arbitration defeats the expectations of those who trust in the protective measures available at the seat of arbitration. To rely upon a court's Article II(3) power to insist on arbitration assumes that such intervention is timely, and ignores the prejudice caused merely by launching pre-emptive proceedings. If unchecked, such proceedings may also distort the arbitral process, altering the balance of advantage, and gifting a tactical victory to the pre-empting party. More significantly, they may inhibit resort to arbitration altogether if the pre-empted party exhausts its resources by defending them, so that the dispute is never arbitrated, effectively neutralising the arbitration agreement. Certainly, *Allianz* shuns the principle (arguably implicit in Article 1(2)(d)) that an agreement to arbitrate represents a legitimate waiver by the parties of the rules of the Brussels Regulation.

RICHARD FENTIMAN

A SET-BACK FOR THE "VILLAGE GREEN INDUSTRY"?

THE "village green industry", so called by some because new town and village green applications have become a widely used weapon in the armoury of the anti-development movement where the planning system has failed to prevent the advance of the bulldozers, has been dealt a further blow by the recent decision of the Court of Appeal in *R (on the application of Kevin Lewis)* v. *Redcar and Cleveland Borough Council* [2009] EWCA Civ 3 ("*Redcar*"). The Court of Appeal upheld the decision of the High Court, ruling that the criteria for registration had not been satisfied.

This case concerned Coatham Common, land owned by Redcar and Cleveland Borough Council, which had been occupied and used by Cleveland Golf Club for many decades until 2002. The owner of Coatham Common had entered into a development partnership with the second respondent, Persimmon Homes (Teeside) Ltd., and planning permission to develop Coatham Common, together with other adjoining land, was granted in May 2007. In June 2007 an application was submitted to Redcar and Cleveland Borough Council, as registration authority, to register Coatham Common as a new green pursuant to section 15 of the Commons Act 2006 ("the 2006 Act"). This provision requires that for land to qualify for registration it must have been used by a significant number of the inhabitants of the locality as of right for lawful sports and pastimes for at least 20 years, the key phrase for the purposes of this comment being "as of right".

The proper interpretation of "as of right" has caused much confusion. It is universally accepted that user as of right must be *nec vi, nec clam, nec precario*. However, the courts have resisted any urge they

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might have had to simply leave it at that. In *R* v. *Suffolk County Council ex parte Steed* (1998) 75 P. & C.R. 102 (CA) it was held that for use to be as of right it was necessary for the users to believe that they had a legal right to use the land for recreation; a subjective test. The House of Lords in *R* v. *Oxfordshire County Council ex p. Sunningwell Parish Council* [2000] 1 A.C. 335 disagreed. Lord Hoffmann said it was wrong to require the users to have an honest belief in the legal right to use the land, but it was, however, necessary to consider how the user appeared to the landowner. This illustrates that user as of right is not limited purely to user which is *nec vi, nec clam, nec precario*.

The interpretation of "as of right" was revisited by the House of Lords in *R (Beresford)* v. *Sunderland City Council* [2004] 1 A.C. 889. Here it was established that as well as being *nec vi, nec clam, nec precario*, user as of right had to be trespassory. This may appear to be unnecessary given that use without permission ["*non precario*"] would generally appear to be trespassory anyway. However, the distinction between express permission to use land and facilitation and encouragement to use land can be relatively subtle, as is evident on the facts of *Beresford*, yet the nature of the use may as a consequence of the distinction be at opposite ends of the permissive spectrum.

As if this were not all complicated enough Sullivan J., in *R (on the application of Laing Homes Ltd.)* v. *Buckinghamshire County Council* [2004] 1 P. & C.R. 573 ("*Laing Homes*"), introduced a further qualification to the test for user as of right. He held that if the recreational users deferred to the landowner's own use of the land, use would not be as of right because it would not have the appearance of user as of right in the eyes of the landowner. In *Oxfordshire County Council* v. *Oxford City Council* [2006] 2 A.C. 674 ("*Oxfordshire*") Lord Hoffmann acknowledged in *obiter* comments that "the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so 'as of right'", seemingly accepting the relevance of Sullivan J.'s deference test.

The question of deference arose again in *Redcar*. The recreational users admitted that they would wait for play to pass before crossing the golf course. It was found as a matter of fact that, despite there being extensive use by non-golfers, the recreational users "overwhelmingly deferred" to use by the golfers. At first instance in *Redcar* [2008] EWHC 1813 (Admin.) Sullivan J. regarded Lord Hoffmann's dicta in *Oxfordshire* as an explicit endorsement of the relevance of deference to the landowner's use which he had introduced in *Laing Homes*. On appeal Dyson L.J., giving the leading judgment, stated that whilst he did not consider there to be a "principle of deference", such a principle finding no expression in section 15 of the 2006 Act, he did consider deference to be "an aspect of the amount or manner of the use [of the

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land by the recreational users which] may be relevant to a determination of whether user has been sufficient to bring home to the reasonable owner that the local inhabitants have been asserting a right to use the land … It is a question of fact and degree in every case".

This latest judgment concerned with the registration of new greens clearly tells us that deference by the recreational users to the owner's use is material to whether use is as of right. It also tells us that deference will be fatal to an application to register a new green where such deference prevents a reasonable landowner from recognising that the recreational users are using his land in such a manner as to give the impression of asserting a legal right to use the land. What it does not, and cannot tell us is when that threshold is met.

The test for determining whether user is as of right becomes ever more complicated. The ability to predict whether the test will be satisfied is, consequently, diminished. The likelihood of further litigation is, therefore, more or less inevitable.

ROWENA MEAGER

THE PECULIAR FINALITY OF ADOPTION

IN *Webster (The Parents)* v. *Norfolk County Council* [2009] EWCA Civ 59, three children of Mr and Mrs Webster had been removed from them under care orders on the basis that one or both of them had non-accidentally injured their second child, B. Adoption orders were made in relation to the children under the Adoption Act 1976. There had been unequivocal medical evidence to the effect that the type of injuries sustained by B were inconsistent with ordinary childhood accidents. There was a high probability that they were caused by forceful twisting or pulling of the limbs. But there was also a highly unusual feature, namely that B, who was nearly two, had never eaten solid food and for the previous nine months had been fed only soya milk. Over a year after the adoption orders were made, the parents obtained powerful contradictory medical evidence that "it was highly likely if not inevitable" that child B suffered from scurvy and that the pattern of bone disorder was "the classical picture seen in scurvy but not that of non-accidental injury". Faced with this new evidence the local authority quickly withdrew care proceedings in relation to the Websters' fourth child. The parents applied to set aside all the previous orders in relation to their other children on the basis that those orders had been founded on a mistake and had resulted in a serious miscarriage of justice.

The Court of Appeal refused permission on two grounds. First, even if there had been a miscarriage of justice, which was not

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