IN THE LEEDS COUNTY COURT Case No. U20060148

The Combined Court Centre
The Courthouse
Oxford Row
Leeds

24th February 2006

Before

HIS HONOUR JUDGE SHAUN SPENCER, QC

HILARY ESTRADA-HAIGH
(Claimant)

-v-

THE PARISH COUNCIL OF ANSTON
(Defendant)

APPROVED JUDGMENT

APPEARANCES:

For the Claimant: MISS C. MASON

For the Defendant: MR. H. LAWSON (S)

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HILARY ESTRADA-HAIGH -v- THE PARISH COUNCIL OF ANSTON

DRAFT JUDGMENT

JUDGE SHAUN SPENCER:

I propose now to deliver Judgment in the case of Estrada-Haigh and The Anston Parish Council.

Introduction

The Claimant, Hilary Estrada-Haigh, is the freehold owner and occupier of High Cragg Cottage. High Cragg Cottage joins Anston Green which is in the Civil Parish of Anston which is in the county of South Yorkshire. The Claimant has lived at that address since November 1979. Initially, she lived there with her husband, George Cope. They were subsequently divorced. He went, she stayed and since 1983 she has been the sole registered proprietor of the dwelling already referred to, High Cragg Cottage.

The Claimant brings this claim to establish a right-of-way specifically, vehicular access from High Cragg Cottage along the south and east perimeters of the area of grassland known as "The Green".

The Geography

The papers contain various plans, the most useful of which I have found comprehending the layout of the area is the plan which appears at Page 423 in the documents bundle and is described as "The Green Registration Plan". As well as the plan there are also some clear photographs which I have found useful, these photographs, two in number, appear at Page 465 of the documents bundle. I have in addition, by courtesy of the Chairman of the Parish Council, Mr. Stonebridge, been provided with a map in which the full title of the area is described as the "North and South Anston Civil Parish". Looking at the map to which I have referred at Page 423, the access to the Claimant's dwelling from the north proceeds via Quarry Lane and then into an area of highway called "The Green". One proceeds down The Green keeping what is referred to as "The Gate House" on one's left, as one is moving in a southerly direction, and if one gets to the house which is numbered 2 on the plan, one

then has the view which the cameraman would have had who took the uppermost photograph on Page 465. That is taken looking in a southerly direction, leaving on one's left hand the perimeter walls of the dwellings down that side of the road.

As can be seen from that photograph, the grassland is at a higher level than the roadway. Between the roadway and the grassland there is a concrete drainage gully which obviously takes surface water from The Green, and one can see in the further distance the metal grating into which the surface water drains.

The minutes and correspondence reveal that that piece of roadway which is most visible on that photograph running down the eastern side in a southerly direction, is highway which is repairable at the public expense. In the bundle of documents there is a minute which appears at Page 229. This is a minute which is dated 1953/1954, being the annual report for that year, and it says this, under the heading "The Green", "Following representation of the bad state of the road to The Green, a sub-committee of the West Riding County Council met members of the parish council on The Green when councillors gave reasons why the county should repair this road. The county considered the reasons were good and sufficient, and so the road was adopted by the Council of the West Riding."

It is also relevant on this point to see the letter dated the 8th August 1972 written by Charles Bland who was then the Clerk to the Parish Council; that letter appears at Page 375 in the documents bundle. In that letter there is a sentence, "The road from Woodsetts Road to the south side of The Green is maintained by the County Council" and that plainly is the same road to which I have already referred.

I accept the evidence of the witness, Mr. Lawrence Bland, Charles Bland's son, which was to the effect that the drainage gully to which I have already referred has been there all his life. As to what that means, the figures are that Mr. Bland was born on the 2nd of May 1940 and is now aged 65. He was born in his parents' home at 8 Hillside, and he lived there until he got married in 1962.

I revert, Paragraph 6, to the photographs for a further description of the area. If one stays with the

upper photograph on Page 465, and moves southwards, one gets to the top of what is known as Blacksmiths Hill. That represents a very steep pedestrian descent to Hillside. It can be seen on the Page 423 plan.

If, instead of descending Blacksmiths Hill, one were at that junction to turn right, one would be looking west, and one's view would be of the southern perimeter of the grassed area. One sees in the middle of the photograph on the left, a small outbuilding. That is part of No. 8. That is currently in the occupation of a Mr. Boyd; in earlier times it was occupied by a Mr. Sarvent.

The white gable end of the actual dwelling which forms No. 8, can be seen in the upper photograph. On the upper photograph, if one moves to the right of No. 8, one can there see a gable end, which is tan or ochre in colour, and that is the premises occupied by the Claimant. That is known as No. 10.

If one looks back at the lower photograph, the pitched roof which one can see running from the left-hand margin in a northerly direction is the pitched roof of No. 11. That is occupied by a Mr. Fielding, who is the owner of the car which one can see in a shrub-surrounded hard- standing.

Turning to the plan again, one can see from the plan how No. 10 is at a more southerly position from No. 11. No. 10 has access to a substantial courtyard, and a vehicular access on to the track which is adjacent to the houses, and which can be seen in the lower part of Photograph 465.

Paragraph 7, to complete the geography aspect of this, I record that on the afternoon of Tuesday, the 21st December, I attended an on-site view, accompanied by the legal representatives of the parties. We circumnavigated The Green on foot. We walked across the concrete footpath which runs across The Green from a north-east/south-west direction. That can clearly be seen represented on the plan, Page 423. We descended Blacksmiths Hill on foot. We turned in a westerly direction along Hillside, and we then ascended the very steep footpath from Hillside to where it meets the footpath which crosses The Green at the south-west corner.

