Neutral Citation Number: [2018] EWCA Civ 2172

Case No: A3/2017/1892

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, CHANCERY DIVISION
Mr Justice Barling
HC-2014-001550

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 October 2018

Before :

LORD JUSTICE LEWISON
LORD JUSTICE LINDBLOM
and
LORD JUSTICE DAVID RICHARDS

- -

Between :

	T W LOGISTICS LIMITED	**Appellant**
	- and –	
	(1) ESSEX COUNTY COUNCIL **(2) IAN JAMES TUCKER**	**Respondents**

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MR GEORGE LAURENCE QC (instructed by **Wilkin Chapman LLP**) for the **Appellant**
MR ANDREW SHARLAND QC (instructed by **Essex Legal Services**) for the **1st Respondent**
MR RICHARD WALD (instructed by **Birketts LLP)** for the **2nd Respondent**

Hearing dates : 17th – 19th July 2018

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Judgment Approved

Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether part of the working port of Mistley has been properly registered as a town or village green (a "TVG"). Barling J held that it was. His judgment is at [2017] EWHC 185 (Ch), [2017] Ch. 310.

2. The modern system of the registration of TVGs has its origin in a report of the Royal Commission on Common Land presented to Parliament in 1958. They proposed a definition which included:

> "… in a rural parish any unenclosed open space which is wholly

> or mainly surrounded by houses or their curtilages and which has been continuously and openly used by the inhabitants for all or any such purposes [i.e. lawful sports and pastimes] during a period of at least 20 years without protest or permission from the owner of the fee simple…"

3. As Lord Hoffmann commented in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674 at [15]:

> "The commission obviously felt some concern about allowing any land whatever to become a deemed village green after 20 years use by local inhabitants for sports and pastimes."

4. However, Parliament did not adopt this definition. Instead both in the Commons Registration Act 1965, and now in the current legislation contained in section 15 of the Commons Act 2006, the legislation provides for a much more expansive definition. Section 15 (2)(a) and 15 (3)(a) and 15 (4)(a) include in the definition any land on which:

> "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."

5. The width of the definition may lead to "a visceral unease at the lack of resemblance between the land registered [as a TVG] and the "traditional" village green": *Oxfordshire* at [37]. However, the consequence of the definition is that there have been registered as TVGs: rocks, car parks, golf courses, school playgrounds, a quarry and scrubland. A sustained attempt was made to register a tidal beach forming part of a port operated by statutory undertakers as a TVG; and the attempt failed only on technical grounds. Parliament has had a number of opportunities to change the definition but has not done so in any respect material to this appeal. +

6. I note in passing that it is not entirely easy to find a positive duty on a registration authority to register as a TVG land which falls within section 15. The authority has a duty to keep a register under section 1 of the 2006 Act. Section 3 (2) provides that the land registered as a TVG in the register "is to be" such land as "may be so registered in it under this Act". That is probably the source of the duty; but at all events Mr Lawrence QC, for TW Logistics Ltd ("TWL"), did not contend that there was no such duty.

The facts

7. I can take the essential facts from the judge's careful and comprehensive judgment.

8. Mistley is a small town in Essex, lying on the southern bank of the tidal estuary of the River Stour, upstream of Felixstowe. It has been a port for several centuries and remains one to this day. The Port of Mistley is owned in part, and operated, by TWL. It is a private port. TWL is not a statutory undertaker; and has no statutory obligations as a port operator. Both inward and outward bound trade passes through it. Cargoes, typically of grain, fertiliser, bricks, aluminium, or zinc, are brought to and taken from Mistley by HGVs. The vessels serving the port have become larger over the last 30 years or so.

During 2007 about 90 vessels docked at Mistley to unload or load cargo or both. The average cargo in that year was about 1,900 tonnes per vessel, whereas in 1977 432 ships docked, each carrying on average 256 tonnes. Overall tonnage passing through the port peaked at 445,000 tonnes in 1986. In 2007 the corresponding figure was 173,552.

9. In general terms the port consists of an elongated frontage to the Stour estuary, running on roughly an east/west axis, with port storage areas including both warehouses and open storage in certain locations. At the west end of the port is an area which includes the main warehouse and a fenced storage area. These are known respectively as the Stockdale warehouse and the Stockdale compound. Running roughly along the south side of the Stockdale area is the Port Road; which is the main access route for HGVs and other port traffic from the town of Mistley.

10. The land which is registered as a TVG is part of an area of the port known variously as Thorn Quay or Allen's Quay. It is situated immediately to the east of the Stockdale compound, and includes a stretch of the water frontage. On the eastern boundary of the TVG is a warehouse known as the Thorn Quay warehouse ("the TQW") and the beginning of a section of dock frontage known as the Eastern Transit. The Eastern Transit is so called because it is the route which HGVs and other vehicles must take in order to access those parts of the port which lie to the east of the TQW, including in particular Baltic Quay. The latter is the area of the port where virtually all the ships which call at Mistley now tie up to unload and load, because the larger vessels currently in use require the deeper water available there. Cargoes are either stored on Baltic Quay until shipped or collected by HGV; or are moved (usually by the port's own unlicensed "dock runners") to the Stockdale warehouse or compound to await collection by HGV or onward transit by sea.

11. There is also some container traffic through the port. Containers are brought by HGVs from Felixstowe and unloaded in the Stockdale warehouse or compound. They are later collected by HGVs. In both cases the HGVs enter the port area via the Port Road, and leave the same way, sometimes using the TVG to turn round in when there is insufficient space in the Stockdale area.

12. Running alongside part of the south western boundary of the TVG is a block of buildings comprising both residential and industrial units. This block is called the Grapevine (after a pub that was once there). Between the Grapevine and the TGV runs a short stretch of public highway. HGVs and other vehicles use these three stretches of road, together with the TVG, as the main route through the port area, from the Stockdale warehouse and compound in the west to the Baltic area in the east. Although there is apparently no formal agreement or right, it is possible that the cars of Grapevine residents and of their visitors, parked outside their properties, are parked wholly or partly on that public highway and/or on the part of the TVG adjoining it. To the south, on the other side of the Grapevine, is the High Street, which is the main street of Mistley.

13. Following a non-statutory inquiry the inspector appointed by Essex CC as registration authority found that the land now registered as a TVG had been used as of right for lawful sports and pastimes by a significant number of local people. The land so used included both the edge of the quay and the quay itself. The main recreational activity which the inspector found to have been established was informal walking or wandering, with or without dogs, and not on a fixed route, and people often standing and having a

chat with others in association with such wanderings. He also found that there had been other activities such as informal games and social activities; and also crabbing at the water's edge. In addition some people painted or drew, although that was a minor part of the overall activities. Although the inspector found that there had also been swan feeding, the judge decided that that activity took place with the permission of TWL; and so was excluded from consideration.

