Hilary Term
[2021] UKSC 4
On appeal from: [2018] EWCA Civ 2172

JUDGMENT

T W Logistics Ltd (Appellant) *v* Essex County Council and another (Respondents)

before

Lady Black
Lady Arden
Lord Sales
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON

12 February 2021

Heard on 2 and 3 December 2020

Appellant	*Respondent (1)*
David Holland QC Toby Watkin (Instructed by Wilkin Chapman LLP (Lincoln))	Andrew Sharland QC Katherine Taunton (Instructed by Essex County Council)
	Respondent (2)
	Richard Wald QC Richard Eaton (Instructed by Birketts LLP (Ipswich))

Respondents:-

(1) Essex County Council ("the Council")

(2) Ian James Tucker

LORD SALES AND LORD BURROWS: (with whom Lady Black, Lady Arden and Lord Stephens agree)

1. Introduction and overview

1. This case raises some important issues about the law relating to the registration of a town or village green ("TVG") under the Commons Act 2006. The use of the phrase "town or village green", particularly the word "green", conjures up an image of the archetypal village green with its area of grass where local inhabitants can walk and play. Hence the initial surprise on reading the facts of this case where the TVG in issue, as registered by the first defendant and respondent, Essex County Council ("the Council"), is an area of concrete of some 200 square metres (which we shall refer to as "the Land") on, or close to, the water's edge in a working port and across which port vehicles, including heavy goods vehicles ("HGVs"), are driven. It is clear, however, that the modern statutory concept of a TVG is much wider than the traditional village green. So it is that registered TVGs have included, for example, an area of rocks used for the mooring of boats, partly submerged scrubland (*Oxfordshire County Council v Oxford City Council* [2006] UKHL 25; [2006] 2 AC 674 - "the *Trap Grounds* case"), and disused quarries.

2. Registration of an area of land as a TVG has important legal consequences for the landowner and for members of the public wishing to make use of it for recreational purposes. Upon registration, the landowner becomes obliged to let members of the public enter and use the land in certain ways. Two Victorian statutes, which enacted criminal offences designed to protect the public's use of TVGs, also have a potential impact on the landowner. The central question on this appeal is whether the registration of the Land as a TVG would have the consequence that the continuation of the landowner's pre-existing commercial activities would be criminalised under the Victorian statutes.

3. Mistley is a small town in Essex, lying on the southern bank of the tidal estuary of the River Stour, upstream of Felixstowe. There has been a port at Mistley for centuries. The port is privately owned and is not subject to any statutory regime governing its use as a port. The port in Mistley is owned in large part, and is operated, by the appellant, TW Logistics Ltd ("TWL"). The Land is part of an area of the port known as Allen's Quay.

4. The Land was registered by the Council as a TVG in 2014 under section 15 of the Commons Act 2006. By that section any person may apply to the relevant commons registration authority (in this case, the Council) to register land as a TVG

where "a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years." The application in relation to the Land was made to the Council in August 2010 by the second defendant and respondent, Ian Tucker, a local resident. Mr Tucker relied on use of the Land by local inhabitants with respect to a 20-year period up to 17 September 2008. The Council appointed Mr Alun Alesbury ("the Inspector") to conduct a public inquiry into the application. The Inspector produced a report in October 2013. He found that there had been recreational use of the Land by local inhabitants "as of right" for the requisite 20-year period and recommended that it should be registered as a TVG. The Council registered the Land as a TVG in July 2014.

5. On 28 November 2014 TWL commenced these proceedings for rectification of the register, to remove the registration of the Land as a TVG, pursuant to section 14 of the Commons Registration Act 1965, and for a declaration that the Land is not a TVG. Barling J dismissed TWL's claim: [2017] EWHC 185 (Ch); [2017] Ch 310. An appeal by TWL against that decision was dismissed by the Court of Appeal (Lewison LJ, with whom Lindblom and David Richards LJJ agreed): [2018] EWCA Civ 2172; [2019] Ch 243. TWL now appeals to this court.

2. Relevant legislative provisions

6. Before looking at the facts, it is helpful to set out six legislative provisions that have featured in the submissions of counsel in this appeal. The first is section 15 of the Commons Act 2006 which deals with the registration of a TVG. It is the successor to section 22 of the Commons Registration Act 1965, which in material part was in the same terms. In so far as relevant, section 15 reads as follows:

> "**15. Registration of greens**
>
> (1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
>
> (2) This subsection applies where -
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and

(b) they continue to do so at the time of the application.

(3) This subsection applies where -

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

(b) they ceased to do so before the time of the application but after the commencement of this section; and

(c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).

…"

7. In this case, the application was made under section 15(3), although it should be noted that the same core test is required to be satisfied under section 15(2) (and indeed under section 15(4), which is not here set out). The 2006 Act has subsequently been amended (in ways that have no bearing on this case), but the above version was the one in force at the relevant time in this case.

8. The other five legislative provisions go to the issue of whether the effect of TVG registration in this case would be to criminalise TWL's pre-existing commercial activities. The first two are the Victorian statutes referred to in para 2 above.

9. Section 12 of the Inclosure Act 1857 (20 & 21 Vict c 31) (as amended) reads as follows:

"**12. Proceedings for prevention of nuisances in town and village greens and allotments for exercise and recreation**

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 before two justices, upon the information of any churchwarden or overseer of the parish in which such town or village green or land is situate, or of the person in whom the soil of such town or village green or land may be vested, forfeit and pay, in any of the cases aforesaid, and for each and every such offence, over and above the damages occasioned thereby, any sum not exceeding [level 1 on the standard scale] … and every such penalty as aforesaid shall be recovered in manner provided by the Summary Jurisdiction Act 1848; and the amount of damage occasioned by any such offence as aforesaid shall, in case of dispute, be determined by the justices by whom the offender is convicted; and the payment of the amount of such damage, and the repayments of the money necessarily expended in the removal of any manure, soil, ashes, or rubbish, shall be enforced in like manner as any such penalty."

10. Section 29 of the Commons Act 1876 (39 & 40 Vict c 56) says this:

"**29. Amendment of law as to town and village greens**

'… 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 12 of the said 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. This section shall apply only in cases where a town or village green or recreation ground has a known and defined boundary.'"

11. Three other criminal legislative provisions are relevant but have played a less prominent role than the Victorian statutes in the submissions of counsel. Section 34 of the Road Traffic Act 1988 ("the RTA 1988") reads as follows:

> "(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."

12. The final two legislative provisions are section 3(1) of the Health and Safety at Work Act 1974 and regulation 17(2) of the Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004). We shall refer to these together as "the health and safety legislation". Breach of either of these provisions is a criminal offence under section 33 of the 1974 Act.

13. Section 3(1) of the 1974 Act provides that:

> "It shall be the duty of every employer 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."

14. Regulation 17(2) of the 1992 Regulations requires that

> "Traffic routes in a workplace shall be suitable for the persons or vehicles using them, sufficient in number, in suitable positions and of sufficient size."

By Regulation 17(5),

> "[Regulation 17(2)] shall apply so far as is reasonably practicable …"

3. The facts

15. We here draw upon the very thorough judgment of Barling J (who himself made detailed reference to the lengthy and detailed report of the Inspector), especially at [2017] EWHC 185 (Ch), paras 6-17 and 144-160.

16. Cargoes, typically of grain, fertiliser, bricks, aluminium, or zinc, are brought to, and taken from, Mistley port by HGVs. The overall tonnage passing through the port peaked at 445,000 tonnes in 1986, but by 2007 this had dropped to 173,552 tonnes. Similarly, 432 ships docked at the port in 1977 compared to 90 vessels in 2007 (though average cargo transported per vessel increased from 256 tonnes in 1977 to 1,900 tonnes in 2007).

