use on a day in and day out basis of dog walking at roughly the same time by at least six people, that pattern would, in and of itself, exceed what could be regarded as "*trivial*" or "*sporadic*" or "*occasional use by individuals as trespassers*"⁷⁰.

⁶⁹ I take the figures from Appendix 2 to Mr Ormondroyd's closing submissions which I consider to contain a reliable numerical analysis.

⁷⁰ The latter phrase is that of Sullivan J in *Alfred McAlpine Homes* [2002] EWHC 76 (Admin) at paragraph 71.

10.2.18 I do not consider that the evidence establishes that dog walking was restricted to defined routes. No doubt, and I so find, some dog walkers on the Application Land (perhaps a good number) did restrict themselves to worn tracks on all or most of their visits to the Application Land. Other walkers may have done likewise. Mrs Harrison's morning dog walks were (see paragraph 6.26 above) always a circuit following a well walked route and she said that dog walkers would generally use the circuit route. Nevertheless, she also liked to vary what she did using routes criss-crossing the Application Land (ibid). Mrs Ashman, not a dog walker herself, said (see paragraphs 6.32 and 6.33 above) that she tended to stick on the path unless she was blackberrying and that, as far as she understood, the well worn routes were the ones which dog walkers used. Mr Boothman said (see paragraph 6.36 above) that dog walkers walked on the paths.

10.2.19 However, there is a convincing body of evidence that it was very far from a universal practice of dog walkers, or other walkers, to stick to worn paths and I find that many did not. When Mrs Bannon accompanied her friend (in the last couple of years before the fence went up) to walk the latter's dogs, they would meander about on the Application Land (see paragraph 6.18 above). Mrs Aitken, a dog walker herself, had no set route but varied what she did according to mood, using all the paths on the Application Land but also wandering around the rest of it (see paragraph 6.20 above). Like her, others were not confined to the worn paths (see paragraph 6.21 above). Mrs Stephenson's dog walking took her all over and around the field as well as on to the many tracks into the woodland beside the open field and the networks of paths on the south west side of the Application Land (see paragraph 6.24 above). Mrs Thompson, another dog walker, said that there were some better trodden areas but hardly anyone stuck to the paths (see paragraph 6.30 above). Mr Harvey, not himself a dog walker but simply a walker on the Application Land, said that he was never one to stick to the footpaths, although they did tend to form and there was a sort of circular one (see paragraph 6.34 above). He had seen dogs and dog walkers all over the field (ibid). Mr Lamba said the dog walking use he observed was fairly haphazard and he would meet people all over the place (see paragraph 6.39 above). Mr Hardy was a dog walker who did not follow paths but just went anywhere through the trees in the south of the

Application Land, following his dogs and playing with them in the open area (see paragraph 6.40 above). The other regular dog walkers he saw walked in a similar way to him, varying their routes (see paragraph 6.41 above). Mrs Clarke tended to stick to what she referred to as the “main track” when on the Application Land with her children but she saw people with dogs not confined to paths or any particular areas (see paragraphs 6.42 and 6.43 above). Mr Haywood generally saw on any given visit of his multiple dog walkers who appeared to be using the Application Land in its entirety rather than simply passing through (see paragraph 6.48 above). Mrs Kendrick walked or wandered all over the Application Land on a daily basis with her dog, staying on the path if the weather was worse (see paragraph 6.49 above). The explanation for the differences between the evidence I refer to in this paragraph and that I refer to in the previous paragraph can be ascribed to different patterns of visitation to the Application Land and differing recollections.

10.2.20 Moreover, I also find that throughout the relevant period there were not just a few well worn paths on the Application Land but a multiplicity of routes which could be, and were, followed by dog walkers and others on foot. Mr Barry (a dog walker) referred (see paragraph 6.2 above) to walking on a network of paths in the scrubby area in the west part of the Application Land. Mrs Bannon referred to a network of footpaths that ran across the central field which formed part of her jogging routes (see paragraph 6.18 above). Mrs Aitken (a dog walker) likewise referred to a network of paths in the wooded/scrubland areas which she used, as well as wandering around the rest of the Application Land (see paragraph 6.20 above). Mrs Stephenson (a dog walker) referred to walking on the many tracks into the woodland beside the open field and the networks of paths on the south west side of the Application Land (see paragraph 6.24 above). Mrs Harrison referred to liking to use routes criss-crossing the Application Land to provide variety to her dog walking circuit (see paragraph 6.26 above). Mr Boothman referred to criss-crossing the area by using paths when birdwatching (see paragraph 6.36 above). Mr Crooks explained that his birdwatching took him off “defined paths” by which he meant the network of routes criss-crossing the Application Land that had been worn away by use (see paragraph 6.44 above). Mr Haywood said that there were well worn paths on the Application Land but that desire lines had changed over the years and there was always a criss-cross of paths such that he could access all parts of the Application Land for his birding activities to within ten metres without going

through undergrowth (see paragraph 6.48 above). Mrs Kendrick (a dog walker) referred to wandering around in the trees on the little paths which people had made by walking there, there being lots of such tracks on the Application Land (see paragraph 6.49 above). Mr Carter, who himself had gone “off piste” away from footpaths as part of his birdwatching said that, throughout the Relevant Period, there were fairly well worn routes from Point C to Point A and from Point C to Point E but other paths existed seasonally or varied in their routes as old routes were blocked by vegetation or new ones were formed by use and that people had wandered all over the Application Land (see paragraph 6.52 above).

10.2.21 It will undoubtedly be the case that some of the paths will have been more well used than others and that some will have taken on a principal status (in terms of use). There clearly was a circular route of sorts (as, for example, described by Mr Harvey – see paragraph 6.34 above - and revealed in some of the aerial photographs examined in the Footpaths Report⁷¹) around at least part of the open grassed area of the Application Land. This may well have been a particular case in point in respect of walking use. Nevertheless, I also find that there was a dense network of worn paths (although the paths themselves, their precise routes and their degree of wear would have varied over time) on the Application Land as a whole (in both open and wooded/scrubland areas) throughout the Relevant Period. And I also find that that network of paths as a whole (not just any principal paths) received significant foot traffic from recreational users (with or without dogs) over the course of the Application period. My findings are consistent with the evidence provided by the 1997 Health & Safety Risk Assessment which reported that “*Plot 2 could be accessed by pedestrians at many points along its boundaries and this appears to be common practice, resulting in many unofficial well worn paths*” (see paragraph 7.1.5 above). They are also consistent with the interpretation of the aerial photographs contained in the Footpaths Report that there were a significant number of tracks on the Application Land (apart from the footpath routes which were the subject of the definitive map modification applications) in both the 1980s and the 2000s (see paragraphs 7.1.23-27 above).

⁷¹ This was possibly originally created by motorcycle use: see the evidence of Mrs Clarke at paragraph 6.43 above and of Mrs Kendrick at paragraph 6.50 above.

10.2.22 In coming to an overall conclusion in respect of the evidence of use of paths on the Application Land, I find without hesitation that the widespread use of the network of paths on the Application Land for dog walking and walking would in itself have conveyed to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of the Application Land (in accordance with the guidance given by Lightman J at first instance in *Oxfordshire*⁷²). I do not consider that the position is any way ambiguous such that the inference a reasonable landowner would have drawn from what was occurring was that there was being asserted no more than the exercise of public rights of way. The very fact that there was significant use of an extensive range of different routes forming a dense network of paths criss-crossing the Application Land makes it untenable to suggest that what the landowner faced was other than the exercise of a right to indulge in recreation across the whole of the Application Land but instead the exercise of public rights of way across a multiplicity of separate, intersecting paths. The position in the present case is, as Mr Ormondroyd submitted, very different from that considered by Sullivan J in *Laing Homes*⁷³ where an order had confirmed that there were footpaths around the perimeters of each of the three fields which were the subject of the village green application in that case. The conclusion I reach is reinforced when walking use (with or without dogs) is considered together with the other sizeable body of recreational use in the form of other activities which I have referred to in paragraph 10.2.12 above.

10.2.23 Dog walking in a circuit on the Application Land by those whose habit it was to do so should be seen in the context of the overall use of the Application Land for informal recreation. That overall use context extends, as I have found, to more general dog walking and walking, not just on a circuit but on a variety of many different paths on the Application Land, dog walking and walking by many which took place off any paths at all and the various other recreational activities which occurred. There is no reason to discount dog walking in a circuit from the overall recreational use of the Application Land in this case. I also note that in *Allaway v Oxfordshire County Council*⁷⁴ an experienced inspector, whose reasoning was upheld by the court, found that walkers

⁷² [2004] EWHC 12 (Ch) at paragraph 102.

⁷³ [2003] EWHC 1578 (Admin).

⁷⁴ [2016] EWHC 2677 (Admin).

