the LASPOA offence without considering its civil law ramifications. More fundamentally, *Best* leaves one wondering whether the new LASPOA offence is justified at all. It was intended to offer a more powerful means by which homeowners could enforce their civil law rights against trespassing squatters. But why enact criminal legislation, with the complications that follow, to plug perceived gaps in the civil law's remedial responses to trespassing?

AMY GOYMOUR

PRESCRIPTIVE ACQUISITION OF RIGHTS OVER PUBLIC AUTHORITY LAND

THE "tripartite" test for the prescriptive acquisition of rights over land, derived from the Roman law of servitudes, has long been a source of confusion. The crucial distinction that underlies it is between use of land that is "as [if] of right" – *nec vi, nec clam, nec precario* (without force, stealth, or licence) – and use that is "by right" – that is, with a licence. This distinction has been affirmed by the Supreme Court in *R. (Barkas) v North Yorkshire County Council & Another* [2014] UKSC 31. The court held that use of land pursuant to a statutory entitlement is necessarily use "by right", and so was not "as of right".

North Yorkshire Council had since 1951 laid out the contested land as a "recreation ground" under s. 80(1) of the Housing Act 1936, substantially re-enacted by s. 12(1) of the Housing Act 1985. In 2007, Helredale Neighbourhood Council – a local residents' association – applied to register the land as a "town or village green". Such registration would result in the public having a permanent and irrevocable right to use the land for recreation. The association claimed that, in accordance with s. 15(2)(a) of the Commons Act 2006, "a significant number of the inhabitants of [the] locality ... have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years". An independent inspector advised that the use of the land had in fact been "by right", and the Council accordingly refused the application. Ms. Barkas, a member of the residents' association, unsuccessfully sought judicial review of that decision. In rejecting Ms. Barkas's appeal, Lords Neuberger and Carnwath, giving the two reasoned judgments of the Supreme Court, provide considerable clarity to the law of prescription.

The central issue in *Barkas* was the meaning of the phrase "as of right" in the 2006 Act. It was established in *R. v Oxfordshire City Council & Another, ex p. Sunningwell Parish Council* [2000] 1 A.C. 235 that "as of right" contains the same requirements – *nec vi, nec clam, nec precario* – in the context of village greens as for the prescriptive acquisition of easements. In that case, Lord Hoffman provided a justification for these requirements:

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> each constitute[s] a reason why it would not [be] reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited [or revocable] period.

The final requirement, *nec precario*, exists because the law of prescription seeks to match a land user's legal position with the factual status quo. This is relevant only where the use has been without a licence, but without opposition from the landowner. If there is in fact a licence, the use is pursuant to that licence, and the legal and de facto positions are not in tension. Applying this to the facts of *Barkas*, their Lordships held that the 1985 Act created a licence in public law, because members of the public had a right to use the land, enforceable in the Administrative Court. As Lord Neuberger said at para. [24], "It would not merely be understandable why the local authority had not objected to the public use; it would be positively inconsistent with their allocation decision if they had done so". Consequently, the public's use of the land was not "as of right".

The reasoning set out above has three consequences. First, the Council did not need to take additional steps to communicate its decision to set out the land pursuant to the 1985 Act; once an enforceable right exists, no further (private law) licence is required to confirm that right. Second, their Lordships rejected Ms. Barkas's argument that a public law licence can only arise from those statutes creating a formal trust of land for public use. The position is therefore rightly the same in public and private law. A licence can be granted without the creation of a trust in favour of the licensee. Third, as Lord Carnwath emphasised at para. [57], a "local recreational ground . . . within the scope of the [2006] Act [is] conceptually different from land held by public authorities for general recreational use". Only the former (or a similar provision) gives the public a right to be on the land. Otherwise, members of the public using the land will either do so by (private law) licence, if one is granted, or as trespassers. We can therefore dismiss the argument made by Bowes in (2013) 5 J.P.L. 495 that the Court of Appeal's decision in *Barkas* ([2012] EWCA Civ 1373) added a "normative gloss" on the law by creating an exemption for publicly owned land from the law of prescription.

In rejecting the appeal in *Barkas*, the Supreme Court overturned the decision of the House of Lords in *R. (Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 A.C. 889. The facts of *Beresford* are substantially similar to *Barkas*, except that, in *Beresford*, the land had been held pursuant to s. 10 of the Open Spaces Act 1906. Counsels' argument in that case had concerned the existence of an implied (private law) licence, but their Lordships considered that the effect of the statutory regime might be important. Their Lordships invited further submissions on that

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point, though the House eventually decided against the claimant on both grounds. It was clearly important to some of their Lordships in *Beresford* that, under the 1906 Act, the land had been held for "no specific purpose", and had not been formally appropriated as open space. It was on this basis that *Beresford* was distinguished in *Barkas*, both by Sullivan L.J. in the Court of Appeal and by Lord Neuberger in the Supreme Court.