It was entirely clear that the south side of The Green furnishes no vehicular access to the south, and it is clear from that that the track which runs on the area which can be seen on Page 465 not only

represents the vehicular access to the Claimant's property, but the only vehicular access which there could be to the Claimant's property.

Having dealt with the geography, I now turn to the history, and for this I start at Paragraph 8. I start with the evidence of the Claimant's predecessors in title, and the first evidence that I received was the evidence of Mr. Alan Clayton. He had made a statutory declaration which I received in evidence; it appears at Page 42 in the bundle, and is dated the 12th July 2002. He declares that he conscientiously believes the contents to be true, and signs the document.

Mr. Clayton said this, Paragraph 1: "In 1938 I went to live in the property known as 9 The Green, North Anston, Sheffield, with my parents and family, and I moved out of the property in 1954.

2. The property now forms part of No. 10 The Green, North Anston, which is currently owned by Hilary Mary Estrada Haigh. During the time I lived at the property, my parents had vehicular and pedestrian access to the property over that part of North Anston known as The Green. Vehicular access was from No. 3 The Green, then my grandmother's property, in the route to the end of the outhouses, just past No. 8, then up the track to the property. The route is shown marked on the plan, and produced and shown to me, and marked 'A'". And indeed there is a plan which is marked "A" and which shows an access from the part of that road which is the north-east corner of The Green area, which runs in very much of a loop, and part of the loop goes past the front of the houses on the south side.

There have been produced, and they have been extraordinarily useful, some aerial photographs taken at varying stages. They admirably demonstrate this track in loop shape. I refer to Page 432, which is an aerial photograph dated the 19th May 1948; 433, an aerial photograph dated the 17th September of 1954. 434, dated the 29th September of 1954. 435, dated the 13th June of 1967. Obviously we are now getting beyond Mr. Clayton's time, and one can see greater evidence of vehicular use.

Mr. Clayton having made his statutory declaration, did attend in order that he might be cross-examined either by way of challenge or to elicit further matter, or generally to test his evidence.

However, his evidence was not challenged in any way and no questions were put to him. That obviously was a considered decision on the part of the Defendants.

The content of Mr. Clayton's declaration is such that he does not assert that he or his parents either drove or had the use of a motor car or other motorised transport. Mr. Din, by way of submission, questions in those circumstances whether one can, by showing access by tradesmen's vehicles, prescribe a right-of-way to oneself to exercise vehicular access. The reason this point is made is because at Paragraph 5 of the declaration, Mr. Clayton says this: "The vehicles using the vehicular access to the property was a coal lorry, refuse lorry, butchers' van and a number of carts, wagons and cars. Once the vehicles had crossed The Green to the property, they then returned by making a right-hand sweep up the back, across the centre of The Green, back to No. 3".

Mr. Clayton, covering the period from 1938 to 1954, there was then a gap of five years when the premises were apparently owned by a lady called Deakin. I have not heard from her, either written or oral, and nothing has been heard of her. The tale is then taken up by Peter Veveris. He made a statutory declaration which appears at Page 46. That declaration again is accompanied by a declaration of conscientious belief in its truth, and signed the 30th July in the year 2002. He puts his dates on those premises as being from the 25th August 1959 to the 9th November 1979. He says in relation to that, "I always had vehicular and pedestrian access over The Green to and from my property".

Paragraph 3: "Such way has been used by me, my agents, servants and friends since 1959 as a right, and without consent of any person, without interruption, without payment of any kind, to anyone whatsoever from 1959 to 1979".

4: "The said use has been to pass and re-pass over The Green, by day or by night, with or without vehicles of any description, and with or without animals for all purposes connected with the property".

As with Mr. Clayton, Mr. Veveris did attend to be questioned, but he was not cross-examined.

I should also refer to some passages of a statement that was made by Yvonne Foulds. This is a statement that was produced on the part of the Defendants dated the 24th October 2005. Ms. Foulds says this, that she was born in 1959 and that she used to live at No. 4 The Green, North Anston, with her mother and father. She said: "Our cottage was the first one with a front garden running down the eastern side of the village green. I was born at this address and lived there all my life up to October 1981, when I got married and left The Green".

So it follows that Ms. Fould's connection with No. 4 The Green runs from her being born in 1959 through to 1981, so that is a period of 22 years.

I should read certain passages from what she says. At Paragraph 7, she says this: "From the south-east corner of the village green, facing westward along the southern boundary of the village green, towards the cottages at the end, there was not a road as such. This was just like a rough track, natural and not tarmacked. I believe it was probably made of gravel or ashes or dirt, and was probably about a car width wide. I think this track was certainly still the same when I moved away from The Green in 1981. There was also a similar rough track running from the east tarmac area along the northern side of the village green, in front of the houses and cottages on that side. I first seem to remember this track being there when I was a young girl aged about five or six".

8: "When I was a young girl living on The Green, from the age of about six or seven years of age ..." - so that will have us in the mid-1960s - "... I do remember a lady called Mrs. Veveris. She used to live in the cottage which is now occupied by a Mrs. Cope. I believe this was No. 10. Access to her home was gained through a gateway directly out on to this rough track. I do remember that Mrs. Veveris had a fairly large car which she used to drive in and out of the entrance to her home, on the rough track. I can remember on occasions seeing Mrs. Veveris driving down the tarmac part of the road on The Green, turning along the unmade rough track on the south side of The Green, and then driving a short distance along it, and turning her car into her own yard at the end of The Green".