17. There is a plan of Mistley port annexed to the judgment of Barling J. The port consists of an elongated frontage to the Stour estuary, running on roughly an east/west axis. At the western end of the port lies the main warehouse and a fenced storage area comprising a warehouse and compound (which we shall call "the Stockdale storage area"). Running roughly along the south side of the Stockdale storage area is the Port Road, which is the main access route for port traffic from the town of Mistley.

18. The Land at Allen's Quay is situated immediately to the east of the Stockdale storage area and includes a stretch of the water frontage. The Land is in front of a block of residential and industrial buildings called the Grapevine, which in former times included a public house that has now been converted to other use. On the eastern boundary of the Land is a warehouse known as the Thorn Quay warehouse. The Thorn Quay warehouse marks the beginning of a narrow section of dock frontage called the Eastern Transit because it is the route that vehicles must take in order to access the eastern parts of the port including Baltic Quay, which is where the main port activity takes place. Signage makes clear that the Eastern Transit and Baltic Quay are private property.

19. In recent times, Baltic Quay is where virtually all the ships calling at Mistley tie up to load and unload their cargo. Cargoes are usually stored on Baltic Quay until shipped or collected, or are moved to the Stockdale storage area (via the Land) to await collection there. The Eastern Transit is also used by residents of a converted

commercial building known as the Maltings which lies to the east of the Thorn Quay warehouse. The residents of the Maltings have a right of way, granted by TWL, for vehicular and pedestrian access over the Eastern Transit and the Land in order to go to, and from, their apartments.

20. Between the Grapevine and the Land runs a short stretch of public highway which forms part of the link between the Port Road and the Eastern Transit. HGVs and other vehicles use these three stretches of road, together with the Land, as the main route through the port area, from the Stockdale storage area in the west to Baltic Quay in the east.

21. There is also some container traffic through the port. Containers are brought by HGVs from Felixstowe and are unloaded in the Stockdale storage area. They are later collected by HGVs. The HGVs enter the port area via the Port Road and leave the same way. Sometimes they use the Land for turning round, when there is insufficient space in the Stockdale storage area.

22. In September 2008, following concerns about the risk of people falling into the water from Allen's Quay and a threat by the Health and Safety Executive of enforcement action, TWL erected a 1.8 metre-high chain link metal fence along the Allen's Quay waterfront. The fence was positioned about half a metre from the edge of the quay.

23. On 18 August 2010, Mr Tucker applied to the Council to register a large part of Allen's Quay as a TVG pursuant to section 15(3) of the Commons Act 2006. The application stated that the local inhabitants had used Allen's Quay for lawful sports and pastimes as of right for the 20 years up to 17 September 2008, when the fence was erected.

24. The Council appointed the Inspector to hold a non-statutory public inquiry into whether the application site should be registered as a TVG. The public inquiry took place in Mistley village hall over eight days in June and July 2013. The Inspector heard oral evidence from some 27 witnesses, who were examined and cross-examined under oath. Eighteen witnesses were local inhabitants called on behalf of Mr Tucker. Eight witnesses gave evidence objecting to the application. In addition to this oral evidence, the Inspector had before him written witness statements and some 2,000 pages of other documentary material.

25. The Inspector's report is dated 28 October 2013. He found that the criteria in section 15(3) of the Commons Act 2006 had been satisfied in relation to the part of Allen's Quay which comprised the Land and recommended that the Land should be

registered as a TVG. The Inspector found that the Land had been used "as of right" for lawful sports and pastimes by significant numbers of local people. The main recreational activity undertaken on the Land was walking, with or without dogs, and not on a fixed route. Local inhabitants often stood and had a chat with others during such wanderings. Other recreational activities also took place from time to time, such as informal games, crabbing at the water's edge, and feeding swans (in the event, however, this final activity was found by Barling J at para 116 of his judgment to have been with the permission of TWL, and so not "as of right", and was therefore excluded by him from consideration).

26. The Inspector said this 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."

27. The Inspector also found that, concurrently with the recreational activities of the public, port-related commercial activities had taken place on the Land throughout the relevant period. These activities included the passage of commercial vehicles, including HGVs and forklift trucks, and, to a lesser extent, the loading and unloading of commercial vehicles and the occasional temporary storage of materials and cargo. The Inspector found that the commercial activities and the recreational activities had co-existed for many years, including throughout the relevant 20-year period.

28. This point about co-existence was amplified by Barling J at paras 157-160 of his judgment, who made a number of important findings about it. They were as follows:

(i) Throughout the qualifying period (September 1988 - September 2008) there was very little commercial activity on the Land for substantial periods, especially at weekends and in the evenings. Even during busier periods, the commercial activity was rarely so intense as to discourage locals from visiting the Land to pursue their pastimes.

(ii) There was generally courteous conduct and give and take on both sides. Pedestrians moved out of the way as the lorries passed over the Land.

But there was no exclusion or displacement of recreational pastimes on the Land by reason of the commercial activity; and the commercial activities of TWL were not adversely affected by the recreational pastimes of the public.

(iii) Many witnesses stated that that they did not perceive there to be a significant risk in their, or their children's, use of the Land; and there was no evidence of any member of the public having been injured there by commercial activity.

Barling J concluded on this co-existence point as follows (at para 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."

4. Barling J's reasoning on the law

29. TWL put forward a number of grounds for challenging the TVG registration. They all failed before Barling J. He dismissed various contentions of TWL suggesting that the use of the Land by the inhabitants had not been "as of right" in the requisite sense. He dismissed its claim to have issued warnings that the Land was private property and not available for use as of right by the local inhabitants and its claim that it had given permission for their activities. Barling J also found that the activities of the local inhabitants constituted lawful sports and pastimes.

30. TWL's grounds of claim which are relevant on this appeal were grounds 3 and 5. By these grounds TWL maintained that registration of the Land as a TVG was unlawful because: there was incompatibility between its use as a TVG and the commercial use to which TWL had put it throughout the qualifying period; there was incompatibility between its use as a TVG and the statutory regime to which the Land was subject; and the use of the Land by the local inhabitants was not of the requisite recreational quality. Barling J dismissed these grounds of claim at paras 161 to 198 of his judgment. His reasoning was as follows:

(i) This case was distinguishable from *R (Newhaven Port & Properties Ltd) v Essex County Council* [2015] UKSC 7; [2015] AC 1547 ("*Newhaven*"). In that case it was held that a beach could not be registered as a TVG because it was part of a port that was operated by the landowner

pursuant to specific statutory obligations to do so which were incompatible with such registration. In contrast, TWL was not subject to statutory obligations to operate the port at Mistley. In Barling J's words, "I do not consider that the *Newhaven* case bears on the present case, which concerns a privately owned port whose proprietor does not hold it for any specific statutory purpose and is subject only to general obligations" (para 179).

(ii) Any potential criminal liability of TWL under the Victorian statutes did not give rise to statutory incompatibility such as to preclude either (a) the registration of the Land as a TVG or (b) the continuation in the post-registration era of the feasible co-existence, which had factually occurred, between the commercial and recreational uses of the Land (para 179).