14. Concurrently with these sports and pastimes, the inspector found that there had been port-related commercial activities throughout the relevant period (with the possible exception of the very edge of the quayside near the bollards located there, and even that area was, he found, used in the earlier part of the period for tying up commercial "lash" barges). These activities consisted of the passage of dock-related commercial vehicles, including HGVs and forklift trucks, also, to a lesser extent, the loading and unloading of commercial vehicles, and occasional temporary storage of materials. In addition, he noted that other motor vehicles, by no means always port-related, parked there.

15. The two types of activity had co-existed for very many years including throughout the relevant 20-year period, and local people from time to time sensibly got out of the way of a passing lorry or forklift truck.

16. The inspector was alive to the differences between the TVG in this case and the traditional perception of a village green. However, he said at para 16.142 of his report:

> "As it happens, Allen's Quay at Mistley … could in my view be seen as having the slight air about it of a town or village "square" (albeit in this case on the one side open to the water of the estuary), rather than looking like a classic "green". I mean this in the sense of its being a hard-surfaced, multi-purpose publicly accessible area in or near the centre of a settlement, and with buildings around at least some of the sides."

The judgment

17. TWL began these proceedings under section 14 of the 1965 Act challenging the registration of the TVG on a number of grounds. In a comprehensive and meticulous judgment Barling J dismissed the challenge on all the grounds advanced. He made a number of findings of fact which are relevant to the grounds of appeal.

18. At [157] he said:

> "It is established beyond doubt that throughout the qualifying period there has often been very little if any commercial movement on the Land for substantial periods, particularly (but by no means exclusively) at weekends and in the evenings. Further, my assessment based on the totality of the evidence put before me is that even during busier periods the commercial activity has rarely if ever been so intense as to preclude or discourage locals from visiting Allen's Quay to pursue their pastimes. I consider the virtually continuous passage of commercial vehicles across the Land, … as unlikely in fact to

have occurred other than perhaps in short bursts on relatively infrequent occasions."

19. At [158] he said:

> "In any event, the overwhelmingly convincing picture painted by the inhabitants' evidence is one of sensible co-existence, with generally courteous conduct and give and take on both sides. The case law makes clear that such give and take can be consistent with use "as of right". In my view there was no question of the exclusion or displacement of recreational pastimes by reason of the commercial activity that was taking place on Allen's Quay. The fact that pedestrians got out of their way when lorries passed over the Land, or that goods were stored or lorries parked on the Land for relatively short periods, does not amount to displacement or exclusion of the relevant pastimes engaged in on Allen's Quay, such as to preclude the continuity or quality of use required by the relevant principles of law. Further, TWL has not suggested that commercial activities on Allen's Quay have been adversely affected by the recreational activities of the public."

20. At [159] he said:

> "It is to be noted that many witnesses in the present case stated that they did not perceive there to be a significant risk in their or their children's use of Allen's Quay. There was no evidence of any member of the public ever having been injured by reason of commercial activity on Allen's Quay."

21. He concluded on this point at [160]:

> "For these reasons, … I do not accept … that the recreational uses of the Land in the qualifying period were displaced or excluded by, or incompatible with, the commercial activity carried on there. I find on the evidence that there was *in fact* sensible and sustained co-existence between the two groups of users." (Original emphasis)

The essential arguments on appeal

22. TWL accepts that there has been co-existence of both recreational and commercial activities on the TVG throughout the 20-year period. However, it argues that that is only the beginning of the inquiry. Registration as a TVG should not be confirmed if any of the following apply:

    i) the effect of registration would be to criminalise the landowner's continuing use of the TVG for the same commercial purposes as took place throughout the 20-year period, and for that reason the recreational use does not have the necessary quality to support the registration;

ii) permission for recreational use can be implied from the interaction of the two uses; or

iii) the two uses are not concurrent but are sequential.

23. Mr Sharland QC for Essex, supported by Mr Wald for Mr Tucker who was the applicant for registration, argues that:

i) Potential criminalisation is not of itself a bar to registration of a TVG; and

ii) On the facts found by the judge there was no implied permission or sequential use.

Continuing use after registration as a TVG

24. In principle, although registration of a TVG curtails many potential uses of the land so registered, the owner of the soil of a TVG is entitled to continue his pre-existing activities as long as they do not interfere unduly with the recreational rights to which the registration gives rise. Likewise, those entitled to exercise recreational rights must do so in a lawful way.

25. This has been the position at common law long before the passing of the 1965 Act. In *Fitch v Fitch* (1797) 2 Esp 543 the defendant was entitled to exercise customary rights of recreation over land at Steeple Bumpstead. The plaintiff had let the land run to grass, which he had then mowed for hay. He asserted that the defendants had trampled down the grass, thrown the hay about, and mixed gravel through it, so as to render it of no value. Heath J directed the jury that:

> "The rights of both parties are distinct, and may exist together. If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded, which is a right to come into the close to use it in the exercise of any lawful games or pastimes, and are thereby trespassers."

26. On the facts the jury found for the plaintiff. Similarly, in *Bell v Wardell* (1740) Willes 202 where there was a customary right to ride over arable land at seasonable times, those entitled to the right were not entitled to exercise it when the corn was growing.

27. Following the registration of a TVG, rights of recreation are not limited to the precise recreational activities on which the registration was based. In the *Oxfordshire* case Lord Hoffmann said at [50]:

> "… land registered as a town or village green can be used generally for sports and pastimes. It seems to me that Parliament must have thought that if the land had to be kept available for one form of recreation, it would not matter a great deal to the owner

whether it was used for others as well."

28. This view of the law was confirmed by the Supreme Court in *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11, [2010] 2 AC 70. However, those enlarged recreational rights must be exercised in accordance with the principle of "give and take": Lord Walker at [48]; Lord Hope at [74] and [75]; Lord Rodger at [84] and Lord Kerr at [115].