"I also remember sometimes she would reverse out on to the road, and although at the time it may

have looked slightly awkward, she used to manoeuvre the car round to drive off along this track, on to the tarmac road part, and out on to Quarry Lane".

I now come on to the position, Paragraph 11, of Charles Bland, the Clerk to the Parish Council. Mr. Bland did not give evidence, he died in 1996. I should give some biographical dates. These details I take from the evidence of Lawrence Bland, and I accept those details as being substantially truthful and accurate.

Mr. Bland, Charles Bland, was born in 1903 at his parents' house of No. 6 Hillside. He married in 1929 and lived for about ten years in a house on the perimeter of The Green. He then moved to No. 8 Hillside, and lived there until the date of his death in 1996. It is Lawrence Bland's memory that Charles Bland was Clerk to the Parish Council for 26 years, and that accords with the understanding of Mr. Gazur, the current Clerk to the Parish Council, who has Mr. Charles Bland as clerk from the year 1951 to the year 1977.

There are obviously over that period minutes which were written by Mr. Charles Bland, containing some contemporaneous account of events. I regard those minutes, by reason of their contemporaneity, as being important evidence. Letters written by him deal either with his observations or his own knowledge of the local history, and I take that as evidence upon which I can act.

I should refer to his letter of the 8th August of 1972. That appears at Page 375. This is a letter from Mr. Bland to a Group Captain Robinson, who was then the secretary to the Yorkshire Parish Councils Association. In that letter he says this: "Two gentlemen living at south side of Green have cars. And all my life there has been vehicular access to these houses across The Green".

In relation to that, the two gentlemen referred to are plainly, from the dates and other evidence, first of all Mr. Sarvent, who was then occupying No. 8, and Mr. Veveris, who was then occupying No. 10.

Paragraph 12. In the light of all the foregoing, I make a finding of fact that The Green has. been used by Mr. Clayton and Mr. Veveris, the Claimant's predecessors in title, as a vehicular access from at

least 1934 for a period exceeding 20 years. I can find no basis in the evidence for concluding that the user was other than as of right, and no basis has been suggested either.

Paragraph 13. I must deal specifically with Mr. Din's point, made on behalf of the Defendants, that the access was (see Mr. Clayton's declaration) expressed to be exercised by visiting tradesmen and not access exercised personally by the occupier of the dominant tenement or his family. That covers, so far as Clayton is concerned, the period of 1938 to 1954. Therefore the submission is made by Mr. Din on behalf of the Defendants (we take the date of commons registration as agreed, which was the 1st October 1970 (See Page 164 in the documents bundle)) that quite clearly, given the nature of the Clayton access, there is no 20 years' relevant user which can be relied on under the doctrine of lost modern grant, before registration.

As a matter of evidence, the point is well-made. As a matter of law, I think it makes no difference. The trade access over the years served the dominant tenement *qua* dwellinghouse. The occupiers of the dwellinghouse had need of, say, coal for warmth and provisions for sustenance. It is true that vehicular access exercised by an occupier would be more frequent or greater than the access exercised by the butcher, baker and candlestick-maker, albeit that the vehicle is likely to be smaller. "Use by occupier" would involve going to work, coming back from work, outings, holidays, etc. However, the fact is that it is still user *qua* dwellinghouse occupation, and it does not significantly alter the nature of the burden on the servient land. Therefore, even on the footing that the 1938/54 access was tradesmen's access, I regard it as good user for these purposes. Therefore, I am not able to accept the submission of law made by Mr. Din on this topic.

Leaving aside for the moment the question of the status of the grassed area, to use a neutral expression, what is established, in my judgment, by the relevant period of user is a right-of-way resulting from the doctrine of lost modern grant, across The Green, as appears from Mr. Clayton's sketch, and the photographs to which I have referred at Pages 432 and 433 and 434.

As I understood him, Mr. Din on behalf of the Defendant accepted that if the right-of-way had

accrued prior to the registration of The Green as a village green, then the Claimant must succeed. On that basis, I need go no further, but even so I think I must make further findings in the light of the potential implications of the legislation to be found in Section 12 of the Enclosure Act 1857, and Section 29 of the Commons Act of 1876.

I read only such parts as are relevant for these purposes. Section 12 of the 1857 Act is in these terms: "Whereas it is expedient to provide summary means of preventing nuisances in town greens and village greens, and on land allotted and awarded upon any enclosure under the said Act as a place for exercise and recreation, if any person wilfully cause any injury or damage to any fence of any such town or village green or land, or wilfully and without lawful authority lead or drive any cattle or animal thereon, or wilfully lay any manure, soil, ashes or rubbish or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green or land, or to the interruption of the use or enjoyment thereof as a place for exercise and recreation, such person shall for every such offence upon a summary conviction thereof, upon the information of any church warden or overseer of the parish ..." And it concludes by making the malefactor liable to a fine.

So far as 29 is concerned - that is 29 of the Commons Act 1876 - it says: "An encroachment on or enclosure of a town or village green, also any erection thereon or disturbance or interference with, or occupation of the soil thereof, which is made otherwise and with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance".