(iii) In any event, prosecutions of TWL under the Victorian statutes would be unlikely to succeed where the activity complained of was not materially different in kind or intensity from that carried out in the qualifying period. Barling J saw this as essentially turning on a factual examination of TWL's activities. For example, such an activity would be unlikely to represent an act "to the interruption of the use and enjoyment [of the TVG] as a place for exercise and recreation" within section 12 of the Inclosure Act 1857 given that factually it had not had that effect in the qualifying period (para 183). Similarly, there were strong grounds for arguing that the occasional temporary storage of cargo or other goods on the Land or occasional parking of HGVs there did not fall within the words in section 12 of "wilfully lay[ing] any … other matter or thing" because of the *eiusdem generis* rule of interpretation in a context where the related references in the section were to "manure, soil, ashes or rubbish" and "or to do any other act whatsoever to the injury of the [TVG] or to the interruption of the use or enjoyment [of the land]" (para 184). It was equally unlikely that the occasional temporary storage of material on part of the Land would amount to "occupation of the soil thereof … made otherwise than with a view to the better enjoyment of such town or village green …" within section 29 of the Commons Act 1876 because, in the context of the opening words of that section, the word "occupation" indicated something more than a temporary use of the TVG of that kind (para 185).

(iv) As regards section 34 of the RTA 1988, TWL had acknowledged that the consent given to its own operators meant that there was "lawful authority", unless the Victorian statutes applied, so that reliance on section 34 largely fell away given Barling J's reasoning on the Victorian statutes (set out in (ii) and (iii) above). As regards other operators, it was indicated that they would have the same defence based on TWL's authorisation (para 187).

(v) In relation to the health and safety legislation, the judge pointed out that:

> "[w]hereas any restrictions or exposure to criminal sanctions under the Victorian statutes were only capable of arising post-registration, TWL's (and its predecessors') obligations under health and safety legislation have existed (at least in the case of the fundamental provisions in the 1974 Act and the 1992 Regulations) for many years." (para 194)

There was no reason to think that the approach of TWL or of the Health and Safety Executive as to what was "reasonably practicable" was likely to change because of registration.

(vi) The conclusion reached, therefore, was that not only factually but also legally the two sets of uses, commercial and recreational, could co-exist post-registration.

5. The Court of Appeal's reasoning

31. TWL appealed to the Court of Appeal on three grounds. Registration, it was submitted, should not be confirmed where any of the following applied:

(i) The effect would be to criminalise the landowner's continuing use of the TVG for the same commercial purpose as took place throughout the 20-year qualifying period, for which reason the recreational use did not have the necessary quality to support the registration ("the first ground").

(ii) Permission for recreational use could be implied from the interaction of the two uses, with the result that the recreational use could not be regarded as having been "as of right" ("the second ground").

(iii) The two uses in the 20-year period had not been concurrent but sequential, and this was insufficient to meet the requirements of the Commons Act 2006 ("the third ground").

32. In a carefully reasoned judgment, Lewison LJ dismissed all three grounds of appeal. Lindblom and David Richards LJJ agreed with his judgment. Lindblom LJ

gave a short concurring judgment, amplifying why he agreed with Lewison LJ's reasoning on the first ground.

33. In relation to the first ground, Lewison LJ referred to the decision of this court in *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11; [2010] 2 AC 70 ("*Lewis*") to explain that the landowner of a TVG is entitled to continue its pre-existing activities as long as they do not interfere unduly with the public's recreational rights (paras 24-36). Although registration could enlarge the recreational rights available beyond the activities of local inhabitants on the area of a TVG in the 20-year qualifying period, the principle of "give and take" recognised in *Lewis* has the effect that the landowner can continue to use its land in the way that it did before registration, where that use is compatible with recreational use. Whether or not the two sets of uses are compatible is essentially a question of fact. In this case, Barling J had found as a fact that the two uses were compatible and an appeal court should not interfere with that careful evaluation.

34. Lewison LJ then considered the question of criminalisation of TWL's continuing commercial activities after registration of the Land as a TVG. Was it correct, as TWL contended, that potential criminalisation of the landowner's activities after registration was a bar to that registration? On this issue, TWL's argument was that co-existence was legally impossible because of the operation of the criminal law contained in the relevant statutes (para 45).

35. Lewison LJ rejected TWL's argument for two reasons. First, all that was necessary to establish use "as of right" for the purposes of registration under section 15 of the Commons Act 2006, as that phrase had been interpreted in the cases, was that the Land had not been used by force, stealth or permission (ie "nec vi, nec clam, nec precario" to use the traditional Latin phraseology). Once this tripartite test had been satisfied, there was no further impediment to registration absent some special conflicting statutory provision, such as the statutory obligations of the landowner to operate the port in *Newhaven*. There was no conflicting statutory provision of that character in the present case. Therefore, whatever might have been the effect of the Victorian statutes on the position after registration of the Land as a TVG, the registration had been lawful.

36. Secondly, the effect of the Victorian statutes was not to criminalise TWL's activities conducted to the same level as during the 20-year qualifying period. The Victorian statutes and the statutory regime governing registration of TVGs should be construed as a coherent whole (paras 66-68). Intrinsic to the registration regime, interpreted in the light of *Lewis*, was the landowner's right to continue to use its land in the same way as prior to registration where that use was not incompatible on the facts with inhabitants' recreational use. Lewison LJ observed:

> "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." (para 71)

In this case, such a reasonable construction was possible. The purpose of the Victorian statutes was to prevent public nuisances (as shown, for example, in the preamble to section 12 of the 1857 Act). Two consequences for the interpretation of the Victorian statutes followed from this linkage to public nuisance. First, an act "warranted by law" does not amount to a public nuisance (in line with the definition of a public nuisance in *R v Rimmington* [2005] UKHL 63; [2006] 1 AC 459). Since, by application of the "give and take" principle as explained in *Lewis*, the landowner has the legal right to continue with the same use of its land as had existed in the 20-year qualifying period, the continuation of that use is "warranted by law". Secondly, the relevant use and enjoyment by the public that is protected by virtue of registration of a TVG, and that the landowner cannot interfere with, is limited by the rights of the landowner to continue with its pre-existing activities. There is therefore no public nuisance, and hence no criminal activity under the Victorian statutes, where the landowner carries on with its pre-existing activities. Lewison LJ put it this way at para 73:

> "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." (Emphasis in original)

37. For similar reasons, in the case of section 34 of the RTA 1988 there would be "lawful authority" for the continuation of vehicular use of the Land by TWL and by HGVs coming to the port. As for the health and safety legislation, Lewison LJ held that, as this had always applied to the Land and had not prevented dual use of it, it could not be a bar to registration (paras 82 to 85).

38. As regards the second ground, TWL's submission was that it could resist registration on the basis that it gave implied permission for the recreational use of the Land and so that use was not "as of right". Lewison LJ disagreed, holding that it was important to distinguish between permission on the one hand and a landowner's toleration or acquiescence on the other, with the former requiring some overt act on the part of the landowner. Mere inaction in the face of known use could not amount to implied consent (paras 87-91).

39. The third ground was, in reality, a further strand to this argument. TWL argued that, as there were periods where the local inhabitants were excluded from the Land, because of TWL's commercial activities, it should be inferred that they were permitted to use the Land when it was not needed for commercial activities. That is, it was not possible to register a TVG on land that was available for recreational use on a part-time basis and temporary exclusion was sufficient to communicate the landowner's permission to the local inhabitants. Lewison LJ rejected these submissions (paras 94-101). Recreational use of land for only certain periods of time was still sufficient to constitute use "as of right". Most importantly, however, TWL's submission foundered in the face of Barling J's factual findings that the commercial activities only rarely discouraged locals from visiting the Land for their recreational activities.

6. The grounds of appeal to this court

40. In this court, TWL relies on three grounds of appeal. The first two flow from the rejection of the first ground in the Court of Appeal. The grounds of appeal are:

> (i) Land should not be registered as a TVG if the effect of registration would be to criminalise the landowner's continuing use of that land for the same commercial purposes as took place throughout the 20-year qualifying period (Ground 1).
>
> (ii) The Court of Appeal misinterpreted section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876: on their correct construction TWL's activities post-registration would be criminalised (Ground 2).
>
> (iii) The quality of the user by the local inhabitants in this case was not such as to qualify the land for registration as a TVG (Ground 3).