29. The principle that the landowner can continue to use the land after registration as a TVG in the same way as he used it before registration finds its strongest expression in the judgment of Lord Brown in *Lewis*:

> "[100] … Indeed, I may as well say at once that, were it the law that, upon registration, the owner's continuing right to use his land as he has been doing becomes subordinated to the locals' rights to use the entirety of the land for whatever lawful sports and pastimes they wish, however incompatibly with the owner continuing in his, I would hold that more is required to be established by the locals merely than use of the land for the stipulated period *nec vi nec clam nec precario*. If, however, as I would prefer to conclude, the effect of registration is rather to entrench the previously assumed rights of the locals, precluding the owner from thereafter diminishing or eliminating such rights but not at the expense of the owner's own continuing entitlement to use the land as he has been doing, then I would hold that no more is needed to justify registration than what, by common consent, is agreed to have been established by the locals in the present case.
>
> [101] This is not merely because in my opinion no other approach would meet the merits of the case. Also it is because, to my mind, on the proper construction of section 15 of the Commons Act 2006, the only consequence of registration of land as a green is that the locals gain the legal right to continue to "indulge" in lawful sports and pastimes upon it (which previously they have done merely as if of right)—no more and no less. To the extent that the owner's own previous use of the land prevented their indulgence in such activities in the past, they remain restricted in their future use of the land. The owner's previous use ex-hypothesi would not have been such as to have prevented the locals from satisfying the requirements for registration of the land as a green. No more should the continuance of the owner's use be regarded as incompatible with the land's future use as a green. Of course, in so far as future use by the locals would not be incompatible with the owner continuing in his previous use of the land, the locals can change, or indeed increase, their use of the land; they are not confined to the same "lawful sports and pastimes", the same recreational use as they had previously enjoyed. But they cannot disturb the owner so long as he wishes only to continue in his own use of the land.
>
> [105] I would, therefore, hold that in this different situation the

owner remains entitled to continue his use of the land as before."

30. It seems to me that Lord Hope took a similar view. At [54] he said that he agreed with Lord Brown's description of the essential issue; and at [78] he said that he agreed with the reasons given by all the other Justices. At [71] he said:

> "… the theme that runs right through all of the law on private and public rights of way and other similar rights is that of an equivalence between the user that is relied on to establish the right on the one hand and the way the right may be exercised once it has been established on the other. …In other words, one looks to the acts that have been acquiesced in. It is those acts, and not their enlargement in a way that makes them more intrusive and objectionable, that he afterwards cannot interfere to stop. This is the basis for the familiar rule that a person who has established by prescriptive use a right to use a way as a footpath cannot, without more, use it as a bridleway or for the passage of vehicles."

31. At [109] Lord Kerr said that he agreed with Lord Brown.

32. I consider, therefore, that the principle of "give and take" enables the landowner to continue to use his land in the way that he did before registration of the TVG, where that use is not incompatible with recreational use.

33. In the *Oxfordshire* case Lord Hoffmann said at [57], commenting on the decision of Sullivan J in *R (Laing Homes Ltd) v Buckinghamshire CC* [2003] EWHC 1578 (Admin), [2004] 1 P & CR 36:

> "But, with respect to the judge, I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purposes of section 22 *if in practice they were not*." (Emphasis added)

34. In *Lewis* at [63] Lord Hope said that Sullivan J was wrong in holding that continued use of the land for the growing, cutting and drying of a hay crop was inconsistent with the effect of registration as a TVG; and made a similar point at [75]. In the light of these observations it seems to me that the *Laing Homes* case has been substantially devalued as an authority.

35. It is true that in *Lewis* Lord Hope at [76] recognised that there may be cases in which recreational uses and the owner's mode of use of his land cannot sensibly co-exist. However, he had said in the preceding paragraph that deference by the public to what the owner does with his land may be taken as an indication that the "two uses can in practice co-exist". Lord Kerr made much the same point at [117] in saying that there should be peaceable co-existence "where it is feasible". It follows, in my judgment, that whether pre-existing use and recreational use are compatible is essentially a question of fact. I note that this was also the view of Dyson LJ in *Lewis* in this court: [2009] EWCA Civ 3, [2009] 1 WLR 1461 at [47].

36. Mr Laurence pointed to a number of factual differences between the land owner's use considered in *Lewis* and TWL's use in the present case. But whether those differences meant that the recreational use was incompatible with TWL's use was a factual evaluation for the judge. The judge found as a fact that the two uses were compatible. An appeal court should not interfere with that careful evaluation.

Is potential criminalisation a bar to registration as a TVG?

37. A number of potential criminal offences are in play under this head. First, section 12 of the Inclosure Act 1857 provides:

> "And 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 inclosure under the said Acts 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 [pay a fine]."

38.

Second, section 29 of the Commons Act 1876 provides:

> "An encroachment on or inclosure 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 than 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 if any person does any act in respect of which he is liable to pay damages or a penalty under section twelve of the Inclosure Act 1857, he may be summarily convicted thereof upon the information of any inhabitant of the parish in which such town or village green or recreation ground is situate, as well as upon the information of such persons as in the said section mentioned."

39. Third, section 34 of the Road Traffic Act 1988 provides:

> "(1) Subject to the provisions of this section, if without lawful authority a person drives a mechanically propelled vehicle—
>
> (a) on to or upon any common land, moorland or land of any other description, not being land forming part of a road, …
>
> he is guilty of an offence."

40. The first two of these provisions have been labelled "the Victorian statutes". TWL does not argue that the potential application of these statutes affects the question whether the recreational use relied on to justify the registration of a TVG was use "as of right". Its argument is that TWL's potential exposure to criminal prosecution means that "things cannot go on as before" compatibly with the principles laid down in *Lewis*. On that basis, the recreational use cannot support the registration. Mr Laurence relied on the statement of Lord Hope in *Lewis* at [71]:

> "… the theme that runs right through all of the law on private and public rights of way and other similar rights is that of an equivalence between the user that is relied on to establish the right on the one hand and the way the right may be exercised once it has been established on the other."

41. Mr Laurence argued that this passage confirms the existence of a "principle of equivalence". Even if use for recreational purposes is use as of right, a claim to registration must fail if equivalence cannot persist after registration.

42. Mr Laurence pointed to the decision of Sullivan J in the *Laing Homes* case. Sullivan J quoted from the then current edition of Gadsden on Commons at 13.07:

> "On principle it must be that the recreational use in such circumstances is subservient to the rights of the owner of the land and the commoners … In the event of conflicting priorities, the original property rights of owners and commoners should prevail. Thus, for example, if the land is traditionally cut for hay, the existence of the recreational use will not allow inhabitants to enter and spoil the hay. On the other hand it also seems, as a matter of principle, that the owners of the land, or rights over the land, may not exercise their rights in such a way as to wilfully inhibit or prevent the rights of recreation."