For these provisions to be applicable, it obviously requires as a necessary condition that there be a village green, properly so-called. If the activity between the years 1938 and 1954 onwards was such as to involve an infringement of either of those sections, then the argument is that the repeated commission of criminal offences is inconsistent with the acquisition of prescriptive rights of way. The sections in question do not contain any such saving provisions as "without lawful authority", and therefore it would be difficult to presume such lawful authority, as was discussed in the case of the *Bakewell Management -v- Brandwood*, in the report with which I have been supplied, 2004 2 WLR

955.

I have to say that I am not satisfied, on the balance of probabilities, that the area was a village green, properly so-called, prior to registration or prior to the Commons Registration Act of 1965. The question which arises is whether there has arisen a customary right in the inhabitants of the parish to use the area for their lawful recreation. Such rights, if they come into being, obviously impinge or can seriously impinge on the right of the lawful owner, if known.

On this topic, the case which I have to look at is obviously the House of Lords decision, *R -v- Oxfordshire County Council, ex parte Sunningwell Parish Council.* That is a case which is reported in the Appeal Cases reports, Volume 1 at Page 335. The speech with which the Law Lords concurred was delivered by Lord Hoffman, starting at Page 346. He described first of all the area which was held by the House of Lords to be a village green. He said, "The Glebe at Sunningwell in Oxfordshire is an open space of about ten acres, near the ancient village church. It used to form part of the endowment of the rectory. The rector let it for grazing, and received the rent. On a reorganisation of church properties in 1978, it was transferred to the Oxford Diocesan Board of Finance. The land slopes upwards to the south and is crossed by a largely unfenced public footpath, running south from the village towards Abington. Local people use The Glebe for such outdoor purposes as walking their dogs, playing family and children's games, flying kites, picking blackberries, fishing in the stream and tobogganing down the slope when snow falls".

His Lordship went on to describe how the occasion for dispute arose out of the Oxford Diocesan Board of Finance obtaining planning permission to build two houses on the northern boundary of The Glebe. That caused something of a stir, and the parish council applied to the county council to register The Glebe as a town or village green, under the Commons Registration Act of 1965. Such registration would, if allowed, scupper the development, because Section 29 of the Commons Act 1876 prohibited encroachment on or enclosure of a town or village green.

The whole case proceeded upon the footing, as obviously was the case, given the dates, that the

necessary consideration of matters started with Section 22.1 of the act of 1965. Obviously that act had not come into being at the time when, as I have indicated in my Judgment, prescriptive rights were being acquired by Mr. Clayton.

Dealing with such parts of the speech of Lord Hoffman as I should refer to for the purposes of this Judgment, I deal first with the argument advanced on the part of the Oxfordshire Diocesan Board of Finance that the status, as "village green" did not arise, because the witnesses who gave evidence did not depose to any belief that the right to use the green for games and pastime was one which attached to them as inhabitants of the village. So far as that is concerned, Lord Hoffman says this. I start from Page 356 at Letter A: "I think that Baron Parke ..." in an earlier case, "... would have been startled by the proposition that a plaintiff asserting a private right-of-way on the basis of his user had to prove his subjective state of mind. In the case of public rights, evidence of reputation of the existence of the right was always admissible and formed the subject of a special exception to the hearsay rule. But that is not at all the same thing as evidence of the individual states of mind of people who use the way. In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has a right to use a footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right, cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years' user, it is almost inevitable that user in the earlier years will have been without a very confident belief in the existence of a legal right. But that does not mean that it can be ignored".

He went on to deal with an earlier case called *Steed*, and said: "I therefore consider that *Steed*'s case was wrongly decided, and that the county council should not have refused to register The Glebe as a village green merely because the witnesses did not depose to their belief that the right to games and pastimes attached to them as inhabitants of the village".

There was also some discussion of the nature of the activities which must be demonstrated. This is relevant in the light of what I have heard in evidence in this case. There had been a point raised in the Oxfordshire case - again, Page 356, just above Letter G. The first point concerned the nature of the activities on The Glebe. They show that it had been used for solitary or family pastimes, walking, tobogganing, family games, but not for anything which could properly be called a sport. Ms. Cameron, who was counsel, said that this was insufficient for two reasons. First, because the definition spoke of sports and pastimes, and therefore as a matter of language, pastimes were not enough.

Lord Hoffman disposed of that on the footing that as long as the activity can properly be called a sport or pastime, it falls within the composite class.

"As for the historical argument ...", he said, "... I think that one must distinguish between the concept of a sport or pastime and the particular part of sports or pastimes which people have played or enjoyed at different times in history". There was a reference to *Fitch -v- Rawling*, where Mr. Justice Buller recognised a custom to play cricket on a village green as having existed since the time of Richard I, although the game itself was unknown at the time. Lord Hoffman cited an Irish case in which the Irish Court of Appeal upheld a custom for the inhabitants of Fermoy(?) to use a strip of land along the river for their evening "passagatio". Lord Justice Holmes said that popular amusement took many shapes: "Legal principle does not require that rights of this nature should be limited to certain ancient pastimes". In any case, he said, the Irish had too much of a sense of humour to dance around a maypole.

Lord Hoffman went on to say that he agreed with Mr. Justice Carnwarth in the *Steed* case that "Dog-walking and playing with children were in modern life the kind of informal recreation which may be the main function of a village green". "It may be, of course, that the user is so trivial and sporadic as not to carry the outward appearance of user as of right. In the present case, however, Mr. Chapman found abundant evidence of the use of The Glebe for informal recreation, which he held to be a

pastime for the purposes of the act."