41. Grounds 1 and 2 are closely linked. It is convenient to consider Ground 2 first. This is for two reasons. First, it is not easy to deal with Ground 1 in the abstract, ie without looking at the correct interpretation of the Victorian statutes which comprise the main possible example of relevant criminalisation. Secondly, if the appeal on Ground 2 fails - and if no criminal offence would be committed, whether under the Victorian statutes or otherwise, by TWL's continuation of its commercial activities post-registration - it will be unnecessary to answer Ground 1. Also, it will be helpful for the parties to have guidance under Ground 2 as to the operation of the Victorian statutes and the other legislative provisions in relation to the Land in the period after its registration as a TVG.

42. We propose to consider briefly within Ground 2 the other criminal legislation referred to by David Holland QC, counsel for TWL, namely section 34 of the RTA 1988 and the health and safety legislation. This is because, despite Mr Holland's understandable focus on the Victorian statutes, the general issue underlying Ground 2 is whether, by reason of registration of the Land as a TVG, TWL would be committing a criminal offence (in particular, but not only, by reason of the Victorian statutes) by carrying on its commercial activities post-registration.

43. It should be noted that, in relation to Ground 2, Mr Holland for tactical reasons makes submissions that, in any other context, would be regarded as being against TWL's self-interest. He submits that TWL would be (and indeed already is, because the Land has been registered since 2014) committing criminal offences by continuing with its commercial activities post-registration. This is denied by Andrew Sharland QC for the Council and Richard Wald QC for Mr Tucker. One might regard Mr Holland's strategy as high-risk because if he were to succeed on Ground 2, but then to fail on Ground 1, he would have argued for, and exposed, TWL's own criminality to no avail.

7. Ground 2: would TWL's activities be criminalised under the Victorian statutes (or any other legislative provision) if they were to be continued after the registration of the Land as a TVG?

(1) The rights of the public and the landowner following registration of land as a TVG

44. In order to answer the question posed by Ground 2, we first need to consider the issue of the respective rights of the public and of the landowner following registration of land as a TVG. In other words, at this stage leaving aside any possible criminality, what are the public and the landowner entitled to do on the TVG? Once we have ascertained this, we will be in a position to consider criminality.

45. It was initially thought (see *New Windsor Corpn v Mellor* [1975] Ch 380) that registration as a TVG conferred no rights on the public that they did not already have; and as a 20-year user of land "as of right" for lawful sports and pastimes did not create rights at common law, it was thought that registration conferred no rights on the public. The Commons Registration Act 1965 was silent on this question and it was said, therefore, that Parliament needed to attend to this as a lacuna in the law on TVG registration. That "no rights" view was subsequently rejected by the courts. As explained in the review of the development of the law relating to registration of TVGs in the judgment of Lord Carnwath and Lord Sales in *R (Lancashire County Council) v Secretary of State for the Environmen*t [2019] UKSC 58; [2020] 2 WLR 1 ("*Lancashire*"), paras 3-11, the courts have proceeded to work out the meaning

and effect of section 22 of the 1965 Act (which became section 15 of the Commons Act 2006) by drawing on analogies in the common law.

46. The tripartite test (see above para 35) for whether use of land by local inhabitants is "as of right" draws on the English common law in relation to the acquisition of easements, rights of common, and public rights of way by prescription: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 ("*Sunningwell*"), 349-354 (Lord Hoffmann, with whom the other members of the appellate committee agreed); *Lancashire*, para 9. An analogy has been drawn between the rights of the public to use a TVG for recreational purposes and rights of common existing at common law to use someone else's land for such purposes, as discussed in *Fitch v Fitch* (1797) 2 Esp 543: see the *Trap Grounds* case, paras 51-52 per Lord Hoffmann (with whom Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe agreed).

47. In *Fitch v Fitch* there was an established customary right for local inhabitants to use a landowner's field at all times of the year for lawful games and pastimes. The landowner had used the field to grow grass for hay. He brought a claim in trespass against local inhabitants who he alleged had gone into the field, "trampled down the grass, thrown the hay about and mixed gravel through it, so as to render it of no value". The defendants argued that they were entitled to remove any obstruction to the free exercise of their right of recreation. However, Heath J rejected their argument that their right meant that the landowner could not allow the grass to grow. Instead, he said, at p 544, "[t]he rights of both parties are distinct, and may exist together". He therefore ruled that the right of the local inhabitants had to be exercised in a lawful, fair and proper way. This was a matter for the jury to decide and it found that the local inhabitants had used their right in an improper way so that judgment was given for the landowner.

48. Mr Holland sought to explain and distinguish *Fitch v Fitch* as a case involving sequential use of a piece of land, rather than concurrent use of the land by landowner and the local inhabitants. However, this is not a sustainable view of the decision. The rights of the landowner and of the local inhabitants existed concurrently and were exercised concurrently. The landowner was using the land for growing grass and storing hay when the local inhabitants went onto it to exercise their rights of recreation. Heath J's ruling was to the effect that the local inhabitants had to exercise their rights in a fair and reasonable way, so as to respect the concurrent reasonable and established use of the land by the landowner.

49. We would add that rights of easement, which have some similarities with the rights to indulge in lawful sports and pastimes claimed pursuant to registration of land as a TVG, are also subject to a general requirement at common law that they be exercised reasonably, and with respect for the competing rights and interests of

the owner of the land over which they exist: see *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 WLR 2620, para 45 (Lord Scott of Foscote). In *Lewis*, at para 48, Lord Walker called attention to this point as offering guidance for resolution of any conflict between a landowner and local inhabitants in relation to the use of a TVG. Such a principle makes a good deal of sense where two people have concurrent rights exercisable in relation to the same area of land.

50. The principle of the fair and proper use of rights of recreation in relation to a TVG owned by someone else, as illustrated by *Fitch v Fitch*, has been adapted in the authorities on TVGs registered under the modern legislation into a principle of "give and take" on both sides in the exercise of the rights of the public which arise upon registration and in the exercise of the landowner's rights. As Lord Hoffmann put it in the *Trap Grounds* case at para 51, "[the landowner] still has the right to use [the land] in any way which does not interfere with the recreational rights of the inhabitants. There has to be give and take on both sides".

51. Lord Hoffmann made further reference to this idea, at para 59, in rejecting the landowner's submission in that case that registration of land as a TVG involved an infringement of its right to respect for its property under article 1 of the First Protocol to the European Convention on Human Rights as given effect in domestic law by the Human Rights Act 1998. Lord Hoffmann held that there was no deprivation of property for the purposes of article 1 of the First Protocol because "the owner retains his title to the land and his right to use it in any way which does not prevent its use by the inhabitants for recreation". In the present case, Mr Holland does not seek to revive any argument based on article 1 of the First Protocol and the interpretive obligation under section 3 of the Human Rights Act 1998.

52. In the *Trap Grounds* case, Lord Hoffmann said (at paras 50 and 56) that registration of land as a TVG created statutory rights for the public and brought the Victorian statutes into operation by virtue of section 10 of the Commons Registration Act 1965, which provided that registration was conclusive evidence of the matters registered. For reasons which are obscure, the Commons Act 2006 does not include an equivalent of section 10 of the 1965 Act. However, this omission does not change the practical effect of registration, which is to certify that land qualifies as a TVG for all purposes: see *Lancashire*, para 7; also *Lewis*, paras 44-47 per Lord Walker. This has the consequence that the Victorian statutes apply in relation to it.