43. Sullivan J described this as an "eminently sensible approach". However, he went on to say:

> "[63] …Prior to the enactment of the nineteenth-century legislation the two rights could coexist; each right was conditional upon it not being exercised in such a way as to deliberately obstruct the exercise of the other.
>
> [64] Since the enactment of s.12 of the 1857 Act it has not been possible to establish such conditional rights. Rights of common can no longer be created by prescription over a village green: if the grazing is with the owner's permission it will not be "as of right", and if it is "without lawful authority" it will be a criminal offence and thus will not give rise to a prescriptive right: see *Massey v Boulden* …per Simon Brown L.J. at para. [9].
>
> [65] Moreover, s.12 makes any act "to the interruption of the use or enjoyment [of a village green] as a place for exercise and recreation …" a criminal offence. Whatever may be the position in relation to those customary rights which had been established

by 1857, where haymaking and recreational use were able to coexist, no such rights can have been established after the enactment of s.12. If a village green is established, any other use involving acts which would interrupt its use for enjoyment and recreation are effectively prohibited. It is difficult to see how the various steps that are necessary to gather a hay crop (as opposed to mowing grass to keep it short and useable for recreational purposes) could be said not to amount to such an interruption.

[66] Section 29 of the 1876 Act, to which the Inspector did not refer, makes any effective agricultural use of a village green even more difficult. The erection of fencing ("inclosure"), or a shelter or water trough ("any erection") to facilitate the use of the land for grazing would be prohibited, as would ploughing and re-seeding ("disturbance or interference … with the soil"). The occupation of the soil for the purpose of taking a grass crop, involving the steps described by Mr Pennington (above), would not be "with a view to the better enjoyment of [the] village green", and would thus be deemed to be a public nuisance.

[67] Mr George submitted that the words "without lawful authority" in s.12 were a recognition that pre-existing commoners' rights of grazing could continue, and were not an acknowledgement of the landowner's right to graze cattle on a village green. I agree with the Inspector (14.45) that s.12 permits the landowner (or his tenant or licensee) "to place his cattle on the green at least in any manner which is not incompatible with the village green rights". I further agree that "the converse would be that [even after 1857] village green rights can be established in circumstances where there happens to be some lawful, and compatible, grazing …". Given the restrictions imposed by ss.12 and 29 (above) such grazing would have to be very low key indeed (as was the case in the *Sunningwell*) in order to be lawful and compatible with the establishment of village green rights.

[68] For the reasons set out above I do not agree with the Inspector's conclusion that village green rights can be established where land is being used for the growing, and cutting, drying, baling etc. of a hay crop. The Inspector refers at the end of para. 14.45 to "hay cutting". The occupation of land for the purpose of "hay cutting" is not to be equated with grass cutting. The former is no different in principle to the harvesting of any other crop. Insofar as the latter is carried out "with a view to the better enjoyment of [the] village green" as such, it will not be a public nuisance under s.29, nor will it be a criminal offence under s.12. When enacting the definition of "town or village green" in s. 22(1) of the Act, Parliament must be assumed to have been well aware of the restrictions that would be placed upon newly created village greens by the nineteenth-century legislation. Against that background, it would be surprising if Parliament had intended that a level of recreational use which was compatible with the use of the land for agricultural activities (such as taking a hay crop) should suffice for the purposes of s.22(1), since upon registration as a village green (if not after 20 years use) some, if not all, of

> those lawful agricultural activities would become unlawful by virtue of ss.12 and 29. Moreover, the prospect of improving the land agriculturally, by fencing, or by ploughing or re-seeding, would be lost."

44. I note in passing that the particular passage in *Boulden v Massey* to which Sullivan J drew attention at [64] is no longer good law in the light of the decision of the House of Lords in *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519.

45. As I have said, the judge found as a fact that peaceful co-existence was not merely feasible; but had actually existed for over 20 years. So the argument for TWL is not that co-existence is factually impossible, but that it is legally impossible. That, in turn, so the argument goes, means that the quality of recreational use upon which the registration is founded does not have the necessary quality to be capable of hardening into a legal right.

46. This is a novel argument; but that alone does not mean that it is a bad one. The courts have considered the interaction between the Victorian statutes and a TVG on a number of occasions. It is established that they apply to TVGs even if the TVG in question is of modern creation: *Oxfordshire* at [69] (Lord Hoffmann), [114] (Lord Rodger), [124] (Lord Walker).

47. *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2015] UKSC 7, [2015] AC 1547 concerned the potential registration of a tidal beach as a TVG. The case was in fact decided on the basis that the use relied on was permissive, on the proper construction of statutory by-laws applicable to the beach as part of a port operated by statutory undertakers. However, the Victorian statutes did warrant a brief mention in the course of an *obiter* discussion. Lord Neuberger and Lord Hodge said at [95]:

> "The registration of the Beach as a town or village green would make it a criminal offence to damage the green or interrupt its use and enjoyment as a place for exercise and recreation—section 12 of the Inclosure Act 1857…—or to encroach on or interfere with the green— section 29 of the Commons Act 1876…. See the *Oxfordshire* case … per Lord Hoffmann, at para [56]."

48. They did not consider how or to what extent the Victorian statutes might apply. In addition, their conclusion on that part of the appeal was on a much narrower ground; namely that registration as a TVG would have been inconsistent with statutory duties imposed by local Act of Parliament on the port authority which was a statutory undertaker. They described the principle of statutory construction that they applied at [93]:

> "Where there is a conflict between two statutory regimes, some assistance may be obtained from the rule that a general provision does not derogate from a special one (*generalia specialibus non derogant*)…"

49. The particular Acts applicable to the port of Newhaven which were said to conflict with the 2006 Act were the special provisions, whereas the 2006 Act was the general provision. But where a public authority holds land under general powers that principle does not come into play. As they pointed out at [101]:

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

50. The narrowness of the principle was confirmed by this court in *R (Lancashire CC) v Secretary of State for Environment Food and Rural Affairs* [2018] EWCA Civ 721, in which Lindblom LJ confirmed at [9] that after registration as a TVG the land will enjoy the protection of the Victorian statutes. There was no suggestion in that case that the existence of the Victorian statutes in some way downgraded the quality of the recreational use on which the registration depended.

51. If there is any such principle as Mr Laurence advances, it must be found in the words of the Commons Act 2006. But the statute seems to me to be clear. If on the facts a significant number of the inhabitants of any locality have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years, then that land is liable to be registered as a TVG.

52. In addition, the supposed principle is contrary to authority. In *Lewis* the land in question was part of a golf course. The initial inquiry was conducted by Mr Vivian Chapman, who had great experience in TVGs. At [12] Lord Walker quoted part of his report in which Mr Chapman had said:

> "Use of the report land as a golf course by the Cleveland Golf Club would have been in breach of Inclosure Act 1857 section 12 and Commons Act 1876 section 29 if the report land had been a town or village green. It was a use which conflicted with the use of the report land as a place for informal recreation by local people. It was not a use which was with a better view to the enjoyment of the report land as a town or village green."

53. However, the Supreme Court held both that the land was a TVG, and also that the land owner was entitled to carry on his pre-registration use. In so holding they must necessarily have disagreed with Mr Chapman's view of the effect of the Victorian statutes; either because the potential commission of criminal offences was not relevant to the question of registration of a TVG, or because they considered that continuation of pre-registration use would not amount to the commission of an offence.