Now in this case, if customary rights came into existence, they were obviously limited by the dimensions of The Green. I have not been given, I do not think, the area of The Green, but I have seen it. To my eye, The Green is considerably smaller than a cricket ground, and considerably smaller than a soccer pitch; indeed I think it is probably smaller than half of a soccer pitch. Nobody would sensibly speak of going for a walk on The Green, and nobody would speak of taking a dog on to The Green for exercise, though I did see some small evidence of canine defecation.

I accept Mr. Bland's evidence that children would use it in order to play football on the basis of coats going down as goal-posts; I think the sort of activity that in my earlier years we would have called a game of "shots in", or a "kickabout". He did not recall any organised activity taking place there. A bonfire took place on Guy Fawkes' Night every year. So far as the activity is concerned, something is said by the witnesses Foulds, Cavill, Latham and Frank Hogg, and I think I should deal with that. The relevant part of Ms. Foulds' statement, I take from Paragraph 9: "As a young girl I used to play with other children who used to live on The Green. We all used to play on the village green, and also when you walk from the village green itself around the back of the houses near to No. 10 The Green, there was an area which was full of large stones, etc. and was known locally and by ourselves as 'The Crags'. We used to play in this area as well, without any problems whatsoever. Neither Mrs. Veveris nor the other residents near to her on the south side of The Green had any objection to us playing in that area".

So far as Mr. Cavill is concerned, Mr. Cavill was a farmer at Mill Farm in Main Street in North Anston. He said he had never lived on The Green at North Anston, but his aunt, Mary Outram, and his two cousins, John and Jim Bell, used to live there at a house called "The Gate House".

He said during his childhood and into his teens, he used to visit his Aunty Mary's on occasions and play on The Green at cricket and football and the like, with John and Jim Bell.

Betty Latham is a very old lady, born in 1912, address No. 5 Hillside, North Anston. It was

represented to me, credibly enough, that she was not fit to undertake the journey to Leeds, and her statement was admitted as hearsay evidence. She said she was born in North Anston - that would be 1912 - and she said that when she was 13 - that would be in 1925 - the family moved into Worksop. She said that her grandparents lived at 5 Hillside, and she said that as a child she used to play on Anston village green. She said, "We used to have a bonfire there every year. To the best of my recollection there was a maypole in the middle of the village green. The boys used to play cricket on the village green. However, when I left at the age of 13, I did not return to live permanently in Anston until the early 1970s".

I confess I am somewhat sceptical about the maypole. I appreciate it was a later period, but Mr. Bland, in giving his evidence, said he never saw one.

Also read was a statement of Mr. Frank Hogg. This appears at Page 158 in the bundle, and Mr. Hogg was born in the year 1918, 12th June 1918. So obviously he is 87 years of age now, and it would not be right to have expected him to get over to Leeds from his home. He said he was born in South Anston and lived there until he was 21 years of age. He said when he was young his mother used to take him to visit a Mrs. Murfin, who was a distant relative, and she used to live in a cottage on the south side of The Green, North Anston.

He said, Paragraph 7: "During my visits as a child to The Green with my mother and well beyond, though I never actually played on the village green myself, on numerous occasions I have seen children playing football and other like games on the village green. I presume these children would have belonged to the residents of these cottages around the village green, and possibly local children not actually living on The Green itself".

What I get from the evidence is a picture of a smallish area of grassland. So far as that grassland is concerned, if tradesmen wanted to drive over it to dwellinghouses, they did. If anybody wanted to use a vehicle of their own to drive across the grassland, they did. If children who lived in the surrounding houses or their visitors, felt like a kickaround, that is what they did. There is no

evidence of any what I might call adult activity, save this. That I have seen some photographs of the Claimant with her children when there have been some heavy snowfall, and snowmen were being made.

Objectively viewed, the picture which I get is not one of user as of right by inhabitants of the civil parish for the purposes of sports and pastimes. I have the impression that the grass was there, and anybody who wanted to go on it for whatever purpose, did. While the fact that the sports and pastimes might be confined, as a class, to the children, is obviously in no sense fatal, the overall impression I am left with is that this is not an area of land which at the time and over the relevant period of 1938 to 1954 would be regarded as some tract of land which by long-standing or immemorial custom was reserved to the inhabitants of the parish for sports and pastimes, and should not be used by anybody else.

That disposes of the village green point.

I now have to deal with the point that the easement which is now claimed by Mrs. Estrada-Haigh is not the easement which was, as I find, acquired by operation of the lost modern grant doctrine some time well before 1970, when the land was registered as a village green. It is common ground that after registration and as a result of discussions between the parish council and the householders, the line of vehicular access to the properties on the south side of The Green, was altered to that which can be seen on the lower photograph in 465.

The Defendants therefore advance their argument that since registration, what has clearly happened is that if the householders had a right-of-way, they were good enough to give it up at the request of the parish council, and therefore had no right-of-way left to exercise. Further, that the use of the route along the south side has been taking place effectively by either toleration or permission of the Defendant council, and is therefore precarious in every sense of the expression.

Mr. Din very appropriately made clear on behalf of the Defendant council that the council has no intention of taking any step which would have the effect of interfering with the Claimant's current

access. That also was clearly made by the parish council chairman, Councillor Stonebridge, when he was giving evidence. Mr. Stonebridge made clear that the council regards itself here as being in a cleft stick, and I have considerable sympathy with that position. If I can quote from Mr. Stonebridge's evidence, "The view of the parish council is that the law is unclear. The boundaries were drawn incorrectly when The Green was registered". Mr. Stonebridge expressed an opinion that technically the drivers commit an offence when they exercise vehicular access, "But what we have done is to try to ensure the preservation of the main body of The Green, and we've made no effort to enforce any fence provisions which might relate to the use of the tracks to the east and the south". Essentially, that summarises the cleft stick. The council is placed in the cleft stick by reason of the fact that the area which is in fact registered as "Village Green", goes to the very boundaries of the houses on the south and east side. Therefore, the council feels inhibited in acknowledging any vehicular access for the Claimant over what, on the paper document, is the village green.