53. At this juncture, it is convenient to consider the *Trap Grounds* case in some detail. Oxfordshire County Council, as the registration authority, sought judicial rulings on a number of issues prior to deciding an application by a local resident to register as a TVG an area of nine acres in North Oxford, known as "the Trap Grounds". This comprised scrubland, about a third of which was permanently under water. The land was owned by Oxford City Council which opposed the application

because it wished to develop part of the site. One of the issues was the respective rights of the landowner and the public following registration.

54. Lord Hoffmann gave the leading speech, with which Lord Rodger and Lord Walker agreed. Lord Scott and Baroness Hale of Richmond preferred not to answer all the issues dealt with by Lord Hoffmann; and Lord Scott disagreed with some of Lord Hoffmann's reasoning. Lord Hoffmann's speech includes a succinct review of the history of the law on TVGs. His Lordship made clear that registration does confer rights on the public. He said this at para 49:

> "one has to look at the provisions about greens in the 1965 Act like those of any other legislation, assuming that Parliament legislated for some practical purpose and was not sending commons commissioners round the country on a useless exercise. If the Act conferred no rights, then the registration would have been useless, except perhaps to geographers, because anyone asserting rights of recreation would still have to prove them in court."

The 1965 Act did not provide for registration of specific rights of recreation to reflect the particular forms of recreation which had been carried out on the land in question over the 20-year qualifying period, but rather for registration as a TVG. His Lordship's view was that the rights conferred by registration as a TVG were "the rights which the statute treated as creating a village green, namely the right to indulge in sports and pastimes" (para 53).

55. As Lord Hoffmann explained (para 50), his analysis of the 1965 Act led to the conclusion that the rights for the public created by registration extended beyond the pre-existing user (relied on to justify registration) to include all forms of recreation:

> "In my view, the rational construction of [the 1965 Act] is that 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. This would be in accordance with the common law, under which proof of a custom to play one kind of game gave rise to a right to use the land for other games: see the *Sunningwell* case [2000] 1 AC 335, 357A-C."

That was referred to, in the submissions of counsel before us, as the "one size fits all" principle, following the characterisation by Lord Walker at para 127 of the category of rights created by Lord Hoffmann's interpretation of the statute. This is, however, not a complete description of the legal position mapped out by Lord Hoffmann, since he immediately explained at para 51 that the rights of the inhabitants were subject to the "give and take" principle described above. But it is fair to say that the full implications of that principle were not spelt out in his speech.

56. Lord Scott agreed with Lord Hoffmann that the statute conferred rights on the public but disagreed with Lord Hoffmann that those rights extended to all forms of recreation. He said this at paras 104-106:

> "104. I agree [with Lord Hoffmann] that the effect of registration under the 1965 Act of a class c town or village green is to confer on the local inhabitants rights of recreation over the land. …
>
> 105. But I do not agree that registration can authorise local inhabitants to enjoy recreative user of the land that is different in kind from the 20 years' user that has satisfied the statutory criteria for registration or that would diminish the ability of the landowner to continue to use the land in the manner in which he has been able to use the land during that 20-year period. I do not accept that a tolerant landowner who has allowed the local inhabitants to use his grass field for an annual 5 November bonfire for upwards of 20 years must, after registration, suffer his field to be used throughout the year for all or any lawful sports and pastimes with the consequential loss of any meaningful residual use that he could continue to make of the field. …
>
> 106. While, therefore, I agree with Lord Hoffmann that registration of the [land in issue in this case] as a class c town or village green would entitle the local inhabitants to recreative rights of user over it, those rights would, in my opinion, be commensurate with the nature of the user that had led to that result and would not necessarily extend to the right to use the land for all or any lawful sports or pastimes."

Lord Scott did not examine whether there was any principle of "give and take" which qualified the use by the public of the rights conferred on them by registration as a TVG.

57. This important issue as to the rights of the public was revisited by this court in *Lewis*, in the context of examining the meaning and application of the notion that the recreational user had to be "as of right". The case concerned an area of land which had formed part of a golf course belonging to a private golf club. Local inhabitants had used the area of land for informal recreation such as walking dogs, without interfering with the golfers. They would wait until play had passed or would be waved across by golfers. On an application by a local resident to register the area of land as a TVG, it was unanimously held by this court that registration should go ahead. The local inhabitants had been using the land as of right despite what might be regarded as the "deference" they had shown to the golfers.

58. As regards the "one size fits all" principle, Lord Walker, who had been a member of the Appellate Committee in the *Trap Grounds* case, indicated (at paras 47-48) that he still essentially agreed with what Lord Hoffmann had said about this, including the "give and take" idea that Lord Hoffmann had identified in that case at para 51. It was on the basis that the "give and take" principle qualified the extent to which the public could enforce the general right conferred on them by registration to use the land generally for sports and pastimes (even though not limited to the precise sports and pastimes which had been carried on during the 20-year qualifying period) that Lord Walker upheld Mr Lewis's appeal. Lord Rodger, also a member of the Appellate Committee in the *Trap Grounds* case, agreed with Lord Walker (para 79), and made a particular point (para 84) of associating himself with what Lord Walker had said at para 47 regarding the operation of the "give and take" principle.

59. Lord Brown of Eaton-under-Heywood analysed more fully the relative rights of landowner and local inhabitants. He said this at para 98:

> "The critical question to my mind is what are the respective rights of the landowner ('the owner') and the local inhabitants ('the locals') over land once it is registered as a town or village green?"

He went on at paras 100-102:

> "100. So far from this question begging that as to the right to registration (the ultimate question at issue here), it seems to me one which necessarily should be resolved before it can sensibly be decided what must be established in order to have the land registered. 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."

He then examined whether the *Trap Grounds* case bound him to take a different view and concluded that it did not because this issue "simply did not arise" in that case (para 104). He went on:

> "105. I would, therefore, hold that in this different situation the owner remains entitled to continue his use of the land as before. If, of course, as in the [*Trap Grounds*] case itself, he

> has done nothing with his land, he cannot complain that upon registration the locals gain full and unqualified recreational rights over it. But that is not the position I am considering here."

60. Lord Kerr of Tonaghmore took the same view as Lord Brown:

> "114. The essential underpinning of [counsel for the defendants'] assertions … 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.
>
> 115. … [T]he view that this was the effect of the relevant authorities in this area may now be discounted. For my part, I find it unsurprising that this view formerly held sway. [Counsel for the defendants] (without direct demur from [counsel for the claimants]) informed us that it was the universal opinion of all who practised in this field that the inevitable consequence of the decision in [the *Trap Grounds* case] [2006] 2 AC 674 was that local inhabitants acquired unrestricted rights of recreation after registration. Passages from the speech of Lord Hoffmann in that case - particularly at para 51 - appeared to lend support for the notion that general, unrestricted rights of recreation over the entire extent of the lands followed upon registration. And the speech of Lord Scott of Foscote certainly seemed to imply that he apprehended that this was the outcome of the decision by the majority. Whatever may have been the position previously, however, it is now clear that, where it is feasible, co-operative, mutually respecting uses will endure after the registration of the green. 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."

61. Lord Hope of Craighead agreed with all four of these judgments (para 78). He understood them all as saying the same thing in substance. At para 55 Lord Hope said:

> "… I think that one must assume … that it was Parliament's intention that practical common sense would be the best guide to the way the public right was to be exercised once the land had entered the register."

62. At para 63 Lord Hope expressed his disagreement with an assumption made by Sullivan J in the case of *R (Laing Homes Ltd) v Buckinghamshire County Council* [2003] EWHC 1578 (Admin); [2004] 1 P & CR 36, that registration of a field as a TVG would be inconsistent with the landowner using it for an annual hay crop, as he had done during the 20-year qualifying period. At paras 70-74 Lord Hope rejected the assumption made in the courts below in *Lewis* "that the effect of registration would be to enlarge the right of the local inhabitants in a way that would effectively prevent the golfers from using the land for their own purposes". He affirmed the application of the principle of "give and take" in this context, following Lord Hoffmann's speech in the *Trap Grounds* case at para 51 and drawing on the analogy with the law on easements and rights of way and on the analysis in *Fitch v Fitch*.