(with or without dogs) who entered, at a particular point, land claimed to be a green, and then walked a circuit (or circuits) of that land before leaving by the original entry point, should be seen to have been asserting a right to use the land for general recreation rather than asserting a public right of way⁷⁵. That approach is even more appropriate in the present case given the context of the overall use of the Application Land. I note also that Mrs Harrison's circuit dog walking (which I consider would be representative of many who also did that) was to go to the Application Land and then come back rather than to pass through it on a longer route (see paragraph 6.26 above). The inspector in *Allaway* discounted as referable to the exercise of a right of way only so much of the circular walking use as formed part of a longer walk where users entered at one point and left by another⁷⁶.

10.2.24 In paragraph 10.2.13 above I said that I did not consider that there was any good reason to discount any significant part of the evidence that I heard in relation to dog walking or, simply, walking on the Application Land and that I did not do so. In this case the only evidence of walking (with or without dogs) that I discount from my assessment of recreational use relevant to the establishment of a new green is that which took place on defined routes across the Application Land and which represented simply a crossing of the Application Land as a means to get from a starting point outside the Application Land to a destination point beyond it. I accept Mr Ormondroyd's submission that this is how I should proceed. I also accept that there was little live evidence that described, and was confined, to such use.

10.2.25 On the contrary, the live evidence establishes that where the Application Land was visited as part of a longer walk, it was used on such occasions for recreational activity in its own right and was not confined to paths on the Application Land. For example, Mrs Thompson described use of the Application Land as part of a longer route (see paragraph 6.29 above) but one which encompassed some recreational use of the Application Land in the course of such a route. Mrs Ashman would sometimes use the occasion of her blackberry picking on the Application Land for a longer walk (see paragraph 6.32 above) rather than simply going to the Application Land and retracing

⁷⁵ [2016] EWHC 2677 (Admin) at paragraphs 33 and 36.

⁷⁶ *Ibid.*

her steps but her blackberry picking took her off the paths in any event. Mr Harvey's visits to the Application Land were sometimes part of a walk to the river but he would birdwatch on the Application Land on the way there and was never one to stick to the paths on the Application Land in any case (see paragraph 6.34 above). Mr Boothman visited the Application Land both as a destination in its own right and as part of a longer walk incorporating birdwatching on the Application Land which he and his wife would criss-cross using paths or just walk randomly where the undergrowth would allow (see paragraphs 6.36 and 6.37 above). Mr Lamba sometimes entered the Application Land after a walk to Marsh Point before spending two to three hours on the Application Land using the whole of it when there (see paragraph 6.38 above).

10.2.26 Instances of use of the Application Land simply as a means of getting from A to B are few and far between in the live evidence. Mrs Thompson referred (see paragraph 6.30 above) to often seeing people walking through the Application Land from one side to the other to reach the cycle path or New Quay Road (although she also gave evidence of observing a good deal of use of the Application Land apart from this). Mr Hardy was a dog walker who did not follow paths on the Application Land but sometimes did a longer walk to the river and then came back through the Application Land entering at Point A and making his way across to the open area before heading home by cutting across to Point E or sometimes via points C and D to visit his daughter in Forest Park (see paragraph 6.40 above). This latter type of use by Mr Hardy may well have been referable to a footpath type use as would have been the use Mrs Thompson saw of people walking through the Application Land from one side to the other to reach the cycle path or New Quay Road. There will have been other use of this nature (indicated potentially by what Mr Carter described - see paragraph 6.52 above - as fairly well worn routes from Point C to Point A and from Point C to Point E) not specifically referred to in the evidence but its discount (which I do allow for) makes no difference to my overall conclusions given the plentiful walking use on the Application Land not of this nature. No one described crossing the Application Land as a short cut to shops, school or work.

10.2.27 I turn to the BMX use. I have already found that there was abundant use of the Application Land generally for lawful sports and pastimes over the Relevant Period. That finding did not take account of the BMX use so the finding stands as it is regardless

of any conclusion I reach on the BMX use. Nevertheless, it is right that I should address that use in the light of the evidence I heard and the submissions that were addressed to me. As a matter of fact finding, it is clear that there was a constructed BMX course in the wooded south western part of the Application Land near Point F for a good deal of the Relevant Period. It is not entirely clear when the course was first constructed or when it was finally dismantled (which at some point it was) but it is not necessary to be more specific given, as I so find, that the BMX course endured for several years. I find that some of the course will have involved a measure of digging to create the humps and hollows. Mrs Bannon accepted as much although she had not witnessed the creation of these features (see paragraph 6.17 above). Mr Harvey referred to ditches having been, as far as he could tell, dug for the BMX track (see paragraph 6.35 above). I also find that some wooden material will have been brought on to the Application Land from elsewhere to create the ramps and platforms referred to by witnesses.

10.2.28 Mr Manley's submissions were that the BMX use was unlawful in that it involved criminal damage to the Application Land (the digging) and the deposit of waste on it (the wooden material introduced from elsewhere). It is clear that the requirement that sports and pastimes must be "lawful" is that activity which is a criminal offence is excluded: *Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust*⁷⁷. I do not consider that there was any unlawful deposit of waste in this case. Wooden material when brought on to the Application Land to construct the ramps or platforms was not then being discarded by those who did so but was being used. What was done in this respect was trespassory but it did not consist of criminal activity. By contrast, I think that the alteration of the physical nature of the Application Land that was involved in digging would, strictly speaking, have been criminal damage.

10.2.29 I agree with Mr Ormondroyd that any damage would not have been significant, would not have interfered with the owner's use of the Application Land (as there was none⁷⁸) and had no impact on the ability to develop the Application Land in the future. However, it does not seem to me that activity ceases to be criminal if it is minor in its criminality. I am also not inclined to think that Mr Ormondroyd's further argument that,

⁷⁷ [2010] EWHC 530 (Admin) at paragraph 90.

⁷⁸ Unlike the case of *Fitch v Fitch* (1797) 2 Esp 543 where the defendants had trampled down the plaintiff's grass, thrown the hay about and mixed gravel with it so as to render it of no value.

if the Application Land had been registered as a village green, the disturbance of the soil would not have been a breach of the Victorian statutes⁷⁹ because it was with a view to the better enjoyment of the Application Land, is persuasive. In *Oxfordshire* Lord Hoffman said that he did not “*follow how the fact that, upon registration, the land would become subject to the 1857 and 1876 Acts can be relevant to the question of whether there has been the requisite user by local inhabitants for upwards of 20 years before the date of the application.*”⁸⁰ However, having said all this, I do think that a distinction can be drawn between the creation of the course and its subsequent use by those on BMX bikes. There was nothing unlawful in the riding of the BMX bikes and no independent criminality attached to that activity, which is the relevant activity for present purposes. A BMX rider could not have been prosecuted for riding his bike even on those parts of the course which had themselves been created unlawfully. The prior unlawful act would not have rendered the BMX activity unlawful for the purposes of the criminal law and should not do so in the present context. The obvious contrast here is with motorcycle or quad bike use of the Application Land (referred to by some witnesses) which was unlawful in itself under section 34(1) of the Road Traffic Act 1984 and which, of course, I ignore for the purposes of assessing qualifying use.

10.2.30 It follows that, while nothing turns on the matter in the light of what I have said in the preceding paragraph, I do not discount BMX riding in the south western part of the Application Land on the course constructed there.

10.2.31 For the sake of completeness, I should also say that I accept, and find, that bicycle riding took place on the Application Land apart from BMX style riding associated with the BMX track. Mrs Bannon referred to riding her mountain bike on the Application Land (see paragraph 6.17 above). Mrs Aitken described cycle riding other than on the BMX ramps (see paragraph 6.21 above). Mrs Ashman observed parents with children on bikes riding off the path into the woodland area (see paragraph 6.33 above). Mr Harvey saw people riding bikes as well as BMX bikes (see paragraph 6.35 above). Mr Hardy saw teenagers on mountain bikes at the weekends in the vicinity of the old football pitch (see paragraph 6.41 above). Mrs Clarke said children on bikes were not

⁷⁹ See section 29 of the Commons Act 1876.

⁸⁰ [2006] UKHL 25 at paragraph 57.

confined to paths or any particular areas (see paragraph 6.43 above). Mrs Kendrick referred to people riding bikes as opposed to children riding on the BMX course (see paragraph 6.50 above).

10.2.32 Before leaving my analysis of the use evidence, I should add that I am quite satisfied in this case that it could sensibly be said that the whole of the Application Land was used for recreational purposes over the Relevant Period. That already follows from all that I have said above but I consider that the following words of Lord Hoffman in *Oxfordshire*⁸¹ are also particularly relevant here: “[i]f the area is in fact intersected with paths and clearings, the fact that these occupy only 25% of the land area would not in my view be inconsistent with a finding that there was recreational use of the scrubland as a whole. For example, the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flower beds, borders and shrubberies on which the public may not walk.”⁸² In fact, paths and clearings in the present case (having regard to the extensive central grassed area) account for well over 25% of the Application Land. As Mr Ormondroyd submitted, the woodland and scrub were part of the attraction of the Application Land from a recreational point of view, whether for those simply seeking variety in the natural environment or those who were birdwatching. Use of tracks to access and then walk through these areas was referable to the use of the Application Land as a whole for recreation.