I observe here that rectification or amendment of the area which amounts to a village green, or the map which indicates where the village green boundaries are, is not something which has been canvassed in evidence before me.

The view which I have come to is that there is a right-of-way which runs down the south side of The Green, in front of the houses. The manner in which that right-of-way came into existence can be discerned from the correspondence. When I say "came into existence", the case as it might be preferred on behalf of the Claimant is that the right-of-way existed but was simply moved.

Page 348, a post-registration letter from Mr. Bland dated the 28th August 1971. In the course of the letter, he says this: "I am afraid that the persons who have been using part of The Green as a highway for so many years will feel that they have a right to continue so to do. So our only hope there will be to make them stick to the perimeter of the same, as they enter and leave home ground".

Page 352, I have a letter from Mr. Bland to Mr. Sarvent, the then occupier of No. 8. 9th September 1971: "When members of the Anston Parish Council met residents of The Green some time ago, it

was mentioned that the parish council would like to improve the same by any means likely so to do. One of which was keeping of vehicular traffic from the centre of the same". I do not think it is necessary for me to read the remainder of the letter. A letter in similar though not identical terms was sent to Mr. Veveris at No. 10, and that appears at Page 353.

A letter, Page 358, dated the 16th September 1971 to the Yorkshire Parish Councils Association, and it says this: "My council agree to stop motorists crossing The Green by placing bollards some ten feet away from the boundary walls and four feet apart. It was then proposed to concrete the path which passes diagonally across, some four feet wide, and grass the rest of what is now a vehicular way in the centre".

Paragraph 361, 26th October 1971, is a letter from Mr. Sarvent at No. 8 to Mr. Bland: "I am deeply interested in the beautification of The Green, both from an aesthetic and practical viewpoint, and because I am a resident of The Green. It is my opinion that by continuing the road which passes Mr. Lidgett's and Mr. Price's cottages, with a short right-hand bend passing my cottage, the present access road to Nos. 8, 10, 11 and 12 could be grassed over, and I think a lovely village green would be the result. The vehicular road for refuse disposal vehicles, coal lorries, etc., which I am suggesting, would also be useful for the pedestrian residents of The Green. A very nice footpath has now been provided across The Green, but a good dry access to the houses is non-existent".

And Mr. Sarvent indicates his anxiety to receive the views of the council on that matter. It will be noted that what is proposed by Mr. Sarvent in that letter is effectively the current state of affairs.

362 and 363, I have two letters, one to a Mr. Harvey on The Green, and one to a Mr. Price on The Green. Mr. Harvey had donated £25, so there were thanks for that. The letter to him at Page 362 refers to "Improvement work carried out recently on the village green". He says, "It is the wish of the members of the council that this piece of land shall now be kept in good condition by regularly cutting the grass, and hope that all vehicles will keep off the same. Many parishioners have congratulated councillors on the improvement carried out by the parish and county council, both on

The Green and to the access road to the same".

And a letter to Mr. Price, Page 363: "The members of the Anston Parish Council are very anxious to make The Green really a 'green', and so some work has been done to achieve that object. It was thought that perhaps a slight diversion of the way Mr. Sarvent passes to and from his home could go further in the matter of improvements. The idea was to make a way from his and Mr. Veveris's gateway to the road, just below your gateway, and then remove the hillock by levelling it on to the present road used by Mr. Sarvent, grassing all down, which in the opinion of the council would add to the beauty of The Green". That proposal is effectively the result which we presently have. I observe in passing that Mr. Price, the recipient of that letter, was not happy about it. However, it was explained to him in later correspondence that the parish council felt it was acting properly.

I revert again to the letter already cited of the 8th August of 1972 at Page 375. I have already read a paragraph which commences: "Two gentlemen living at south side of Green have cars, and all my life there has been vehicular access to these houses across The Green. These gentlemen agree, however, that to move the access road to the side would be a great improvement to The Green, and would be no inconvenience to them".

That is the correspondence. If I read a short extract from the minutes. These minutes were in Mr. Bland's handwriting, and the Clerk to the Parish Council, Mr. Gazur, has taken the trouble to transcribe them. There is, on Page 302, an entry for September the 25th, 1971. "Mr. Harvey gave a report of a meeting between Mr. Hall, representing Mr. Lawton of the West Riding County Council Highways Department, and members of the parish council re the junction of the path crossing The Green, and its junction with the highway, Mr. Hall promising to make good the junction and also to higher existing manhole cover. Also to make provision for alteration to approach to houses 8 to 12 on the south of The Green."

The result of all this is that certainly since August of 1972, the perimeter access has been exercised by Veveris, and after him, the Claimant. There is an absence of direct evidence from anyone as to

the intentions of Veveris and the council. However, the conclusions which I clearly draw are that the council offered and the Claimant's predecessor accepted an alteration of the route of an existing right-of-way. The alteration of the route was greatly to the advantage of the village green, because that resulted in it acquiring the appearance which it presently has. I think it is relevant that I should observe, or make an observation on the general attractiveness of that area.