63. At paras 75-77 Lord Hope turned to assess the landowner's submission that the deference of the local inhabitants to the use of the golf-course by its members showed that they appeared to accept that they were not asserting rights against the landowner. He observed (para 75), "once one accepts, as I would do, that the rights on either side can coexist after registration subject to give and take on both sides, the part that deference has to play in determining whether the local inhabitants indulged in lawful sports or pastimes as of right takes on an entirely different aspect"; seen against that background, "[d]eference by the public to what the owner does on his land may be taken as an indication that the two uses can in practice coexist." That was found to be the position in relation to the golf-course in issue in that case.

64. In line with this analysis, Lord Carnwath and Lord Sales in their judgment in *Lancashire* (with which Lady Black agreed) said (para 8):

> "Lord Hoffmann [in the *Trap Grounds* case] made clear that, following registration, the owner was not excluded altogether, but retained the right to use the land in any way which does not interfere with the recreational rights of the inhabitants, with 'give and take on both sides' (para 51). That qualification was further developed in *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, in which it was held that the local inhabitants' rights to use a green following registration could not interfere with competing activities of the landowner to a greater extent than during the qualifying period."

65. The position which has been mapped out in these authorities, therefore, is this. Registration of land as a TVG has the effect that the public acquire the general right to use it as such, which means the right to use it for any lawful sport or pastime (whether or not corresponding to the particular recreational uses to which it was put in the 20-year qualifying period, evidence of which gave rise to the right to have it registered as a TVG). However, the exercise of that right is subject to the "give and take" principle so that it is potentially misleading to think that there is a "one size fits all" principle. This means that the public must use their recreational rights in a reasonable manner, having regard to the interests of the landowner (which may, or may not, be commercial) as recognised in the practical arrangements which developed to allow for coexisting use of the land in question during the qualifying period. The standard of reasonableness is determined by what was required of local inhabitants to allow the landowner to carry on its regular activities around which the local inhabitants were accustomed to mould their recreational activities during the qualifying period.

66. The application of this standard means that after registration the landowner has all the rights that derive from its legal title to the land, as limited by the statutory rights of the public. It has the legal right to continue to undertake activities of the same general quality and at the same general level as before, during the qualifying period. If there was some fluctuation in the level of the landowner's activity during the qualifying period, the standard of reasonableness applicable to the public's use of their recreational rights should reflect what the local inhabitants had shown themselves willing to accept for a reasonably sustained period or periods of time. In practical terms, in the present case, this means that the landowner has some leeway to intensify its use of the port, with a concomitant increase in HGV movements across the Land. The landowner also has the right to undertake new and different activities provided they do not interfere with the rights of the public to use the land for lawful sports and pastimes.

67. It is to be hoped and expected that the local inhabitants and the landowner will adjust their activities on the Land in the same spirit of give and take and compromise as has been the pattern for decades. However, if any dispute were to arise about their relative rights to use the Land it would fall to be resolved in the civil courts as with any other land dispute. There could be an application by either side for a declaration as to their rights or for other relief which may be available to them.

68. It follows from the analysis above that the mere fact of registration of land as a TVG does not inform a prospective purchaser of land what the precise nature of its entitlement to use the land might be. However, registration serves an important function in alerting any purchaser of the land to the fact that TVG rights exist in relation to it and puts the purchaser on notice that it should investigate the extent to which activities of the landowner were established and accepted during the

qualifying period. In any case where registration of land as a TVG has been controversial, it is likely that relevant information will be available in the form of a detailed report into the factual background by an inspector, as there was in this case.

(2) The Victorian statutes

69. Having established the respective rights of the public and the landowner in relation to a TVG, we can now turn to the Victorian statutes. The relevant provisions are section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876. We have set these out in paras 9-10 above. For our purposes, the importance of these two Victorian statutes is that they create offences that are concerned to safeguard the rights of members of the public to use a TVG. The question of the interaction of the statutory regime for registration of TVGs and the Victorian statutes was addressed in the *Trap Grounds* case. When land is registered as a TVG, the act of registration creates statutory rights for the public to use a TVG and, from that time, section 12 of the 1857 Act and section 29 of the 1876 Act have application in relation to the land: see the *Trap Grounds* case, para 56 (Lord Hoffmann).

70. In obiter dicta in the *Trap Grounds* case, Lord Hoffmann said (para 57):

> "There is virtually no authority on the effect of the Victorian legislation. The 1857 Act seems to have been aimed at nuisances (bringing on animals or dumping rubbish) and the 1876 Act at encroachments by fencing off or building on the green. 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* 2 Esp 543. This was accepted by Sullivan J in *R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P & CR 573, 588. In that case the land was used for 'low-level agricultural activities' such as taking a hay crop at the same time as it was being used by the inhabitants for sports and pastimes. No doubt 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'. 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 [of the Commons Registration Act 1965] if in practice they were not. 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. I have a similar difficulty with para 141 of the judgment of Judge Howarth in *Humphreys v Rochdale Metropolitan Borough Council* (unreported) 18 June 2004, in which he decided that acts of grazing and fertilising by the owner which, in his opinion, would have contravened the 1857 and 1876 Acts if the land had been a village green at the time, prevented the land from satisfying the section 22 definition."

In Lord Hoffmann's view, therefore, the Victorian statutes did not have the effect of criminalising activity of the landowner carried out on the land after its registration as a TVG at the same level as it had been carried on during the qualifying period.

71. This issue was not revisited in this court in *Lewis*. It had been an important point for the inspector in that case, who in a report dated 14 March 2006 followed the decisions in the *Laing Homes* case and *Humphreys v Rochdale Metropolitan Borough Council* in suggesting that the activities of the landowner golf club would have been made criminal by the Victorian statutes after registration; partly for that reason, the inspector recommended that the land in issue should not be registered as a TVG (see the account set out in *Lewis* by Lord Walker, at paras 9-12). That report was overtaken by the handing down of the decision of the House of Lords in the *Trap Grounds* case. In the light of Lord Hoffmann's speech in that case at para 57, the inspector produced a further report in which he accepted that his reasoning based on the Victorian statutes was wrong, while maintaining his recommendation that the land should not be registered as a TVG by reason of a distinct argument that the local inhabitants had not made use of the land "as of right" because they showed "deference" to those playing golf (the relevant part of the inspector's further report is set out in the judgment of the Court of Appeal in the *Lewis* case: [2009] EWCA Civ 3; [2009] 1 WLR 1461, para 12). Thereafter, in the litigation in the *Lewis* case, it was not suggested that the Victorian statutes would criminalise the continued playing of golf or the operation of the golf club.

72. We agree with Lord Hoffmann that, against the background of the respective civil law rights of the public and the landowner that we have analysed above, registration as a TVG does not criminalise the continuation of the pre-existing activities of the landowner. But Lord Hoffmann did not spell out in any detail how one should interpret those statutes and why precisely they do not criminalise the continuation of the landowner's pre-existing activities. That is the issue of statutory interpretation to which we now turn, with TWL's activities in this case being at the forefront of our attention.

73. As with almost all statutes, one should regard the Victorian statutes as "always speaking": see, eg, *R v Ireland* [1998] AC 147, 158-159. This means that the correct approach is to interpret the words of the Victorian statutes in the light of

modern conditions rather than conditions that prevailed in Victorian times. Modern conditions include the introduction in 1965, as confirmed by the enactment of section 15 of the Commons Act 2006, of a process by which registration of land as a TVG creates rights for members of the public to use it as such and the availability of a statutory right to seek registration of forms of land which, as Lewison LJ in the Court of Appeal said (para 66), could not plausibly have been contemplated as being a TVG when the Victorian statutes were enacted.