10.2.33 It follows from all the above that I reject Mr Manley’s third proposition. The character and extent of the use was such as to bring to the attention of a reasonable landowner that recreational use of the Application Land as a whole was being asserted.

10.2.34 I deal with the issue of whether use was “*as of right*” next.

⁸¹ [2006] UKHL 25.

⁸² At paragraph 67.

10.3 “As of right”

Introduction

10.3.1 The issue in respect of whether use of the Application Land has been “*as of right*” is whether use has been *vi* or forcible. There may have been some permissive use for formal cricket or football matches in the early part of the Relevant Period when the pitches were still used and maintained (as reported in the 1997 Health & Safety Risk Assessment (see paragraph 7.1.4 above)) but this is of no significance in the overall picture and formed no part of Satnam’s case. Their case relied on the presence of fencing and signs.

The evidence in support of the Application relevant to use “as of right”

10.3.2 The live evidence that I heard in support of the Application paints an entirely consistent picture of the absence of any effective fencing throughout the relevant period until the steel palisade fencing was erected at the end of 2011. Mr Barry said that the position in 1997 was that there were concrete posts with some mesh between them but there were more gaps than there was fencing and there was no fencing where people entered the Application Land (see paragraph 6.14 above). Mrs Bannon said that there had been concrete posts there in 1997 but she had never noticed, and did not recall, wire mesh with barbed wire on top (see paragraph 6.19 above). Mrs Aitken said that from the time she started using the Application Land (which was 1990) there had been a few short patches of very old, broken down mesh fencing with bits here and there of rusty barbed wire and that the fencing looked rusty and old then (see paragraph 6.22 above). Mrs Stephenson had not seen any fencing until the 2011 fence went up (see paragraph 6.24 above). Mrs Harrison said that there were old concrete fence posts but no upkeep of the fencing took place although there was mesh in places; it had deteriorated over time and had been in better condition in the early 1990s; there were loads of ways through it (see paragraph 6.27 above). Mrs Thompson only saw fences around 2011 (see paragraph 6.31 above). Mrs Ashman was not aware of any fencing (see paragraph 6.32 above). Mr Harvey had seen concrete posts but not any wire between them except some rusted wire which had become semi-detached from the posts (see paragraph 6.34 above). Mr Boothman had seen concrete posts but did not recall seeing any maintenance of the

fence (see paragraph 6.37 above). Mr Lamba said that in 1981 the old concrete fence posts were present but there had never been a continuous wire fence maintained throughout and he had never seen any maintenance work or any evidence of it (see paragraph 6.38 above). Mr Hardy said there were no fences until 2011 (see paragraph 6.40 above). Mr Haywood said there were some relict pieces of very old fence (see paragraph 6.47 above). Mrs Kendrick said that there were no fences and nothing to climb over or through (see paragraph 6.49 above). No one recalled any maintenance ever being carried out to the old fence.

10.3.3 The only witnesses who could remember any signs before those which were erected at the time that the new steel palisade fence was put up in 2011 were Mr Barry (see paragraph 6.4 above) and Mrs Aitken (see paragraph 6.22 above) and each thought that these signs had been very short lived, a few weeks according to Mr Barry and maybe a week or two according to Mrs Aitken. No other live witness recalled any signs before 2011 and the written evidence similarly shows that the vast majority of users did not see any signs⁸³. I do not think that Mr Maudsley's reference in the evidence questionnaire that he completed (see paragraph 7.1.29 above) in respect of one of the footpath applications to "*occasional signs*" provides a reliable basis on which to conclude that signs were erected on more than one occasion before 2011. Mr Maudsley also completed an evidence questionnaire in respect of the Application in which he stated in respect of the relevant question about notices that this had happened "*once*" and the signs only lasted a day or two.

The documentary and photographic evidence relevant to use "as of right"

10.3.4 I turn next to consider the documentary and photographic evidence adduced by Satnam in order to evaluate it in relation to fencing of the Application Land and the display of signs.

10.3.5 I have no hesitation in finding that the new fence which was referred to in Mr Cadman's letter of 2nd December 1998 to Mr Chan of Property Trust Plc (see paragraph 7.1.8

⁸³ The very few references to signs in the written evidence suggest that signs (of an ambiguous nature) were erected on one occasion only in the Relevant Period.

above) as having been erected by North West Water after they had damaged the existing fence was not a fence on the boundary of the Application Land but one on the boundary of Plot 1. The reference in the letter to the new water main “*on the land adjacent to the river*” is clearly a reference to the land comprised within Plot 1 and relates the works to that plot rather than the Application Land. That is confirmed by the further reference in the letter to the “*main area of land*” in respect of which Mr Cadman reported that gypsies had been removed. The “*main area of land*” is clearly a reference to Plot 2 which encompasses the Application Land. The position is put beyond doubt by the “Safedig” evidence produced by Mr Barry (see paragraph 6.12 above) which shows that no pipes which would have been relevant to North West Water’s works crossed into the Application Land.

10.3.6 The 1997 Health & Safety Risk Assessment recorded that the boundaries of the waste ground assessed were “*unprotected*” and allowed “*open access to the public*” and stated that “[*t*]he boundaries to both plots of land are marked with various broken fences with large stretches of fence missing in many places” with the consequence that “*members of the public gain access to the land for recreational purposes.*” (See paragraph 7.1.5 above). It noted that “[*t*]here are no direct security measures in force to protect the plots of the land” and that the main access to Plot 2 was via a locked gate at its north east corner (i.e., Point A) but “*Plot 2 could be accessed by pedestrians at many points along its boundaries and this appears to be common practice, resulting in many unofficial well worn paths.*” (Ibid). There is no reason to think that what was recorded here was other than an accurate description of the boundaries to Plot 2, and thereby the Application Land, at the time.

10.3.7 As to whether the various recommended actions in the 1997 Health & Safety Risk Assessment (including consideration of: repairing the fencing or removing the hazard it posed; erecting signs along all boundaries of the plots warning that the land was private; and providing heath fire beaters near access points) were carried out, there is then the exchange of faxes in April 1998 between Mr Cadman and Mr Allen (see paragraph 7.1.7 above). Works in respect of the signs and the heath fire beaters were requested and a quotation was sought in respect of the repair of the broken boundary fencing. No quotation has been put in evidence. The fact that one was requested is consistent with there being no ongoing agreement in relation to maintenance of the

fencing. There is also no further documentation in the form of an invoice (or other record) from Mandraw which evidences the erection of signs (or any of the other work such as the provision of the heath fire beaters). This does not of course evidence that the work was not done but it does mean that there is no contemporaneous documentary evidence to show that it was done at the time in the first part of 1998.

10.3.8 There is then the 1998 Audit Report of December 1998 (see paragraph 7.19 *et seq* above). This recorded that there had been no changes to the property since the 1997 Health & Safety Risk Assessment and its overall conclusion was that poor progress had been made in implementing the recommendations in the earlier document. The 1998 Audit Report made no reference to any fencing repairs having been carried out. In respect of signs, it reiterated the recommendation in the 1997 Health & Safety Risk Assessment that signs be provided along the boundaries of both plots warning that access was restricted to authorised persons. There is no mention of signs having been erected since the previous assessment but having been removed or vandalised. I agree with Mr Ormondroyd's submission that, had signs been erected but then removed or vandalised, it would have been expected that this would have been mentioned as an explanatory factor or as one which might shape a new recommendation. In this respect there is a contrast with the 1998 Audit Report's treatment of the issue of the fire beaters where it was noted that the recommendation that they be provided had not been implemented but recognised that, if provided, the beaters could be subject to vandalism or theft.

10.3.9 The reference in the 1998 Audit Report to work having been in progress on a site on the industrial estate adjacent to the south east corner of the property (see paragraph 7.1.11 above) with the deposition of rubble and large lumps of concrete in the area on a section of ground along the eastern boundary is consistent with the evidence which Mr Barry gave about the expansion of the Ultramark factory at this time and the dumping of material on the Rectangle (see paragraph 6.11 above). It cannot be inferred from the reference in the 1998 Audit Report to the absence of boundary fencing in the area in question that there was effective boundary fencing elsewhere. The fact that the property had not changed since the 1997 Health & Safety Risk Assessment (which had recorded "*various broken fences with large stretches of fence missing in many places*") and that there was no reference in the 1998 Audit Report to fencing having been

repaired makes this an impossible construction to put on matters. What I do think is of significance for present purposes is that the 1998 Audit Report, in dealing with the construction work and its associated deposit of rubble and large lumps of concrete, recorded that the matter should be investigated to ensure that the area was left safe in view of the “*easy access for the public*” to the site (see paragraph 7.1.11 above).