I was taken by car on the view, and as one goes down Quarry Lane and then down Green Lane to the area which one can see on the photographs on Page 465, it really is like walking back in time about a century-and-a-half. One has a scene which one might associate with Jane Austen or George Eliot. It is plain to me that the scheme that was devised was the very best that could be devised for the appearance of the area.

In those circumstances, I take the view that insofar as there is any law to consider on this topic, I found helpful some observations made by Lord Justice Stamp in the case of *Davis -v- Whitby* in the Court of Appeal, 1974 1 Chancery, 186. The relevant extract appears at Page 193. He said this (I do not recite the facts.) "I had at one time thought that the point taken that the agreement of 1950 by the servient owner amounted to a consent by him which interrupted the enjoyment as a right, and so made the user *precario* was a good point. But I accept Mr. Gidley-Scott's submission that what was agreed in 1950 did not involve a simple consent to the user given by the owner of the dominant tenement, but is more consistent with the existence of a claim of right by the dominant owner settled by the servient owner offering a route less disadvantageous to him than a path crossing the middle of his garden. And I do not think that it was a case of consent, but rather of compromise".

In fact, this case is *a fortiori*, because that was an instance of facts involving prescription still running. In this case it is not a prescription issue, it is simply an issue of moving by agreement an already-accrued right of way. It is quite clear to me that it cannot lie, in the light of the history, in the mouth of the Defendant council to say that the Claimant does not have the right-of-way. Therefore, I will make the declaration - obviously I will seek a minute of order from counsel - that as against the

Defendants, who are the owners of the land, the Claimant is entitled to a declaration that she has the vehicular access which is sought in broad terms in the particulars of claim.

Counsel have to draw a minute of order setting out the terms of the declaration. I think this task would be approached with more enthusiasm, for obvious reasons, by counsel for the Claimant. So I will direct that counsel for the Claimant will prepare, lodge and serve a draft minute of order by 4 p.m. on the 10th March. The Defence will lodge any proposed alterations by the 24th March. If the minute cannot be agreed, the matter must be listed for a hearing.

IN THE LEEDS COUNTY COURT

Case No: 4SE13364

The Combined Court Centre
Oxford Row
Leeds

24th February 2006

Before

HIS HONOUR JUDGE S SPENCER QC

ESTRADA HAIGH

-v-

THE PARISH COUNCIL OF ANSTON

PROCEEDINGS AFTER JUDGMENT

APPEARANCES:

For the Claimant: MISS MASON

For the Defendant: MR LAWSON

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ESTRADA HAIGH -v- THE PARISH COUNCIL OF ANSTON

24th February 2006

PROCEEDINGS AFTER JUDGMENT

JUDGE SPENCER: So far as costs are concerned, as I indicated, the usual rule is that costs should follow the event. There is no material before me at the moment why that should be displaced, but it may be that either party might want to put material before me, and so I will give a direction that any party wishing to make submissions on costs should send to me written submissions by the 10th of March, 4pm, and request a hearing on that issue if a hearing is what they want.

Now for the sake of completeness, I think I should deal with one trailing loose end, which might possibly be still there, which is this. Given that on paper the track on the southern side of the green amounts to village green, see the map at page 423, does the use of the track amount to the commission of an offence under Section 12. I think that matter strictly arises, should anybody wish to try and make something of it, but at the moment I accept the submission made on behalf of the Claimant that use of the track, which we see in the lower photograph, on page 465, does not amount to an infraction of Section 12 of the Enclosure Act of 1857 because it is doing no injury to the green as it is.

I also take the view that there is no question of there being any nuisance under the other piece of legislation, that is to say the Commons Act of 1876, again this is strictly speaking something that only arises should anybody wish to try and prosecute, but it does seem to me that the very terms of Section 29 indicate why any prosecution under Section 29 would fail.

> "An encroachment on an enclosure of a town or village green, or interference with the occupation of the soil thereof, which is made otherwise and with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance,"

and of course it is as plain as a pikestaff in this case that, so far from the changes being deleterious, the changes which were done in 1972 have resulted in the green having far more of a picture postcard appearance than as was the case before, and in all the circumstances I think that is all I need say about those two pieces of legislation.

Can I conclude by thanking all concerned, legal representatives, witnesses, for the helpful and civilised way in which the matter has been conducted. Rights of way disputes can get a little tetchy sometimes but this one has not.

IN THE LEEDS COUNTY COURT

Ref: 4SE13364

The Crown Court
Oxford Row
Leeds

29th June 2006

Before

HIS HONOUR JUDGE SHAUN SPENCER QC

ESTRADA HAIGH (Claimant)

-v-

THE PARISH COUNCIL OF ANSTON (Respondent)

JUDGEMENT ON COSTS
(As Approved)

APPEARANCES:

For the Claimant: MR BLOHM

For the Respondent: MR DIN

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ESTRADA HAIGH -v- THE PARISH COUNCIL OF ANSTON

29th June 2006

JUDGEMENT ON COSTS

JUDGE SHAUN SPENCER QC:

1. On 24 February 2006 I gave judgement in this case to the effect that the Claimant was entitled to the right of way sought in her Particulars of Claim. The minute of order has been agreed this morning, 29 June 2006, and reads in these terms:

> "It is declared that there exists as pertinent to High Crag cottage, The Green, North Anston, Sheffield, South Yorkshire, there stating the title number, right of way for the Claimant as owner of the property and her successors in title and all persons authorised by her or them to pass and re-pass over the land shown coloured brown on the said plan between the property and the public highway at all times by day or night whether on foot, with animals, and with or by or without motor vehicles for all purposes connected with the use and enjoyment of the property as residential property."