74. As we have seen, the rights of the public in respect of a TVG are qualified by the principle of "give and take". This principle has assumed greater importance in relation to modern TVGs created by registration as the mechanism by which the rights of the public and the rights of a landowner can be found to coexist and to operate alongside each other in relation to land which does not have the quality of a traditional TVG. That in turn has enabled the courts to give wider effect to the modern TVG legislation for the benefit of the public (as explained in particular by Lord Brown and Lord Kerr in *Lewis*), in accordance with the object of that legislation. If it were not possible to say that a landowner's pre-existing use of his land could continue after registration of it as a TVG, the purpose of the modern legislation would be undermined and there would be a risk that that legislation would be applied in a more restricted way.

75. In the present context this blends with another relevant principle of statutory construction. We agree with Lewison LJ (paras 66-68: see para 36 above) that it is right to view the Victorian statutes and the Commons Act 2006 as dealing with the same subject-matter, namely TVGs, and as forming a coherent statutory scheme for the protection of rights in relation to TVGs. The statutes use the same technical terminology, in referring to town greens and village greens, and have the same general purpose. They fall to be interpreted as one general and coherent code. Lewison LJ cited 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 explanatory of each other."

76. Again in agreement with Lewison LJ (paras 71-79), we consider that there is a conventional interpretive path available in relation to the Victorian statutes which ensures that they apply in a manner which does not cut across the purpose of the modern registration statutes, as explained in *Lewis*.

77. At common law, the criminal offence which operated to protect the interests of the public in being able to enjoy a town or village green for recreational purposes

was that of a public nuisance. This was triable on indictment. Section 12 of the Inclosure Act 1857 has to be read against that background and in light of its preamble. The purpose of this provision was to provide more effective protection for the public against nuisances affecting the use and enjoyment of TVGs, which is to say public nuisances. As stated in the preamble, it was enacted "to provide summary means of preventing nuisances in town greens and village greens …[etc]", ie without the need for trial on indictment. Read in the light of this object, this provision is properly interpreted as setting out specific statutory examples of public nuisances which are to be amenable to summary prosecution. The preamble shows that the provision is directed to land which is available for enjoyment by the public as a TVG, ie for lawful sports and pastimes, or "as a place for exercise and recreation", so it is concerned with interference with those public interests. The matters set out in the section all have the character of a public nuisance. This point is emphasised by the fact that the list concludes with "any other act whatsoever to the injury of such town or village green or land", ie in relation to its character as a TVG or land dedicated to public use, "or to the interruption of the use or enjoyment thereof as a place for exercise and recreation", ie focusing again on interference with public rights regarding use of the land. The provision was enacted to render more effective the protection of the criminal law for the rights of the public to use a town or village green or equivalent recreational area, not to expand those rights.

78. This interpretation of section 12 of the 1857 Act is reinforced by section 29 of the Commons Act 1876. Section 29 refers to the earlier provision and its purpose is plainly to operate in conjunction with it. Section 29 makes it clear that both provisions are concerned to treat certain acts as a public nuisance. It is appropriate, therefore, to have regard to the general requirements of the crime of public nuisance.

79. The leading recent case on the crime of public nuisance generally - the facts had nothing to do with TVGs - is *R v Rimmington* [2005] UKHL 63; [2006] 1 AC 459. In that case, at paras 10 and 45, the House of Lords relied on *Archbold, Criminal Pleading, Evidence and Practice* (then in its 2005 edition but see now the 2021 edition, para 31-40) for the following definition of the crime of public nuisance (but deleting the reference to "morals"):

> "A person is guilty of a public 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."

80. Interpreting the Victorian statutes with these features of the common law offence in mind, we consider that Lewison LJ was correct to hold that the activities

of TWL would not be criminalised by the Victorian statutes where those activities are “warranted by law”. This underlying feature of the Victorian statutes is reflected in the words “without lawful authority” in section 12 of the 1857 Act, which qualify the offence created in so far as it applies in relation to the activity of wilfully leading or driving any cattle or animal on the TVG. It is difficult to see any reason why that particular activity should be singled out for special treatment as a matter of law, and it makes more sense to read this phrase as a particular reminder in the context of a regular and perfectly normal activity on a TGV (normal for the time, so far as concerns driving cattle, and still normal so far as concerns, eg, walking dogs) that this general limitation has to be taken into consideration. It seems legitimate to read the provision in this way because the Inclosure Act 1857 was drafted in the less rigorous style which was normal before the creation of the Office of Parliamentary Counsel in 1869 and the adoption of more precise forms of drafting which followed (see *R (Andrews) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWCA Civ 669, para 30).

81. Interpreting the Victorian statutes in this way leads to a sensible and readily comprehensible result in the present case, which is consistent with the overall legislative scheme in relation to TVGs. Here, as TWL has the legal right in the period after the registration of the Land as a TVG to carry on with what it has been doing previously on the Land, its activities are “warranted by law”. TWL would therefore not be committing an offence under the Victorian statutes in continuing its pre-existing commercial activities. The same is true in relation to the common law offence of public nuisance, which continues to be relevant in this context.

82. We also agree with Lewison LJ that, in so far as one is concerned under the Victorian statutes with an interference with the use and enjoyment of the TVG by the public (eg in section 12 of the Inclosure Act 1857: “do any … act … to the interruption of the use or enjoyment thereof as a place for exercise and recreation”), the public’s use and enjoyment of the land is qualified by - or, one might say, the extent of that use or enjoyment is defined by - TWL’s pre-existing activities. Put another way still, the public’s statutory right is only to enjoy the land subject to the continuation of the owner’s pre-existing rights, as exercised to that extent. There is therefore no interference with the relevant use and enjoyment of the land by TWL continuing with its pre-existing activities.

83. Mr Holland submitted that the approach that we have here set out, in agreement with Lewison LJ, is practically unworkable and contrary to the certainty that is required in criminal law. This boiled down to a submission that one could not clarify sufficiently the scope of TWL’s pre-existing commercial activities. We do not agree.

84. The conclusion regarding the true meaning and effect of the Victorian statutes which Lewison LJ reached, and which we reach as well, is a consequence of the application of ordinary principles of statutory interpretation. The criminal law is often formulated by reference to general standards of behaviour, eg in relation to the offences of careless and inconsiderate driving and gross negligence manslaughter and the use of the standard of being "reasonably practicable" in the offences under the health and safety legislation (paras 13-14 above, which Mr Holland did not suggest was improperly uncertain). A court is not entitled to depart from the meaning of a statutory provision arrived at on the basis of ordinary principles of interpretation, on the grounds that it might have preferred greater precision in the formulation of an offence. Indeed, there is a long-standing principle of statutory interpretation, designed to avoid cases of doubtful penalisation, which precisely deals with any problems which might arise from a lack of precision in the formulation of an offence (see *Tuck & Sons v Priester* (1887) 19 QBD 629, 638 per Lord Esher MR; *Craies on Legislation*, 12th ed (2020), para 19.1.14).

85. As it happens, on the facts of this case, the supposed problem does not arise because there is clear evidence (as referred to in the Inspector's report and Barling J's judgment) as to what TWL's commercial activities have been over the qualifying period. More fundamentally, in conceptual terms, as we have explained above, it is the landowner's pre-existing proprietary rights that the criminal law, in the form of the Victorian statutes, builds on. It would be very surprising if a crime were held to be too uncertain, so as to compel a different interpretation of a statutory provision than that arrived at through a normal process of interpretation, because the property right, with reference to which it is framed, is itself too uncertain. In principle, in a civil law dispute the relevant rights of the public and a landowner can be ascertained by evidence. There is no conceptual uncertainty, even if there might be a degree of uncertainty as to what the facts are. Such uncertainty falls to be resolved by reference to the available evidence in the usual way. There is no basis for saying that what is sufficiently certain in the law of property is too uncertain to form part of the elements of a criminal offence.