54. In the *Oxfordshire* case Lord Hoffmann said at [57]:

> "Nor do I 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."

55. Lords Walker and Rodger agreed with Lord Hoffmann. Lord Scott, who gave a partially dissenting speech, was even more emphatic. He said at [99]:

> "Whether the Victorian statutes, to which I have already referred, apply to a class c town or village green has no conceivable relevance to the registration issue."

56. In *Redcar* Lord Walker said at [20]:

> "The proposition that 'as of right' is sufficiently described by the tripartite test *nec vi, nec clam, nec precario* (not by force, nor stealth, nor the licence of the owner) is established by high authority."

57. Lord Hope said at [67]:

> "In the light of that description it is, I think, possible to analyse the structure of section 15(4) in this way. The first question to be addressed is the quality of the user during the 20-year period. It must have been by a significant number of the inhabitants. They must have been indulging in lawful sports and pastimes on the land. The word "lawful" indicates that they must not be such as will be likely to cause injury or damage to the owner's property. …And they must have been doing so "'as of right': that is to say, openly and in the manner that a person rightfully entitled would have used it. If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right…, the owner will be taken to have acquiesced in it—unless he can claim that one of the three vitiating circumstances applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way—either because it has not been asked, or because it has been answered against the owner—that is an end of the matter. There is no third question."

58. Mr Laurence submitted that by describing the "quality of use" as the first question, and use as of right as the second question, Lord Hope was leaving open the possibility that some kinds of use would not have the necessary quality to support registration of a TVG. I do not accept that argument. Lord Hope began by explaining that what he was doing was analysing the structure of section 15 (4), which contains nothing to support the argument. The quality of use to which Lord Hope referred was use for lawful sports and pastimes by a significant number of local inhabitants: no more and no less. He cannot be taken to have opened the way for the argument that Mr Laurence advances, which is not based on anything to be found in the words of the section itself.

59. At [72] Lord Hope added:

> "… while the principle of equivalence tells one in general terms what the land may be used for, there may be some asymmetry as to the manner of its use for that purpose before and after it has been registered. But it does not follow that, where the use for recreation has coexisted with the owner's use of the land during the 20-year period, the relationship of coexistence is ended when registration takes place."

60. Lord Brown made a similar point at [101] in the passage I have already quoted.

61. Lord Kerr said at [116]:

> "The inhabitants must have used it as if of right but that requirement is satisfied if the use has been open in the sense that they have used it as one would expect those who had the right to do so would have used it; that the use of the lands did not take place in secret; and that it was not on foot of permission from the owner. If the use of the lands has taken place in such circumstances, it is unnecessary to inquire further as to whether it would be reasonable for the owner to resist the local inhabitants' use of the lands."

62. In short, once the three criteria have been established, there is no further impediment to registration of a TVG in the absence of some special and conflicting statutory provision. The Victorian statutes are not such a provision. I would therefore dismiss this ground of appeal.

Would continuing use be a criminal offence?

63. In the *Oxfordshire* case Lord Hoffmann said of the Victorian statutes at [57]:

> "But I do not think that either Act was intended to prevent the owner from using the land consistently with the rights of the inhabitants under the principle discussed in *Fitch v Fitch*…. This was accepted by Sullivan J in *R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P & CR 573, 588."

64. Mr Laurence argued that Lord Hoffmann's observations on this point were *obiter*, and that we are not bound by them.

65. In the *Newhaven* case, at the end of his judgment, Lord Carnwath referred to what Lord Hoffmann had said in the *Oxfordshire* case at [57] and added at [139]:

> "It was not necessary in that case to consider the issue which arises here: that is, the potential conflict between the general village green statutes and a more specific statutory regime, such as under the Harbours Acts. It is at least arguable in my view that registration should be confirmed if the necessary use is established, but with the consequence that the 19th century restrictions are imported subject only to the more specific

statutory powers governing the operation of the harbour."

66. It cannot, in my judgment, be plausibly suggested that when the Victorian statutes were passed Parliament at that time contemplated that they would apply to the very different kinds of land that have now been held to be capable of registration as TVGs. But in the *Oxfordshire* case in this court ([2005] EWCA Civ 175, [2006] Ch 43) Carnwath LJ said at [86]:

> "… when one is looking at the combined effect of two statutes, concerned with the same general subject-matter, even if separated by a substantial period of time, the intention of Parliament is not necessarily to be derived solely from the most recent. They must be looked at together."

67. This echoes Lord Mansfield's statement in *R v Loxdale* (1758) 1 Burr 445, 447:

> "Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other."

68. The task of construction, then, is to construe the Victorian statutes as part of the same system as the TVG registration system, as the latter has been interpreted by the courts.

69. Mr Laurence subjected the Victorian statutes to close scrutiny. Contrary to his clients' apparent interests, he contended that the continuation of pre-registration use would amount to a criminal offence. It was an understandable contention in so far as it was intended to persuade us that potential criminalisation of pre-registration activities precludes registration as a TVG. But if we were to reject that argument (as in my judgment we should) it was a high risk strategy, as Lindblom LJ pointed out in argument.

70. Mr Laurence concentrated in particular on the prohibition against "lay[ing] any … matter or other thing thereon". That, he said, would outlaw the placing of pallets on the land. There is a further prohibition on "do[ing] 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." That, he argued, would outlaw the manoeuvring of HGVs or the loading or unloading of cargo. It would not matter that while these activities were being carried out locals stayed away from the land. The mere fact that they might be deterred from exercising their recreational rights would amount to an offence. Likewise, even if the port activities did not in fact amount to an interruption of use, it could amount to an interruption of enjoyment, which was different from use. Enjoyment in this context meant taking pleasure from the amenity of the land and the ability to participate in recreational activities on it.