2. At the conclusion of the judgement which I gave on 24 February, when I fancy my appreciation of the evidence in the case and the whole flavour of the proceedings was a good bit fresher than it is today, I said this:

> "So far as costs are concerned, as I indicated the usual rule is that costs should follow the event. There is no material before me at the moment why that should be displaced, but it may be that either party might want to put material before me, and so I will give a direction that any party wishing to make submissions on costs ..."

and then I gave directions.

3. Well that is what I said on the day, a nod is as good as a wink to a blind horse, and so here we are on 29 June discussing the basis and the incidence of costs. First so far as the incidence is concerned, I am in no doubt that the Claimant should have her costs. The arguments which are advanced to a contrary effect may be summarised as being these: that the local authority has at no time any intention to disturb the Claimant in her use of the access to her premises, be that access

described as a 'licence' or 'permission' or any other name that could be applied to it other than an easement as of right. It is said that in those circumstances there was no compelling reason for the Claimant to issue and pursue these proceedings. It is said that the trigger to the commencement of the litigation were the acts of a neighbour who persistently parks a motor vehicle on the vehicular way, and it is also said that the matter could have been resolved by the Claimant taking the appropriate steps pursuant to the Countryside and Rights of Way Act.

4. It is also said, and I have been shown correspondence on this, that the Council has done its best to compromise this matter in all ways short of acknowledging in plain terms that the Claimant does have the easement of way which she seeks.

5. It seems to me that whether or not the Claimant has or may have some other remedy as under the Countryside and Rights of Way Act is not something that weighs with me. She may have, she may not, but the fact is that the Queen's Courts are open and anybody has access to them in order to vindicate her Cause of Action if she has one. In this case the Claimant says that she has an easement; the Defendant Council was clear in not being prepared to acknowledge that the Claimant had such an easement, and it seems to me to follow therefore that the Claimant was entitled to go to law to vindicate what she said was her right of way. That the particular trigger to litigation may have been the acts of the neighbour is neither here nor there. The Claimant still was entitled, if she wished, to vindicate the right if she had it.

6. That the Council has sought to compromise is a factor which I have given serious consideration to. I do take the view that the Council was making genuine efforts to see if this matter could be dealt with in all matters short of acknowledging that she had a right of way.

7. I have already made clear in my judgement [page 16, lines 2 to 15] that the Council has my sympathy for the reason as expressed by Mr Stonebridge that the Council was in a cleft stick on this issue. I am not impressed by the rather sabre-rattling flavour of the correspondence as I saw

it from the Complainant's legal advisors when the Council were putting forwards suggestions to settle. The correspondence did not seem to me to be imbued with those efforts to avoid litigation, if possible, which Civil Procedure Act correspondence should have. The fact however is that this case was beyond settlement. The Claimant said she had an easement, about that she was right or she was wrong; the Counsel said that she did not have an easement, about that the Council was right or wrong.

8. There is in fact no third way and, if not admitted, the Claimant was left in a position where the only recourse which she had was to go to court and all that the court could do was decide the issue. I did put to Mr Sufi Din that it would have been possible, if the local authority wished, as it were, to come out of this without making any overt acknowledgement of a right of way, by simply omitting to lodge an acknowledgment of service or omitting to serve a defence. But, as Mr Din observed, is that really the way for a responsible local authority to behave?

9. Having said all that, it seems to me that I come back to where I started: the Claimant came, she fought, she won and therefore it seems to me the local authority will have to pay the costs. That is the normal order and I see no reason for it being displaced.

10. So far as the basis of costs is concerned, I am in no doubt that, subject to a Part 36 offer dated 9 May, to which I shall currently give my attention, the costs should be on the standard basis. They should be on the standard basis because I am not satisfied there is any good reason for there being any other basis, namely the indemnity one. The basic reason advanced is that this was a hopeless case for the local authority to defend and if they want to stand on the bridge as the ship slowly sinks that is a matter for them, but they ought to be in a position where they should pay for it. I do not think that is a correct analysis of the situation.

11. True it is that there was little challenge to the factual evidence, indeed how could there be if somebody is saying that this is the sort of kick around he had 30 or 40 years ago. Unless you can

produce his neighbour who was around at the time and says it is all a pack of lies, it is not difficult to see that the scope for pronounced cleavages of evidence is simply not there. What there was was what I considered to be substantial legal argument and legal issues which I had to decide. I mention only the following: what is the effect so far as lawful user is concerned if the user is that of tradesman's vehicles rather than vehicles owned or used by the proprietor of the (hopefully) dominant tenement? That is a matter which was raised and had to be discussed. For instance, what effect should I attribute to the activities which I found to exist? Does that amount really to the use of the premises as a village green within the meaning of the recent decisions by the House of Lords or not? So far as the fact that the use was across the grassland and that the roadway, to give it that title is now round the perimeter of the grassland, what should I attribute to that? And it seemed to me that the case was well spiked by matters which required the arguments of Mr Blohm and Mr Din on the opposite sides.

12. Therefore it seems to me that this is a case which the local authority were perfectly entitled to defend and the fact that they have lost simply indicates that they fall into the 50% of people who go to court and do not win. I do not see that as signifying that they have to be made subject to a more onerous burden in costs than is the normal rule.