10.3.10 Turning next to the documentary material of early 2001 (see paragraph 7.1.16 above) in relation to the fence repair work, it is clear, and I so find, that the repairs in question were to the boundary of Plot 1 and not the Application Land. This is the inevitable conclusion from both the location of the work described in the documentation and the identification of the relevant materials. The repairs carried out were (according to Mandraw’s letter of 9th March 2001) “*to the boundary fence on the road side of the land on New Quay Road*”. This is a description of the boundary to Plot 1 which sides on to New Quay Road (whereas the Application Land does not). The same letter refers to the materials involved as “*timber rails & post, woodstain.*” It has never been suggested that the Application Land has ever had any timber fence, a position confirmed by Mr Barry who also demonstrated by Google Earth photographs that Plot 1 had timber post and rail fencing (see paragraph 6.12 above). I also note, echoing Mr Ormondroyd’s submission to like effect, that the existence of the documentation in relation to the 2001 fence repair tends to suggest that such matters were dealt with on an individual basis, supported by separate invoices, rather than accounted for by way of a general retainer for running repairs. I further agree with Mr Ormondroyd that the reason that fences to Plot 1 were repaired was because of its road side frontage on New Quay Road and the obvious potential for vehicle incursion. By contrast, the Application Land had no roadside frontage, with vehicular access from New Quay available only at the gate at Point A, which was additionally defended by a mound of earth behind it, as recorded in the 1998 Audit Report (see paragraph 7.1.10 above) and as can be seen on a photograph produced by Satnam said to have been taken on 11th September 2005.

10.3.11 The documentation then moves on to early 2004. It is clear that, at this point, in response to a request from Mr Chan to Mr Cadman (by letter of 16th January 2004) (see paragraph 7.1.18 above) to organise a few signs saying “*Keep Out, Private Land*” around the Property Trust’s “*sites*” an estimate (from Mandraw dated 28th January 2004) was provided for the erection of eight signs on metal posts stating “*Private*

Property – Keep Out” which was then sent by Mr Cadman to Mr Chan on 29th January 2004 (see paragraph 7.1.19 above). Thereafter those works were instructed to “*go ahead*” (as recorded by the handwritten note, whoever wrote it, on the letter of 29th January 2004). That signs were subsequently erected is not disputed by Mr Barry but the documentation repays some further analysis to see how much further it takes matters. As to the wording of the signs, it is not clear from the documentation whether the addition of the words “*trespassers will be prosecuted*”, which were to be put on the signs if the cost was less than £250, as referred to in the handwritten note on the letter of 29th January 2004, formed part of the eventual instruction and whether those words were then put on the signs. Nevertheless, I find that the signs said at least “*Private Property - Keep Out*”. There is no good reason to think that what they said did not reflect what the estimate said (and Mr Barry accepted that the signs were signs of prohibition (see paragraph 6.4 above)). Similarly, there is no good reason to think that the signs were erected on other than the metal posts referred to in the estimate and Mr Barry also accepted that they had been erected on metal posts (see again paragraph 6.4 above). I find accordingly. The estimate does not help further with the location of the signs although Mr Chan’s letter of 16th January 2004 referring to “*sites*” in the plural raises the possibility that signs may have been erected not just around the Application Land but also at Plot 1. I return to the question of the number and location of the signs at paragraph 10.3.30 below. As to the handwritten note on the letter of 29th January 2004, regardless of who was the author of it, the note itself reflects (as Mr Ormondroyd submitted) that the person in control of the purse strings (who would have been Mr Chan) was keeping a tight rein on costs.

10.3.12 The documentation from January 2004 is silent in relation to the question of fencing. Fencing work was neither requested nor was any estimate provided for it.

10.3.13 A final point that I note in connection with present matters is that the genesis of the instruction to erect signs appears to have been a concern in relation to the burning out of vehicles as well as motorcycle and quad bike activity on The Property Trust’s land, thus giving rise to potential liability issues, rather than any recreational presence of the public. So much emerges from Mr Cadman’s letters to Mr Chan of 13th August 2003 (see paragraph 7.1.17 above) and 9th January 2004 (see paragraph 7.1.18 above) whereas Mr Chan’s letter to Mr Cadman of 16th January 2004 (see again paragraph

7.1.18 above) shows that Mr Chan's decision that signs should be erected followed from advice he had been given by his insurance broker after notification to his insurers of problems with quad bikes.

10.3.14 There is then no further documentation until the end of 2011 at which point there is a series of three invoices beginning with one dated 12th December 2011 and followed by two others of 16th January and 20th February 2012 which record the erection of the new steel palisade fence (see paragraph 7.1.20 above). Episodes of vandalism to this fence are recorded by way an email of 25th January 2012 and a repair invoice of 28th January 2014 (see again paragraph 7.1.20 above).

10.3.15 I found the photographs which were adduced as part of the Satnam Objection to be of no particular assistance in evaluating the issue of fencing during the Relevant Period. One of the photographs, said to have been taken in 1996 (although the provenance of the date was not clear) and put to Mr Barry in cross examination (see paragraph 6.14 above), was said to show the presence of wire mesh between a line of concrete posts. Mr Barry did not recognise the photograph as part of the Application Land. Be that as it may, it was not clear to me that there was wire between the posts but, in any event, the fact (if such it was) that a particular stretch of fence was then intact on part of one boundary of the Application Land is in no way inconsistent with the fact recorded a year later in the 1997 Health & Safety Risk Assessment that "*large stretches of fence [were] missing in many places*" (see paragraph 7.1.5 above). Mr Griffiths suggested (see paragraph 7.3.5 above) that the photograph referred to by Mr Cadman of some blue and orange plastic mesh fencing supported on wooden poles alongside part of the cycleway on the north west boundary of the Application Land related to the works by North West Water which Mr Cadman had also referred to. I find that that cannot have been the case. The photograph referred to by Mr Cadman was said by him to have been taken in September 2005 (the date of 11th September 2005 appears underneath the photograph although, again, the source of this date is unclear). The North West Water works were in 1998 and, as I have already found (see paragraph 10.3.5 above), were on Plot 1. The blue and orange plastic mesh fencing appears to be related to some unspecified work on the edge of the cycleway and to be unrelated to any fencing of the Application Land. Another photograph, said to have been taken in 2003 (again the source of the dating is unspecified) shows some strands of barbed wire (in a non-rusted

condition) extending from a concrete post in an unexplained location. I do not think that any particular conclusion can be drawn from this.

10.3.16 As to the light cast on the issue of signs by the photographs adduced by Satnam, there are no photographs of signs other than those erected in 2011 in association with the new steel palisade fence. However, there is a photograph (said, again without explanation, to be taken on 11th September 2005) of the entrance to the Application Land at Point A which shows a (new) steel gate across the vehicular entrance to the Application Land at that point (with an earth mound behind it) and, next thereto, a gap between old concrete posts in which there is a four feet or so high steel post. That post is the same as the posts which appear in other photographs and which posts are still present on some of the boundaries of the Application Land as Mr Barry described and as I saw on my site visit. Mr Barry's evidence was (see paragraph 6.4 above) that the latter posts are those on which the signs referred to in the 2004 documentation had been erected. He acknowledged in cross-examination (see again paragraph 6.4 above) that the post in the photograph, said to have been taken on 11th September 2005, of Point A was the right height for the posts on which signs had been mounted. I find at this stage of my analysis that one of the signs erected in 2004 would have been at Point A (which would have been an obvious place to put a sign) and that the metal post shown in the September 2005 photograph is the post on which it would have been placed.

Satnam's witness evidence

10.3.17 I turn next to consider Satnam's witness evidence, starting with Mr Cadman. I said in paragraph 10.2.7 above that I had serious reservations about Mr Cadman's statement, that it was a confused document, that it was inconsistent with contemporaneous documents in several important respects and that I was unable to accept it as reliable. I also stated there that I largely agreed with the criticisms made of it by Mr Ormondroyd in his closing submissions. I now turn to expand on those matters.

10.3.18 Mr Cadman's evidence (see paragraph 7.2.3 above) that the Application Land was used principally for disposal of waste (such as ash and linseed) until manufacturing ceased in 1994 seems to me to be inexplicable. Leaving aside the question of precisely when it was that manufacturing ceased at the old Williamson's factory, there is no evidence

whatsoever of tipping on the Application Land in the aerial photographs from the 1980s which I referred to in connection with the Footpaths Report (see paragraph 7.1.23 above). The documentary material from the Unilever archives produced by Mr Barry (see paragraph 6.11 above) shows that manufacturing on the site next to the Application Land had switched (from linoleum) to wallpaper production in the 1970s such that linseed (a raw ingredient for lineolum) would no longer then be employed. There is no reference in the 1997 Health & Safety Risk Assessment or the 1998 Audit Report to the recent cessation of active tipping. Mr Griffiths's explanations of what Mr Cadman was saying about this matter (see paragraph 7.3.3 above) seemed to me to add confusion rather than introduce clarity. It is inconceivable that, had there been active tipping on the Application Land in the early 1990s, no witnesses in support of the Application had remembered it.