71. But if I may respectfully say so, I consider that Lord Hoffmann was right. First, the absolutist view taken by Sullivan J in the *Laing Homes* case took as its foundation the denial of the possibility of co-existence between a TVG and the continuation of the landowner's activities. But that view has been comprehensively rejected in *Lewis*. As the Supreme Court held in *Lewis*, it is an intrinsic feature of the scheme for registration of

TVGs that the land owner has the legal right to continue his use of the land as before where, on the facts, that is not incompatible with recreational use. The Victorian statutes should not be construed so as to make illegal that which, under the statutory registration scheme, is legal if another reasonable construction is possible. Second, the purpose of section 12 of the 1857 Act is to provide summary means for preventing "nuisances". The preamble to a legislative provision is a legitimate aid to interpretation; and an interpretation which conflicts with the preamble is suspect: *Matthews v State of Trinidad and Tobago* [2004] UKPC 33, [2005] 1 AC 433 at [46]. Nuisances are of two kinds. Private nuisance is an interference with possession of land or with some other proprietary right. That kind of nuisance is a tort, but it is not a criminal offence. I think it unlikely that the species of nuisance contemplated by section 12 is a nuisance of that kind, except perhaps where the complainant is the owner of the soil himself. The other kind of nuisance is a public nuisance. The commission of a public nuisance is an offence. The nature of the offence is itself a guide to the interpretation of the statute. In *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459 the House of Lords approved the following definition of "public nuisance":

> "A person is guilty of a public nuisance (also known as common nuisance), who (a) *does an act not warranted by law*, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects." (Emphasis added)

72. If, therefore, the act in question is "warranted by law" it will not amount to a public nuisance. In my judgment *Lewis* establishes that where a pre-existing use is compatible with recreational use that leads to registration of a TVG, the land owner has the legal right to continue that use after registration. In other words, the continuation of that use is "warranted by law" and does not amount to the commission of a public nuisance.

73. In addition, it has long been the law that whether an activity amounts to a nuisance is influenced, sometimes heavily influenced, by the place where it takes place. As Thesiger LJ memorably remarked in *Sturges v Bridgman* (1879) 11 Ch D 852, 856 what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey. Moreover, the question whether something amounts to a nuisance is itself controlled by the principle of give and take: *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, 299; *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822 at [5]. Third, the town or village green which is subjected to section 12 is the particular TVG in question. This TVG carries with it the right of the landowner to carry on as he did before registration as a TVG. If he does no more than he used to do he does not, in my opinion, cause "injury" to the TVG in question. In considering whether the land owner interrupts "the use or enjoyment [of the TVG] as a place for exercise and recreation" it is necessary to identify the use which is said to be interrupted. In my judgment what is in question is the use of the particular TVG under consideration. In a case to which the principle of co-existence articulated in *Lewis* applies, that use is the use for which the TVG has *actually* been put as a place for recreation and exercise; namely recreational use compatible with the land owner's pre-registration commercial activities. If the land owner simply carries on doing what he has done before there is no interruption of that use. As Lindblom LJ put it in argument, the "use as a place for recreation" has a qualitative aspect to it: namely use subject to the land owner's right to continue his pre-registration activities. Contrary to Mr Laurence's submission, the word "enjoyment" is not, in my judgment, one which carries with it the concept of deriving pleasure. In the case of a landlord's covenant for quiet enjoyment for example, as Pearson LJ said in *Kenny v Preen* [1963] 1

QB 499, 511:

> "I think the word "enjoy" used in this connection is a translation of the Latin word "fruor" and refers to the exercise and use of the right and having the full benefit of it, rather than to deriving pleasure from it."

74. That is in accordance with normal Victorian legal usage. In addition, parts of the section confine prohibited acts to those done "without lawful authority". The fact that a landowner is continuing a pre-registration use in circumstances in which the law permits him to do so, amounts to lawful authority to continue as before. The only restriction is that he may not do anything which is an unreasonable interference with the recreational rights of the local inhabitants: *Bakewell Management Ltd* at [24]. But I do not consider that, conformably with the principle of "give and take," a continuation of a pre-existing use could be described as unreasonable. Fourth, as the judge pointed out at [183], where uses have co-existed for over 20 years without interrupting the use and enjoyment of the TVG as a place for exercise and recreation, it is hard to see how continuation of that use would do so in the future. If there is ambiguity in section 12 it would be construed in favour of the landowner in accordance with the principle against doubtful penalisation on which Mr Laurence relied.

75. So far as section 29 of the 1876 Act is concerned, much the same considerations apply. The particular parts of that section on which Mr Laurence concentrated were those that forbade any "disturbance [of] or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green". The first point to note is that these prohibitions are all concerned with the soil. I will assume (without deciding) that in this context "soil" simply means ground, and thus can apply to an area of hardstanding. But I cannot see that the port activities that TWL have carried on throughout the qualifying period have disturbed or interfered with the soil itself. On the contrary, that soil has been designed to support the port activities. Mr Laurence submitted that the parking of HGVs or the storage of pallets would amount to "occupation". The evidence about the storage of pallets is, to say the least, thin. The high point was the inspector's conclusion that there was "evidence of occasional temporary storage of materials on parts of the Quay". There is no specific mention of pallets; and no indication of how occasional or temporary the storage was. Nor were we shown any finding either by the inspector or the judge which would support the conclusion that the land was used for prolonged parking, although we were shown some photographs which appeared to show parked HGVs. I cannot regard the inspector's observation as giving rise to any real risk of committing a criminal offence.

76. Section 29 deems certain things to be a "public nuisance". Mr Laurence submitted that this deeming provision overrode the question whether that which was the subject of the deeming provision could amount to a public nuisance. However, the intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further: *Szoma v Secretary of State for Work and Pensions* [2005] UKHL 64, [2006] 1 AC 564 at [25]. I do not consider that the deeming provision can override the legislative purpose of section 29 which was to prevent the commission of public nuisances, or to change the recognised meaning given to that expression.

77. As I have said, where, as here, a land owner is conducting his activities because he has

the lawful right to do so inherent in the statutory scheme for registration of TVGs his activities are warranted by law and do not, in my judgment, amount to public nuisances.

78. It is also the case that none of these activities is prohibited by section 29 if done for the better enjoyment of "such" TVG. The word "such" means the particular TVG. Thus, in my judgment, the "enjoyment" of the TVG is enjoyment of the particular TVG as registered: warts and all. Likewise in the case of section 34 of the 1988 Act the continuation of vehicular use would, in my judgment, be a use for which there was "lawful authority".

79. These conclusions are, in my judgment, consistent with the decision of this court in *Massey v Boulden* [2002] EWCA Civ 1634, [2003] 1 WLR 1792. One of the issues in that case was whether there was a contravention of the Victorian statutes by driving a motor vehicle over land that had been registered as a TVG in 1972. The claimants claimed the right to do so by virtue of a prescriptive right of way. The defendants countered by asserting that the use was in breach of the Victorian statutes and that a prescriptive right could not be founded on criminal activities. Simon Brown LJ rejected the defendants' argument for two reasons. The first need not concern us. The second was that the trial judge was entitled to find that the prescriptive right had been created before the registration of the land as a TVG. Although he did not spell this out, it is necessarily implicit in that reason that the registration did not affect the continued enjoyment of a property right acquired before the date of the registration, and that for that reason the continuation of that enjoyment was not a contravention of the Victorian statutes.

80. Mr Laurence may well be right in his submission that registration of the TVG would prevent TWL from significantly expanding its operations; but that is the inevitable consequence of the registration.