86. Where there is a dispute about what the landowner is entitled to do, the burden of proof will be on the prosecution to show that the landowner is not entitled to act in a particular way. The fair operation of the criminal law is ensured in this way. As we have explained at para 66 above, the landowner has the right to continue with, at least, the same activities as it carried out on the land prior to its registration as a TVG, ie the pre-existing use can continue. That proprietary right is sufficiently clear to be recognised in the operation of the Victorian statutes.

87. The reasoning of Lewison LJ in the Court of Appeal, and our own reasoning agreeing with it, is more detailed than Lord Hoffmann's obiter dicta in the *Trap Grounds* case (see para 70 above). But the overall conclusion is the same. Contrary to the submission of Mr Holland, the Victorian statutes do not have the effect of

criminalising post-registration activities which TWL carried out on the Land before its registration as a TVG.

(3) Other criminal legislation

88. We agree with the lower courts' reasoning in respect of section 34 of the RTA 1988 and the health and safety legislation. As regards the former, "without lawful authority" is expressly written into that offence and, therefore, in continuing with its activities after registration of the Land as a TVG, TWL would not be committing this offence. TWL has the legal right to carry on with what it has been doing. Just as that is "warranted by law" for the purposes of the law of public nuisance, it is "with" and not "without" lawful authority for the purposes of section 34 of the RTA 1988, as explained by Lewison LJ (para 78). On the same basis, the activities of those coming to the port to assist in its continued operations, such as the drivers of HGVs, are "with" and not "without" legal authority because TWL has given consent for their activities at the port, which it is legally entitled to do (as explained by Barling J: see para 30(iv) above).

89. As regards the health and safety legislation, this has always applied irrespective of registration as a TVG, and registration will not make any difference to this. That is, TWL must comply with, as it would appear that it has always been complying with, its duty to ensure, so far as reasonably practicable, the safety of its workers and the public when they come on the Land. Since the Land can readily be accessed by the public, and particularly in view of the fact that there are rights of way for residents of the Maltings through the Eastern Transit and across the Land, TWL would in any event have to take care to ensure that it complied with the health and safety legislation to ensure members of the public are safe. It is clear that the qualification "so far as reasonably practicable" should be read in the light of TWL's right to continue its ongoing commercial activities.

90. To the extent that TWL is lawfully required by the Health and Safety Executive to take some particular action to safeguard workers or the public, that would again constitute lawful authority for TWL to take that action and there would be no criminality involved in it doing so. One would hope and expect that, if the Health and Safety Executive had safety concerns, those concerns could be raised with the local inhabitants and the Council, as the representative of the public interest with respect to the TVG at the Land, as well as with TWL, so that there could be discussion between all parties to see how those concerns could be dealt with while respecting all parties' rights and interests so far as possible. If the Health and Safety Executive ignored the rights of local inhabitants in relation to the TVG when considering whether to impose obligations on TWL, there would be the possibility of judicial review of its action.

(4) Conclusion on Ground 2

91. For the reasons we have given, our conclusion is that the appeal on Ground 2 should be dismissed. TWL's activities have not been criminalised under the Victorian statutes in respect of their continuation after the registration of the Land as a TVG. Nor has registration had the effect that they are criminalised under any other legislative provision.

8. Ground 1: should land not be registered as a TVG if the effect of registration would be to criminalise the landowner's continuing use of that land for the same commercial purposes as took place throughout the 20-year qualifying period?

92. In the light of our conclusion on Ground 2, it is not necessary to reach a conclusion on Ground 1. Nor is it appropriate to do so, since our reasoning on Ground 2 means that the question posed under Ground 1 does not arise. There is no point in asking what effect criminalisation of TWL's continuing activities under the Victorian statutes (or other legislation) would have on the question of registration when the analysis under Ground 2 shows that the Victorian statutes (or other legislation) would not have that effect. We note that Lord Hoffmann in obiter dicta in the *Trap Grounds* case (in the latter part of para 57, set out at para 70 above) expressed the opinion that the application of the Victorian statutes could not on any view of their effect have an impact on the right to obtain registration under section 22 of the Commons Registration Act 1965 (now section 15 of the Commons Act 2006) and that Lord Scott took the same view (para 99). However, we are not convinced that the issue posed under Ground 1 would be straightforward, if (contrary to our view) continuation of the pre-existing activities of the landowner were criminalised by the Victorian statutes (or other legislation). We therefore prefer to say nothing about it. But our silence on the point should not be treated as endorsement of the parts of the judgments below (see paras 30 and 35 above) in which TWL's arguments on this issue were rejected.

9. Ground 3: was the quality of the user by the local inhabitants in this case not such as to qualify the land for registration as a TVG?

93. Mr Holland explained this ground of appeal by emphasising that the concept of use of land "as of right" by local inhabitants is based on the idea of acquiescence by the landowner as regards such use. As developed by Mr Holland, this ground of appeal has two aspects: (a) viewed objectively, it could not be said (and TWL could not be thought to have accepted) that the local inhabitants were asserting a right to use the Land when they made use of it in the 20-year qualifying period, when TWL continued to use the Land throughout that period by activities on it which were

inconsistent with any such right on their part; and (b) TWL could not be thought to acquiesce in any assertion by local inhabitants of a right to use the Land for recreational purposes if that would have the effect (upon registration of the Land as a TVG) of criminalising the continuation of TWL's pre-existing activities.

94. In so far as Ground 3 depends on TWL's submission regarding the criminalisation of its activities after registration of the Land as a TVG (ie aspect (b) set out in the last paragraph), it falls to be dismissed for the reasons we have already given. More fundamentally, however, we consider that Ground 3 is based on a distortion of the concept of use "as of right" by the local inhabitants and is contrary to the authorities which explain that concept.

95. As the House of Lords made clear in *Sunningwell*, [2000] 1 AC 335, 349-356 (per Lord Hoffmann), the concept of use "as of right" is a feature of the law of prescription and involves use of land by the local inhabitants in a way which would suggest to a reasonable landowner that they believed that they were exercising a public right in doing so, in circumstances where the tripartite test of nec vi, nec clam, nec precario is satisfied. Although a landowner might be concerned at the thought that its activities on the land might have to cease, or might be criminalised, if the land were registered as a TVG, that would not be something which affected the quality of the use of the land by the local inhabitants, as a reasonable landowner would perceive it. The local inhabitants would not share that concern and might well welcome the confirmation and enhancement of their rights which would follow registration. The idea that the acquisition of TVG rights by prescription depends on acquiescence by the landowner, as explained in *Sunningwell*, simply means that the landowner has been able to observe over a long period of time that the local inhabitants have appeared to be making use of the relevant land in the belief that they had a public right to use it and failed to take steps to disabuse them or prevent them from doing so. In this case, the Inspector and Barling J both found that, on the facts, the use of the Land by the local inhabitants during the qualifying period had this quality. There are no good grounds for an appeal on such an issue of fact.

96. To the extent that TWL's submissions under Ground 3 involve a contention that it would have appeared to a reasonable landowner that the local inhabitants were not asserting a public right to use the Land because they moved out of the way of TWL's activities when they conflicted with their recreational activities, that is to revert to the "deference" argument which was definitively rejected by this court in *Lewis* (see, in particular, para 36 per Lord Walker).

10. Conclusion

97. For the reasons given above, we would dismiss this appeal.