10.3.19 The only tipping of any sort that took place in the vicinity of the Application Land in the Relevant Period was, I so find, that referred to in the 1998 Audit Report which mentioned the deposition of rubble and concrete blocks in connection with work on a site on the industrial estate adjacent to the south east corner of the property (see paragraph 7.1.11 above). I find that this tipping took place on the Rectangle (which is where Mr Griffiths ultimately located tipping (see paragraph 7.3.3 above)) and that it took place when, as Mr Barry recalled, the Ultramark factory was being extended (see paragraph 6.11 above). What the 1998 Audit Report referred to as "*easy access for the public*" (see paragraph 7.1.11 above) was, I also find, not impeded at this time although the works may explain the movement of the position of the path to the Application Land from Coronation Field as referred to by Mr Barry (see again paragraph 6.11 above).

10.3.20 Mr Cadman's evidence (see paragraph 7.2.6 above) that in around 1998 the Water Authority replaced a palisade fence which they had damaged along the boundary of the Application Land with the adjacent cycleway on the north west side of the Application Land is completely contradicted by his own letter to Mr Chan of 2nd December 1998. I refer to my finding in paragraph 10.3.5 above. Further, there is no evidence that any palisade fence existed until the erection of the new fence in 2011.

10.3.21 Mr Cadman's evidence (see paragraph 7.2.7 above) that around 1998 a ten feet high earth mound was built up along two boundaries of the Application Land lacks any

credibility. There is no reference to this in either the 1997 Health & Safety Risk Assessment nor in the 1998 Audit Report which recorded the condition of The Property Trust Plc's land as remaining unchanged between the two documents. It is completely implausible that work of the magnitude claimed by Mr Cadman would not have been reported in these documents had it been carried out. It is equally implausible that such extensive works would not have generated some form of documentary record in the form of correspondence, an estimate, quotation or invoice. There is a raised mound along the north west boundary of the Application Land which I saw on my site visit and which, as I have described (see paragraph 5.6 above), appeared to be of very long standing. It could not have been constructed there in 1998 for the reasons I have already given.

10.3.22 Mr Cadman's evidence (see paragraph 7.2.9 above) that in 2004 he arranged for damage to fencing around the boundaries of the Application Land to be repaired at the same time as the signs were installed is wholly improbable because it is entirely inconsistent with the contemporaneous documentation. No fencing repairs were ever requested at this point by Mr Chan and Mandraw's estimate of 28th January 2004 (see paragraph 7.1.19 above) did not provide for any such repair work. Mr Cadman's reference (see paragraph 7.2.9 above) to the correspondence supporting the fact that fencing repairs were carried out at the time is simply wrong. There is further confusion in his evidence in that he referred (see again paragraph 7.2.9 above) to photographs taken in September 2005 as showing the remains of some of this fencing. The only relevant fencing shown on these photographs (the temporary blue and orange plastic mesh fencing apart) is some of the old concrete posts (with no wire mesh in place) but nothing that shows the remains of any fencing erected in 2004.

10.3.23 In significant part Mr Griffiths's evidence in relation to fencing and signs amounted to repetition of evidence provided by Mr Cadman. Repetition second hand by a witness of another's evidence without the benefit of additional direct testimony from the witness is of little probative value in any circumstances but when that repetition derives from an account which is itself unreliable that value is diminished yet further. Mr Griffiths's first hand account of the breaking down of fences and the removal or defacing of signs related to the 2011 fence and signs (see paragraph 7.3.4 above). I do not consider that Mr Griffiths gave any material first hand evidence in relation to fences

and signs before that date. I do not therefore derive assistance from Mr Griffiths's evidence in relation to the issues of fencing and signs during the Relevant Period.

Findings of fact

10.3.24 I turn to my findings of fact in relation to fences and signs. I begin with fences. I accept the live evidence that I heard in support of the Application in relation to the fences and I reject as unreliable the evidence of Mr Cadman. I find that throughout the Relevant Period the only fence in existence around the Application Land was the old concrete post and wire mesh fence which had first been erected many years before the start of the Relevant Period. When I say "around the Application Land" I refer to the north west, south west and south east sides of the Application Land. There is no evidence that any concrete post and wire (or other) fencing ever existed on the north east side of the Application Land separating it from the Lune Industrial Estate. I consider that the reference in the 1997 Health & Safety Risk Assessment to "[t]he boundaries to both plots of land are marked with various broken fences with large stretches of fence missing in many places" (see paragraph 7.1.5 above) provides an entirely reliable description of the state of the concrete post and wire fence around the Application Land as it was at that time. I find accordingly. I also find that the old fence would have been in no significantly better condition at the start of the Relevant Period. That latter finding is consistent with the 1997 Health & Safety Risk Assessment in that it recorded (see again paragraph 7.1.5 above) that the "common practice" of pedestrian access to Plot 2, which the state of the fence allowed, had by that date already given rise to such access at "many points", resulting in "many unofficial **well worn paths**" [my emboldening]. It is also consistent with all the live evidence I heard on the matter (see paragraph 10.3.2 above) which clearly establishes that there was an absence of any effective, fenced impediment to access right back to the start of the Relevant Period and I so find. There would, over the Relevant Period, have been places where there were stretches of intact mesh fencing and, indeed, such a stretch notably remains to the present day, as I on saw on my site visit and as I record at paragraph 5.6 above, along part of the south east boundary of the Application Land although stopping well short of Point C. However, these did not give rise to any hindrance to entry to the Application Land given the missing stretches.

10.3.25 I find that no significant repairs to the old concrete post and wire fence ever took place over the Relevant Period. I accept the evidence of all the live witnesses in support of the Application that they never saw any maintenance of this fence and regard this as a reliable indicator that there was no maintenance of any substance. It will be apparent from what I have said already that I cannot accept Mr Cadman's evidence (see paragraph 7.2.4 above) that fencing was continuously maintained throughout the relevant period through a process of ongoing patchwork repair. Not only is this inconsistent with the live evidence in support of the Application which I accept, it is also inconsistent with the documentary evidence. The documentary evidence suggests an absence of any general retainer to repair fences yet there is also (unlike the case for Plot 1) a complete absence of any estimates, quotations or invoices in respect of the repair of fences around the Application Land. The general picture is, as Mr Ormondroyd submitted, of a landowner exercising tight cost control and a managing agent operating on "*a shoestring budget*" (Mr Cadman's own words – see again paragraph 7.2.4 above) with concern about activity on the Application Land restricted to potential sources of liability in the shape of the burning out of abandoned vehicles or motorcycle or quad bike use. I specifically find that, contrary to Mr Cadman's evidence, no fencing repair was undertaken after the 1997 Health & Safety Risk Assessment. To my mind it is particularly significant in this respect that there is no reference to fencing work having been undertaken in the 1998 Audit Report which recorded that the condition of the property was unchanged from the 1997 Health & Safety Risk Assessment and that poor progress had been made in implementing the recommendations of the latter (see paragraphs 7.1.9 and 7.1.15 above). I also find, in the light of what I have said in paragraph 10.3.22 above, that no fencing repairs were undertaken in 2004 at the time when signs were erected.

10.3.26 I find that there was no forcible entry to the Application Land over the Relevant Period by breaking down fences. No force was ever needed. There were always many unsecured entrances where there was an absence of any effective fencing on each side of the Application Land. Without confining the generality of the last finding, I also find specifically that access was always available from Coronation Field without any fenced barrier. That finding is supported by the live evidence I heard, the analysis of the aerial photographs contained in the Footpaths Report (see paragraphs 7.1.23-27 above) and the account in the 1998 Audit Report of "*easy access for the public*" in this area at that

time (see paragraph 7.1.11 above). While it is clear that damage to the steel palisade fence which was erected at the end of 2011 and beginning of 2012 shows that there were those in the local community prepared to force entry to the Application Land from that time onwards, that point is of no avail to Satnam given that, as I have found, it was not necessary before then in the Relevant Period for any such force to be used. I cannot accept (as Mr Cadman suggested – see paragraph 7.2.10 above) that it was decided to erect the steel palisade fence because a losing battle was being fought to keep the old fence intact on a patchwork basis. The reality, and I so find, is that the steel palisade fence was erected in 2011 because no effective fencing measures had previously been taken against recreational use and it was the emergence of development proposals for the Application Land which led to action being instituted against that use at that point.

10.3.27 I turn to the issue of signs. I find that the only point at which any signs were erected during the Relevant Period was in early 2004. This is consistent with the live evidence of Mr Barry and Mrs Aitken and with the written evidence in support of the Application (see paragraph 10.3.3 above).