81. I do not accept, as Mr Sharland submitted, that it is necessary to read words into the statutes to achieve this result. Rather, it is a question of construing the words of the statutes in the light of their purpose, and in the knowledge that they must be applied to circumstances that cannot have been contemplated by Parliament at the dates at which they were passed. Nor do I accept, as Mr Laurence submitted, that the construction that I favour creates an exception to the description of the criminal offences that would cast on the putative defendant the burden of proving that he fell within the exception. The burden of proof will remain that of the prosecution to prove beyond reasonable doubt that an offence has been committed.

82. I would therefore reject Mr Laurence's argument under this head.

83. Ms Crail addressed us on possible contraventions of the health and safety legislation. Section 3 of the Health and Safety at Work etc Act 1974 places on an employer:

> "the duty … to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."

84. She also referred us to regulation 17 of the Workplace (Health, Safety and Welfare)

Regulations 1992 which requires every workplace to be organised in such a way that pedestrians and vehicles can circulate in a safe manner.

85. Unlike the Victorian statutes which had no application before the TVG came into existence on registration, the health and safety legislation has always applied to the quay, even during the qualifying period. Although it is fair to say that the Health and Safety Executive has raised the occasional concern there has in fact been no allegation of a contravention, let alone a prosecution. It cannot, in my judgment, be the case that the risk of prosecution under generally applicable legislation, however remote, can of itself be a bar to registration of a TVG. Whether an offence may be committed in the future is a matter of pure speculation.

Implied permission

86. The next question is whether TWL can resist registration of the TVG on the ground that the recreational purpose relied on was permissive. It is not suggested that TWL gave express permission to members of the public to use the land for recreational purposes. What is relied on is on implied permission; and moreover one that arises from the alleged fact that the public was excluded from the land on occasions. The principle on which TWL relies was stated by Lord Bingham in *R (Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 AC 889 at [5]:

> "I can see no objection in principle to the implication of a licence where the facts warrant such an implication. To deny this possibility would, I think, be unduly old-fashioned, formalistic and restrictive. A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use."

87. Nevertheless, it is important to distinguish between permission on the one hand, and toleration or acquiescence on the other. The former requires some overt act on the part of the landowner: *Beresford* at [75] to [81] (Lord Walker). Lord Bingham himself made the same distinction: *Beresford* at [6] and [7]. Even if the use in question is encouraged by the land owner, that will not amount to an implied licence: *Beresford* at [7] (Lord Bingham); [60] (Lord Rodger) and [85] (Lord Walker). Nor can permission be implied from the context of a limited recreational use in competition with the land owner's use: *Lewis* in this court at [59] (Rix LJ).

88.

In *R (Mann) v Somerset County Council* [2012] EWHC B14 (Admin), [2017] 4 WLR 170 the landowner occasionally held a beer festival and funfair on part of the land for which he

charged an entrance fee. Judge Robert Owen QC held that the exclusion of members of the public (except for those who paid the entrance fee) for a few days in the year was sufficient exclusion to demonstrate that public access to the land for the rest of the year was permissive. *Mann* may be contrasted with *R (Cotham School) v Bristol City Council* [2018] EWHC 1022 (Admin) in which the use by the landowner of football and rugby pitches laid out on the land in question (which would have prevented simultaneous use by the public for recreational purposes) was not enough to amount to permissive use at times when the pitches were not so used. Sir Wyn Williams held that, in essence, the principle of co-existence negatives the grant of permission. Likewise in the *Lancashire* case, which concerned land adjacent to a school, the occasional challenge of persons using the land for recreational purposes, and the need to pay for various activities at a school fair, did not amount to permission such as to deprive that use of its character as being use "as of right".

89. The first strand to Mr Laurence's argument is that licence should be inferred from the fact that TWL did not object to locals pursuing recreational activities at times when TWL had no particular need for the land. If a local inhabitant walked his dog along the quayside on a summer's week-end evening when port activities were not being carried on, what, he asked, could be more natural than that a reasonable person in the position of the dog walker would understand that he had the owner's permission to be there? The first answer to Mr Laurence's rhetorical question is, in my judgment, that to accept that argument would erode any distinction between permissive use and tolerated use. The second is that mere inaction in the face of known use cannot, in principle, amount to implied consent: *Beresford* at [7] (Lord Bingham), [59] (Lord Rodger), [79] (Lord Walker). The third is that there are no findings of fact to support an argument that recreational use took place predominantly outside the working hours of the port. Mr Laurence sought support for this argument for Lord Kerr's judgment in *Lewis*. He fastened on [114] in which Lord Kerr said:

> "It is for this reason in particular that I am in emphatic agreement with Lord Hope DPSC in his view that one must focus on the way in which the lands have been used by the inhabitants. Have they used them as if they had the right to use them? This question does not require any examination of whether they believed that they had the right. That is irrelevant. The question is whether they acted in a way that was comparable to the exercise of an existing right? Posed in that way, one can understand why the Court of Appeal considered that the examination of the relevant question partook of an inquiry as to the outward appearance created by the use of the lands by the inhabitants. On that basis also one can recognise the force of Mr Laurence QC's argument that it was necessary to show not only that the lands had been used *nec vi, nec clam, nec precario* but also that it was reasonable to expect the landowner to resist the use of the land by the local inhabitants."

90. Mr Laurence submitted that the force of his argument, as recognised by Lord Kerr, remained unimpaired. But that is to overlook the immediately following part of Lord Kerr's judgment. In the final part of paragraph [114] Lord Kerr pointed out that:

> "The essential underpinning of both these assertions, however, was the view that the registration of the lands as a village or town green had the inexorable effect of enlargement of the inhabitants'

> rights and the commensurate diminution of the right of the owner to maintain his pre-registration level of use, if that interfered with the inhabitants' extended use of the lands."

91. At [115] he then explained why the essential underpinning was wrong:

> "For the reasons that Lord Hope DPSC and Lord Walker JSC have given, the view that this was the effect of the relevant authorities in this area may now be discounted…. Where the lands have been used by both the inhabitants and the owner over the pre-registration period, the breadth of the historical user will be, if not exactly equivalent to, at least approximate to that which will accrue after registration."

92. Accordingly, in my judgment, far from supporting Mr Laurence's argument Lord Kerr's judgment contradicts it.

93. The argument that the recreational use on the one hand and the commercial use on the other were sequential is a further strand to this argument. If there were periods when the local inhabitants were excluded from the land in consequence of TWL's commercial activities, then Mr Laurence argued that it should be inferred that they were permitted to use the land when it was not needed for commercial activities. It was not possible to register a TVG on land that was available for recreational use on a part time basis. Mr Laurence argued that temporary exclusion of the locals from part of the land even for a short time (such as exclusion attributable to an HGV loading or unloading, or the storage of pallets on the quayside) was sufficient to communicate permission to the locals to use the remainder of the land for recreational purposes.