Distinguishing *Beresford* on these grounds would have been sufficient to dismiss the appeal in *Barkas*, but the law would have been left in an unsatisfactory state. The existence of a public law licence would then have depended on whether the relevant statutory regime formally appropriated the land for a specific purpose. As a result, their Lordships' decision to "grasp the nettle", as Lord Neuberger said, and overturn *Beresford* altogether, is to be welcomed. A second consequence of this decision is the rejection of Lord Scott's suggestion in *Beresford* that "an implied permission is [not] necessarily inconsistent with the use being as of right". The implication of this view is that there might exist in law an intermediate category between a licensee and a trespasser, referred to in *Beresford* as a "tolerated trespasser". Those in this category would have a statutory right to use the land, but their use would be *nec precario* for the purposes of prescription. This interpretation of *Beresford* was relied upon by counsel for Ms. Barkas, and was rightly dismissed by the Supreme Court. As Lord Neuberger noted, "third parties on the land either have a right to be there and to do what they are doing, or they do not .... A 'tolerated trespasser' is still a trespasser".

Though the decision in *Barkas* provides a welcome clarity to the law of prescription, one point of uncertainty persists. Lord Carnwath suggested that the tripartite test "is not always the whole story ... but rather a means to arrive at the appropriate inference to be drawn from the circumstances of the case as a whole". Consequently, where there is "room for ambiguity, the user by the inhabitants must in my view be such as to make clear, not only that a public right is being asserted, but the nature of that right". This indicates an additional requirement of "assertiveness" as against the landowner, in certain cases. Lord Carnwath's scepticism about the sufficiency of the tripartite test is misplaced. Of course, for a right to arise by prescription, some minimum level of continuous use is required. In the case of village greens, the 2006 Act requires that "a significant number" of inhabitants have used the land for a period of 20 years up to the time of application. Similarly, in the case of easements, Lord Neuberger in *Coventry v Lawrence* [2014] UKSC 13; [2014] 2 W.L.R. 433 has said that "time does not run for the purposes of prescription unless the activities of the owner (or occupier) of putative dominant land can be objected to by the owner of the putative servant land". These requirements ensure that an attempt to acquire a right by prescription will only succeed if

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the applicant's use of the land is of the same character as the right being claimed. To add to these requirements, and to the tripartite test, an additional criterion of "assertiveness" is unhelpful. It was in fact rejected by the Supreme Court in *R. (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11; [2010] 2 A.C. 70. The conduct of the applicant, so long as it is lawful, should remain irrelevant to her claim to a prescriptive right. We should therefore welcome Lord Neuberger's "doubt" about Lord Carnwath's suggestion.

AARON TAYLOR

PROPRIETARY REMEDIES FOR BREACH OF FIDUCIARY DUTY

FHR bought a long lease for €211.5 million. Cedar Capital conducted the negotiations on FHR's behalf, but also received a €10 million commission from the vendor. On becoming aware of this commission, FHR sought to recover it from Cedar Capital. As its negotiating agent, Cedar Capital owed fiduciary duties to FHR, and had not obtained FHR's fully informed consent to the commission. Cedar Capital therefore had to account to FHR for the commission. However, applying the Court of Appeal's decision in *Sinclair Investments (UK) Ltd. v Versailles Trade Finance Ltd.* [2011] EWCA Civ 347, [2012] Ch. 453, Simon J. held that the remedy was purely personal; FHR could not assert a proprietary constructive trust over the €10 million: *FHR European Ventures LLP v Mankarious* [2011] EWHC 2999 (Ch). The Court of Appeal allowed an appeal as to remedy, distinguishing the facts from those in *Sinclair v Versailles*, but also casting some doubt on the correctness of that decision: [2013] EWCA Civ 17, [2014] Ch. 1. The Supreme Court was thus required to pass judgment on the voluminous debate as to whether English law should follow *Lister & Co. v Stubbs* (1890) 45 Ch.D. 1, or *Attorney-General for Hong Kong v Reid* [1994] 1 A.C. 324.

Delivering judgment less than a month after argument, the Supreme Court has now held that *Lister v Stubbs* was mistakenly decided and overruled *Sinclair v Versailles*, holding that "where an agent acquires a benefit which came to his notice as a result of his fiduciary position, or pursuant to an opportunity which results from his fiduciary position, the equitable rule ('the rule') is that he is to be treated as having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal": *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2014] 3 W.L.R. 535 at [7]. The Court of Appeal had, therefore, correctly found that FHR was entitled to a proprietary constructive trust over the €10 million.

The authorities on this issue had been, to say the least, confused: "it is not possible to identify any plainly right or plainly wrong answer ... as a matter of pure legal authority": *FHR*, at para. [32]. Some judgments, of

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