10.3.28 I cannot accept as reliable the plan produced by Mr Cadman (see paragraph 7.2.4 above) said to indicate the position of signs (of unspecified wording) before the 1997 change of ownership (*“before Property Trust took over”*). I have already made it clear that I reject Mr Cadman’s evidence in general. More specifically, I note that the plan must have been prepared to resist the Application and cannot attract the weight that a contemporaneous document prepared for other, independent purposes might command. I further note that there is no suggestion in the 1997 Health & Safety Risk Assessment that there were any signs present when the site visit for the assessment was carried out or that there had been any previous signs. The recommendation was that consideration was given to the erection of signs (see paragraph 7.1.6 above), apparently as a precaution not previously undertaken.

10.3.29 I further find that no signs were erected in 1998 after the 1997 Health & Safety Risk Assessment. I reject Mr Cadman’s evidence to the contrary. Despite the instruction which had been forthcoming from Mr Allen in his fax of 27th April 1998 (see paragraph 7.1.7 above) in relation to the erection of signs, the position reported in the 1998 Audit Report was that poor progress had been made in implementing the recommendations

of the 1997 Health & Safety Risk Assessment (see paragraph 7.1.15 above). The 1998 Audit Report reiterated the recommendation in the earlier document that signs be provided along the boundaries of both plots warning that access was restricted to authorised persons (see paragraph 7.1.12 above) and there is no mention of signs having been erected since the previous assessment but having been removed or vandalised. I have already (see paragraph 10.3.8 above) expressed my agreement with Mr Ormondroyd's submission that, had signs been erected but then removed or vandalised, it would have been expected that this would have been mentioned as an explanatory factor or as one which might shape a new recommendation.

10.3.30 Turning to the signs which it is not disputed were erected in 2004, I have already found (see paragraph 10.3.11 above) that these signs said at least "*Private Property - Keep Out*" and were erected on metal posts. I have no reason to think that the total number of signs erected was not the eight which had been the subject of the estimate and I also so find. I accept Mr Barry's evidence (see paragraph 6.4 above), which tallies with what I saw on my site visit (see paragraph 5.6 above), that there are presently five remaining posts on which the signs would have been placed in the locations he described (one on the north west boundary of the Application Land, one at the junction of the north west and south west boundaries of the Application Land near Point F, two on the south west boundary of the Application Land and a further one on this side beyond (nearer to Willow Lane) the point where the south east boundary of the Application Land meets the south west boundary. I find accordingly that five of the 2004 signs would have been erected in these locations. I have also already found (see paragraph 10.3.16 above) that a further sign was erected at Point A. I cannot make any finding in respect of where the remaining two signs would have been erected (which includes the possibility of erection on the boundaries of Plot 1) as there is no evidence which helps in this regard but I do think it more probable than not (and so find) that there was not a sign on the south east boundary of the Application Land. This was Mr Barry's evidence (see paragraph 6.4 above), which I accept, and Mrs Aitken's evidence (see paragraph 6.22 above), which I also accept, was that the signs she saw (which would have been the 2004 signs) were on the south west and north west sides of the Application Land. I also think that, if a sign had been erected on the south east side of the Application Land, it would probably have been remarked upon by users given the well used access from Coronation Field. Neither Mr Maudsley nor Mr Salkeld located the signs they had referred to on the south

east boundary (see paragraph 7.1.29 above) and there is no metal post of the type on which the 2004 signs were erected in the vicinity of Point C.

10.3.31 I find, in accordance with the evidence of Mr Barry and Mrs Aitken as well as the written evidence of Mr Maudsley that the signs remained in place for only a very short period of time (no more than one or two weeks at most) (see paragraphs 6.4, 6.22 and 10.3.2 respectively). I think that this is consistent with few people having seen them. I find that they were never replaced (there is no evidence of this at all) and that no further signs were erected until those which were put up in association with the new steel palisade fence in 2011/2012. I do, however, find that the reason that the signs were present for only a very short period is because they were forcibly removed by persons unknown who did not agree with them. There cannot be any other rational explanation for the disappearance of the signs.

The law applied to the facts

10.3.32 I turn now to apply the law to the facts as I have found them. It is well established that use which is *vi* is not confined to use which employs physical force but extends also to use which is contentious: see, Lord Rodger in *Lewis v Redcar and Cleveland Borough Council*⁸⁴. However, Lord Rodger was not faced in that case with the question of what a landowner had to do in order to render use of his land contentious. That issue was more particularly considered in *Betterment Properties*⁸⁵ where, after a comprehensive survey of the authorities⁸⁶, Morgan J formulated the following test: “[a]re the circumstances such as to indicate to the persons using the land, or to a reasonable person knowing the relevant circumstances, that the owner of the land actually objects and continues to object and will back his objection either by physical obstruction or by legal action? For this purpose, a user is contentious when the owner of the land is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user.”⁸⁷

⁸⁴ [2010] UKSC 11 at paragraphs 88-90.

⁸⁵ [2010] EWHC 3045 (Ch).

⁸⁶ Including *Smith v Brudenell-Bruce* [2002] 2 P & CR 4 and *Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust* [2010] EWHC 530 (Admin).

⁸⁷ [2010] EWHC 3045 (Ch) at paragraph 121.

10.3.33 When *Betterment Properties* reached the Court of Appeal⁸⁸, the court upheld Morgan J on the issue of contentious user. Patten LJ defined the issue to be whether the landowner “*had taken sufficient steps so as to effectively indicate that any use by local inhabitants of the registered land beyond the footpaths was not acquiesced in.*”⁸⁹ Patten LJ also said, *inter alia*, that “*all the relevant authorities in this area proceed on the assumption that the landowner must take reasonable steps to bring his opposition to the actual notice of those using his land*”⁹⁰ and that, while the landowner was “*not required to do the impossible*”, his response must “*be commensurate with the scale of the problem that he is faced with.*”⁹¹ In short, the test is whether the landowner has done enough to make his opposition known to users of his land.

10.3.34 That test was endorsed by the Court of Appeal in *Winterburn v Bennett*⁹². That case was not about a village green but concerned an easement to park vehicles and thus involved the law of prescription. The Court of Appeal proceeded on the basis that the same principles were applicable in each case⁹³. David Richards LJ said that the issue was, as Patten LJ had defined it in *Betterment Properties*, namely, “*whether the owner has taken sufficient steps so as to effectively indicate that the unlawful user is not acquiesced in.*”⁹⁴ He agreed that “*the circumstances must indicate to persons using the land that the owner objects and continues to object*” to the use in question and that the protest of the owner “*needs to be proportionate to the user.*”⁹⁵ On the facts of the case itself it was held that the continuous presence of signs asserting that the land in question was private property was a proportionate protest. David Richards LJ also said “*the authorities do not support the proposition that a servient owner must be prepared to back his objection either by physical obstruction or by legal action or the proposition that the servient owner is required to do everything, proportionately to the user, to contest and to endeavour to interrupt the user. As it seems to me, the decision of this court in *Betterment* [2012] 2 P & CR 3 is inconsistent with these propositions. The court there accepted that the erection and re-erection of signs was all that the owner*

⁸⁸ [2012] EWCA Civ 250.

⁸⁹ At paragraph 30.

⁹⁰ At paragraph 49.

⁹¹ At paragraph 52.

⁹² [2016] EWCA Civ 482.

⁹³ At paragraph 31.

⁹⁴ At paragraph 37.

⁹⁵ *Ibid.*

needed to do to bring to the attention of those using the land that they were not entitled to do so."⁹⁶

10.3.35 It is important to note that *Betterment Properties* was a case where there had been a "process of erecting and re-erecting signs [which] continued for a period of years and was not a short lived affair."⁹⁷ The Court of Appeal held that it would be a direct infringement of the principle that rights of property could not be acquired by force or by unlawful means for the court "to ignore the landowner's clear and repeated demonstration of his opposition to the use of the land simply because it was obliterated by the unlawful acts of local inhabitants. Mrs Taylor is not entitled in effect to rely upon this conduct by limiting her evidence to that of users whose ignorance of the signs was due only to their removal in this way."⁹⁸

10.3.36 In the light of my factual findings in the present case, the issue in respect of whether use of the Application Land has been "as of right" or rather, *vi*, resolves itself into the question of whether the 2004 signs defeat the Application. The relevant question is, as Mr Ormondroyd submitted, whether the 2004 signs were sufficient to render use of the Application Land contentious. I have found that the erection of signs at this point in time was the only occasion that signs were erected during the Relevant Period and that the signs so erected lasted for no more than one or two weeks (albeit because of their unlawful removal) and that no further signs were erected thereafter before signs were put up in connection with the erection of the steel palisade fence in 2011/2012.