94. In my judgment one must be careful about elevating this to a point of principle. As Lord Hope explained in *Lewis* at [76]:

> "But it would be wrong to assume, as the inspector did in this case, that deference to the owner's activities, even if it is as he put it overwhelming, is inconsistent with the assertion by the public to use of the land as of right for lawful sports and pastimes. It is simply attributable to an acceptance that *where two or more rights coexist over the same land there may be occasions when they cannot practically be enjoyed simultaneously*." (Emphasis added)

95. Moreover, even if it were a point of principle, it would fall foul of what Lord Walker said in *Lewis* at [28]:

> "Taking a single hay crop from a meadow is a low-level agricultural activity compatible with recreational use for the late summer and from then until next spring. *Fitch v Fitch* (1797) 2 Esp 543 is venerable authority for that."

96. In other words, recreational use for part of the year will suffice. It was an example of conduct which he himself had described in the preceding paragraph as a case of:

> "successive periods during which recreational users are first excluded and then *tolerated* as the owner decides. An example would be a fenced field used for intensive grazing for nine months of the year, but left open for three months when the animals were indoors for the worst of the winter." (Emphasis added)

97. Lord Walker chose his words with care. In the context of the acquisition of prescriptive rights toleration is the antithesis of permission.

98. The main difficulty that this argument faces, however, lies in the judge's findings of fact. First is his finding at [157] that:

> "even during busier periods the commercial activity has rarely if ever been so intense as to preclude or discourage locals from visiting Allen's Quay to pursue their pastimes."

99. Second is his finding at [106]:

> "… there is on any view a body of evidence before me indicating that local inhabitants did not consider their recreational use of the Land to be impeded in a significant way by the transit or parking of HGVs and other dock transport, or by the temporary storage of goods thereon. It seems to me that the situation is very far from the kind of exclusion to which Lord Bingham was referring in *Beresford's* case [2004] 1 AC 889, which sends an unequivocal message to users that the owner is regulating access to and use of his land. It is much closer to the *Lewis v Redcar* [2010] 2 AC 70 position, where walkers paused while golfers took their shots. In any event, I do not see how, on the facts of this case, by simply continuing their commercial activities the land owners could be said to be communicating to locals their permission for recreational pastimes to take place."

100. Although Mr Laurence argues that the factual situation is closer to *Mann* than to *Redcar*, that was a factual evaluation for the judge to make. TWL have not been granted permission to challenge the judge's factual conclusions; and I can see no legal error which underlies his evaluation.

101. I would reject this ground of appeal also.

Result

102. For these reasons I would dismiss the appeal.

Lord Justice Lindblom:

103. I agree entirely with the reasoning and conclusions of Lewison L.J., and I too would dismiss the appeal. It is only for the sake of emphasis that I add these few words of my

own.

104. Barling J. spoke (in paragraph 158 of his judgment) of the "sensible co-existence", between TW Logistics' commercial use of the land and its recreational use by local inhabitants, "with generally courteous conduct and give and take on both sides". As Lewison L.J. has pointed out, this conclusion recalls the principle of "give and take" that was acknowledged – or effectively so – in the judgments of Lord Walker (at paragraph 48), Lord Hope (at paragraphs 74 and 75), Lord Rodger (at paragraph 84), Lord Brown (at paragraphs 100, 101 and 105) and Lord Kerr (at paragraph 115) in *Lewis*, and the notion of "equivalence" and "the relationship of coexistence" to which Lord Hope also referred in that case (at paragraph 71).

104. I see a clear connection here with the observation of Lord Carnwath in *Newhaven Port and Properties* (at paragraph 139 of his judgment) that "[it] is at least arguable in my view that registration should be confirmed if the necessary use is established, but with the consequence that the 19th century restrictions are imported subject only to the more specific statutory powers governing the operation of the harbour". That observation was made obiter, but not, as I read it, in dissent from the analysis of Lord Neuberger and Lord Hodge on which the outcome of the appeal in that case depended.

105. Lewison L.J.'s conclusions here are, I think, a true reflection of what Lord Carnwath said in *Newhaven Port and Properties*. Like him, I do not construe the "Victorian statutes" as rendering criminal the landowner's continued use of his land compatibly with such recreational use by local inhabitants as has been found to satisfy the requirements for its registration as a town or village green. There is no reason in principle to think that, upon registration, the landowner's hitherto lawful activities on his land in the qualifying period should now expose him to the risk of criminal liability and sanction. That, in my view, is a misconception of the effect of the "Victorian statutes" when a town or village green is registered.

106. For the purposes of section 12 of the 1857 Act, the "use or enjoyment [of the land] as a place of recreation" must, I think, be understood as having a nature and quality specific to itself in the particular circumstances of the case in hand. It is not a concept at large, unlimited by the character of the recreational use that has co-existed viably with the landowner's use of his land throughout the qualifying period. It is not to be understood as meaning, for example "use and enjoyment [of the land] as a place of recreation of any kind, by any person, and at any time". No such gloss on the words of the statute is necessary, or justified.

107. If that is correct – as I think it must be in the light of the relevant jurisprudence in this court and above – a landowner will be free, and indeed has the right, to continue in his previous commercial or other activities on the land after registration, so long as he does not interfere with the corresponding right of local inhabitants to continue in their use of it for recreation. He does not thus become liable to prosecution and conviction for an offence under section 12 of the 1857 Act. In maintaining his own use of the land as he has chosen to use it, but consistently with recreational use, he will not have brought about an "interruption of the use or enjoyment thereof as a place for exercise and recreation". It could hardly be said that a recreational use of land, carried on as it was before and without being disrupted or disturbed by the landowner, has, in the statutory sense, been interrupted. That, in my view, is not a consequence of the land being registered as a town or village green. The balance between the landowner's use and the recreational use prevailing before registration will prevail afterwards too. Whether in a given case there

has been an "interruption" of the "use or enjoyment" of the land sufficient to give rise to the commission of an offence will always be a matter of fact, which the prosecution will have to prove to the requisite standard.

108. This, of course, is merely to amplify what Lewison L.J. has said in paragraphs 63 to 74 of his judgment, which I find compelling.

109. I also agree, for the reasons he gives, with his conclusions on section 29 of the 1876 Act in paragraphs 75 to 78, and in general on the "Victorian statutes" in paragraphs 79 to 81. And there is nothing more I would say than he has done in those passages of his judgment.

Lord Justice David Richards:

110.

I too agree that this appeal should be dismissed for the reasons given by Lewison LJ.