10.3.37 I consider that, in terms of wording, signs stating "Private Property – Keep Out" would in principle undoubtedly make it clear to any reasonable user of land to which such signs related that the owner thereof was objecting to and contesting use of his land (in accordance with the first principle formulated by HHJ Waksman QC in *Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust*⁹⁹). Accordingly, the 2004 signs erected in this case, which I have found to be in those very terms, would, other

⁹⁶ At paragraph 36.

⁹⁷ [2010] EWHC 3045 (Ch) at paragraph 94.

⁹⁸ [2012] EWCA Civ 250 at paragraph 63.

⁹⁹ [2010] EWHC 530 (Admin) at paragraph 22.

things being equal, be signs on which Lune Industrial Estate Limited, as owner of the Application Land, could rely to convey their objection to its use. The next question would be as to the sufficiency of the signs in terms of their number and location. On the facts of the present case I am sceptical of the point advanced in support of the Application that the 2004 signs placed in the six locations I have identified in paragraph 10.3.30 above would have left it unclear whether or not they were referring to the Application Land. The absence of any sign on the south east boundary of the Application Land does, however, raise more of a question mark over the sufficiency of the signs.

10.3.38 However, I need not come to a definitive view on the sufficiency of the 2004 signs in terms of their number and location. This is because I am very firmly of the opinion that this single episode of the erection of prohibitive signs in the Relevant Period was, regardless of other considerations, not sufficient on its own for Lune Industrial Estate Limited to have made known their opposition to use of the Application Land to those using it and to effectively indicate that the use was not acquiesced in. More needed to be done. It is clear from *Betterment Properties* and *Winterburn v Bennett* that a landowner must object, and continue to object, before enough will have been done to show to users that he does not acquiesce to use of his land. There was no continued objection in this case. The contrast with *Betterment Properties* is stark. In that case there was a “*process of erecting and re-erecting signs [which] continued for a period of years*” and, by reference to that process, “*clear and repeated demonstration of ... opposition to the use of the land*”. In the present case the 2004 signs were swiftly removed and nothing further was done during the Relevant Period either to replace them or take other steps to contest recreational use of the Application Land. *Betterment Properties* and *Winterburn v Bennett* also establish that protest on the part of the landowner needs to be proportionate to the user. The recreational user of the Application Land in this case was already longstanding by 2004, was extensive in nature before that date and continued to be extensive thereafter. A proportionate response on the part of the landowner required more than the isolated and one-off erection of signs. At the least, signs should have been re-erected. Secure fencing could also have been introduced well before the palisade fencing in 2011. I have already found (see paragraph 10.3.26 above) that the erection of it at that point was a response to use of the Application Land. It could hardly be said, that being the actual response

to use of the Application Land then, that the erection of secure fencing would have been disproportionate to use of the Application Land before that date. However, my conclusion does not depend on that last judgment given that, as I have said, something more than was actually done was required in this case to demonstrate to users of the Application Land that use was not acquiesced and that, at the least, signs should have been re-erected.

10.3.39. I conclude that use of the Application Land was “*as of right*”. I reject Mr Manley’s fourth proposition

10.4 Use by a significant number of the inhabitants of the locality

The qualifying locality

10.4.1 The locality relied on in this case is the Castle Ward of the City of Lancaster as it stood before the local government elections in 2003 at which point a small part of the eastern area of the ward had been moved into a new city centre ward, Dukes Ward. Mr Barry estimated that this redrawing of the boundaries resulted in about 10% of the addresses in the pre-2003 Castle Ward being affected (see paragraph 6.7 above).

10.4.2 Mr Manley (correctly) did not argue that an electoral ward could not be a qualifying locality and (again correctly) took no point on the change in the ward boundary but submitted, variously, that the pre-2003 Castle Ward had not been shown by the Applicant to be a qualifying locality because it had not been demonstrated that it was an identifiable community, that it had not been established that it possessed the necessary cohesiveness and that it did not have a credible relationship with the Application Land.

10.4.3 I cannot accept any of these submissions. As to the first aspect of the submissions – that it must be shown that a locality is an “*identifiable community*” – I do not accept that there is any such separate requirement in the case of an electoral ward. The starting point for consideration of the issue is the decision in *Oxfordshire* where Lord Hoffmann referred to “*the insistence of the old law upon a locality defined by legally significant boundaries*” and contrasted this with “*the deliberate imprecision*” of the phrase “[a]ny

neighbourhood within a locality”¹⁰⁰. There is no suggestion here of any requirement that a locality will only qualify as such for the purposes of the registration of a new green unless, in addition to being an area with legally significant boundaries, it also satisfies the added requirement of being an identifiable community.

10.4.4 The first aspect of Mr Manley’s submissions relies, however, on the decision in *Paddico*¹⁰¹. In that case Sullivan LJ accepted that a locality must have legally significant boundaries but observed that a conservation area, although it did have legally significant boundaries, was not a locality because those boundaries were not defined “*by reference to any community of interest on the part of its inhabitants*” but by reference to “*its characteristics as an area of ‘special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance’*”¹⁰². Carnwath LJ similarly said that the conservation area in question in the case was not “*a description of a community*” whereas an ecclesiastical parish (canvassed, but rejected, as an alternative locality to that which had been relied upon) was “*an identifiable community*”¹⁰³.

10.4.5 I do not consider that the above remarks of either Sullivan LJ or Carnwath LJ provide any basis for concluding that it is necessary for an applicant, once an electoral ward is identified, to further demonstrate some identifiable community before a qualifying locality is established. Care should be taken not to read too much into these remarks. *Paddico* was not concerned with electoral wards and the remarks of Sullivan LJ and Carnwath LJ were not directed at such administrative districts. It seems to me that an electoral ward is already inherently defined by law by reference to a community of interest on the part of its inhabitants. It consists of an area recognised by law as an appropriate electoral division for the purposes of local administration which thereby identifies a community of voters bound by a common interest in terms of political representation. An ecclesiastical parish is likewise an identifiable community of churchgoing interest. I accept Mr Ormondroyd’s submissions which are to substantially similar effect. Once the law has identified that an area (with legally significant

¹⁰⁰ [2006] UKHL 25 at paragraph 27.

¹⁰¹ [2012] EWCA Civ 262.

¹⁰² At paragraph 29.

¹⁰³ At paragraph 62.

boundaries) is a community, or one that has a community of interest, there is no need for an applicant to go further and satisfy any additional requirement. In this case Castle Ward as relied on by the Applicant was an identifiable community throughout the Relevant Period.

10.4.6 While Mr Manley did not rely on it, Mr Ormondroyd drew my attention to what was said in *R v Suffolk County Council ex p Steed*¹⁰⁴ where Carnwath J observed that a locality “*should connote something more than a place of geographical area – rather, a distinct and identifiable community, such as might reasonably lay claim to a village green as of right.*”¹⁰⁵ This formulation was cited with approval by Sullivan J in *Cheltenham Builders*¹⁰⁶. I agree with Mr Ormondroyd’s submission that some caution should be exercised in relying on *Steed* in this context in that it both pre-dates Lord Hoffman’s authoritative statement in *Oxfordshire* that a locality should be “*defined by legally significant boundaries*” and it was also a decision shaped by a pre-*Oxfordshire* approach which introduced concepts of what “*a town or village green, as generally understood*”¹⁰⁷ might be, above and beyond the actual statutory requirements. *Cheltenham Builders* was a case where the claimed locality had been arrived at by simply drawing an arbitrary line on a plan. The factual context for what Sullivan J had to say there was entirely different from the present case where an area with legally significant boundaries in the form of an electoral ward has been selected as the qualifying locality. But, in any event, I consider, as above, that an electoral ward is, in and of itself, a distinct and identifiable community for present purposes.

10.4.7 I make two further observations in respect of the first aspect of Mr Manley’s submissions. The first is that I do not consider that it derives any support from *Mann*¹⁰⁸. In that case the judge decided that two polling districts were, without more, an appropriate locality¹⁰⁹.

¹⁰⁴ (1995) 71 P & CR 463.

¹⁰⁵ At page 477.

¹⁰⁶ [2003] EWHC 2803 (Admin) at paragraph 45.

¹⁰⁷ (1995) 71 P & CR 463 at page 476.

¹⁰⁸ [2017] 4 WLR 170.

¹⁰⁹ At paragraphs 94-98.

10.4.8 The second is that I also do not think that any support for the first aspect of Mr Manley’s submissions can be found in *Lancashire*¹¹⁰. On the contrary, that case is all of a piece with what I have said already in that an electoral ward (in that case the Scotforth East Ward of Lancaster City Council) relied upon as the qualifying locality was treated as an identifiable community by virtue of its status as a ward, and the question was whether changes in the boundary of that ward during the relevant 20 year qualifying period prevented registration. The Court of Appeal held that that question was to be answered by asking whether the community in question had “*significantly changed*”¹¹¹ (and found that the inspector had effectively decided that, on the facts of that case, it had not so that her conclusion that registration was not prevented by the change was correct). In the present case Mr Manley was right not to take any point on “*significant change*”. The minor change in the boundary of Castle Ward which took effect when the 2003 elections were held did not significantly alter the identifiable community of the ward.

10.4.9 Turning to the second aspect of Mr Manley’s submissions in relation to “*cohesiveness*”, this again founds on remarks of Sullivan J in *Cheltenham Builders*¹¹² where he said that “[i]t may well be difficult to define the boundary of a ‘locality’ on a plan because views may differ as to its precise extent, but there has to be, in my judgment, a sufficiently cohesive entity which is capable of definition.”¹¹³ An electoral ward can be defined without difficulty and its precise extent identified by reference to the legally significant boundaries which it possesses. It is cohesive for those reasons and because it represents an identifiable community of interest for the purposes of local governance. There is, in my view, no further additional requirement of cohesiveness to be satisfied.

10.4.10 Even if I were to be wrong in my views about the lack of need for an extra demonstration of community identity or cohesiveness above and beyond that which I consider already inherent in an electoral ward, I take the view that any such further test is satisfied in this case in any event. I refer to Mr Barry’s evidence on this point which

¹¹⁰ [2018] EWCA Civ 721.

¹¹¹ Per Lindblom LJ at paragraph 71.

¹¹² [2003] EWHC 2803 (Admin).

¹¹³ At paragraph 45.

I summarise in paragraph 6.8 above and which, in its characterisation of the physical geography and social make up the locality relied upon, supplies the necessary demonstration.

10.4.11 The third aspect of Mr Manley's submissions related to the issue of whether the locality of Castle Ward had a credible relationship with the Application Land. I have no difficulty with the proposition that a locality must have a real or credible relationship with the land claimed to be a green. So much was accepted in *Mann*¹¹⁴. The same case also accepted the proposition that the locality had to be credible in the sense that it was one from which the inhabitants might be expected to come to enjoy the land in question¹¹⁵. *Mann* illustrates that the latter requirement serves to exclude excessively large localities such as counties (the examples given in the case being the counties of Surrey or Somerset)¹¹⁶.

10.4.12 It seems to me that the two propositions put forward in *Mann* are interrelated but, whether they are or not, I have no doubt that they are satisfied in the present case. The locality itself is far from excessively large with a population of about 8,000. Far larger areas (such as the town of Leek with a population of about 20,000: see *McAlpine Homes*¹¹⁷) have been accepted as qualifying localities. The locality in this case is very much an area (the western part of Lancaster) from which inhabitants might be expected to come to enjoy the Application Land¹¹⁸ (and have, in fact, come with users' addresses widely distributed across the locality). The Application Land is within comfortable walking distance for addresses in the locality. These factors also point to the real and credible relationship which the Application Land has with the locality. It sits within the locality on the edge of its built up area, is near to other recreational facilities (Coronation Field and public rights of way) serving the area and is historically linked to the former Williamson's factory (for a period as its sports ground), which was an important local feature in times past.

¹¹⁴ [2017] 4 WLR 170 at paragraph 97.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ [2002] EWHC 76 (Admin).

¹¹⁸ Which also serves to explain why those seen on the Application Land by users (but not recognised) can generally be taken to be inhabitants of the locality.

10.4.13 It follows from all the above that I reject Mr Manley’s first proposition.

Significant number

10.4.14 I turn finally to consider the issue of whether use of the Application Land has been by a significant number of the inhabitants of the locality.

10.4.15 The classic guidance on this matter is that provided in *McAlpine Homes*¹¹⁹ where Sullivan J said¹²⁰ that: a significant number did not mean a considerable or substantial number; that the matter was very much one of impression; and that what mattered was “*that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers.*” There is no requirement that there be a geographical spread of users. The idea that there should be has been authoritatively dismissed by the Court of Appeal in *Lancashire*¹²¹.

10.4.16 Mr Ormondroyd submitted that the “*significant number*” requirement would be satisfied provided that the use of the land for recreational purposes was “*more than trivial or sporadic*” citing passages of Sullivan LJ’s judgments in *Leeds Group Plc v Leeds City Council (No.1)*¹²² and *Leeds Group plc v Leeds City Council (No.2)*¹²³ as authority. While I can see that the proposition put forward by Mr Ormondryod can be derived from one reading of what Sullivan LJ said in the passages in question, I am not convinced of the correctness of the submission. It seems to that Sullivan LJ was more concerned in the passages in question to make the point that a reasonable landowner might be put on notice that those using his land for recreational purposes were asserting a public right if their use was “*more than trivial or sporadic*” rather than to be equating such use with use by a “*significant number*” of inhabitants. It would seem to me curious that satisfaction of what is, in effect, a threshold test for the potential assertion of a public right would also serve to satisfy the “*significant number*” test. My view is that the latter test imposes a further requirement. Thus a use which is “*trivial or sporadic*”

¹¹⁹ Ibid.

¹²⁰ At paragraph 71.

¹²¹ [2018] EWCA Civ 721 at paragraphs 74-80.

¹²² [2010] EWCA Civ 1438 at paragraph 31.

¹²³ [2011] EWCA Civ 1447 at paragraphs 22 and 23.

will never satisfy the “*significant number*” requirement but a use which is more than “*trivial or sporadic*” does not, by virtue of that fact alone, satisfy the “*significant number*” requirement. It seems to me that there is some intermediate ground between the two formulations.

10.4.17 If I am wrong in the view I have just expressed then, as I have already found that use of the Application was “*more than trivial or sporadic*”, the “*significant number*” requirement is also satisfied. However, if my view is correct and “*significant number*” adds an extra requirement, I consider as a matter of impression that the requirement is indeed satisfied. I have already found (see paragraph 10.2.10 above) there to have been abundant use of the Application Land generally for lawful sports and pastimes over the relevant period. I am left in no doubt by the evidence I have considered that that abundant use was indulged in by a significant number of the inhabitants of the locality. The present is a case where the Application Land was in general use by the local community for informal recreation. Mr Manley’s comparisons of the population of the locality with the number of live witnesses called in support of the Application and the number of evidence questionnaires represent just the sort of approach which Sullivan J rejected in *McAlpine Homes*¹²⁴. I reject Mr Manley’s second proposition.

10.5 The Hurstwood Land

10.5.1 In paragraph 3.4 above I said that I did not find the Hurstwood Objection to be entirely clear but that its gist appeared to be that the Hurstwood Land (which, it will be recalled, I have defined as that small strip of the Application Land on its north east boundary owned by Hurstwood) had been the subject of commercial activity by occupiers of the industrial estate. Mr Park’s statement does not add any greater clarity. However, I am comforted in my approach to the Hurstwood Objection by the fact that Mr Ormondroyd understood it in the same way in that he stated that (see paragraph 9.1.3 above) the Applicant did not seek the registration of the Hurstwood Land if it was actually the subject of commercial activities as part of the Lune Industrial Estate. And that, while it appeared to the Applicant that those activities did not in fact extend to the Hurstwood

¹²⁴ [2002] EWHC 76 (Admin) at paragraph 72.

Land, should I conclude otherwise, I was invited simply to modify the boundary of the Application Land accordingly.

10.5.2 The only evidence which casts any real light on the issue is that of Mr Barry which I have referred to in paragraph 6.16 above. The exercise to be undertaken involves comparing what is shown on the aerial photographs referred to by Mr Barry with the plan attached to Addleshaw Goddard's objection letter of 21st November 2018 showing the Hurstwood Land hatched blue (as referred to in paragraph 3.4 above). It is far from easy to make a definitive judgment on this point but I am not persuaded that the commercial activity referred to by Mr Barry in the 2010 aerial photograph had not, in fact, extended into the Hurstwood Land. I think it probably did. On that basis, and exercising a degree of pragmatism, I consider that the detailed boundary of the Application Land should be amended to exclude the Hurstwood Land.

11. OVERALL CONCLUSION AND RECOMMENDATION

11.1 My overall conclusion is that all the necessary requirements of section 15(3) of the 2006 Act have been established in this case. A significant number of the inhabitants of the Castle Ward locality indulged as of right in lawful sports and pastimes on the Application Land for the Relevant Period of 20 years from the end of 1991 to the end of 2011 and the Application was then made in time thereafter in October 2012.

11.2 Accordingly, I recommend to the Registration Authority that the Application is granted. This is subject only to the further recommendation that the detailed boundary of the Application Land should, on registration, be amended to exclude the Hurstwood Land as shown hatched blue on the plan attached to Addleshaw Goddard's objection letter of 21st November 2018¹²⁵.

Kings Chambers
36 Young Street
Manchester M3 3FT

Alan Evans
14th October 2019

¹²⁵ Regulation 36(1) of the Commons Registration (England) Regulations 2014 allows an application to be granted in whole or in part.