

## Allen's Quay, Mistley case

### Full name

T W Logistics Ltd v Essex County Council and another  
8 February 2017

### Neutral citation number

[2017] EWHC 185 (Ch)

### Link to judgment

[www.bailii.org/ew/cases/EWHC/Ch/2017/185.html](http://www.bailii.org/ew/cases/EWHC/Ch/2017/185.html)

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### Summary

The High Court upholds the registration of part of Allen's Quay, Mistley, Essex, as a town green, dismissing a challenge to the registration by the quay owner, TW Logistics Ltd (TWL) on several grounds.

### Background

Ian Tucker, the second defendant, applied in 2010 to Essex County Council, the first defendant, to register [Allen's Quay](#) as a town green under section 15(3) of the Commons Act 2006. Allen's Quay is part of a larger series of quays in Mistley, many of which are busy with maritime and commercial traffic. The application was stimulated by a fence erected along the quayside in 2008 by the owner, TWL. The council appointed Alun Alesbury of counsel as an inspector to advise on the application, and he reported in October 2013 following a public inquiry. The inspector recommended that the application be granted in respect of much of the application land insofar as it lay between the quayside and a public road. There could be, he reported (para16.52), 'no real doubt that, over many years, significant numbers of the local inhabitants of Mistley parish have enjoyed using [the Land] regularly for leisure-related purposes.' The relevant council committee determined to accept the application in July 2015, and the land was duly registered.

TWL challenged the registration under section 14(b) of the Commons Registration Act 1965<sup>1</sup>. A challenge under section 14 enables the court to conduct a broader review of the merits of the registration than would be possible on a judicial review, and the case was therefore heard in the Chancery Division under Barling J.

## Discussion

The claimants challenged the council's decision to grant the application on a number of grounds, including whether the use had been 'as of right', that commercial use of the land was incompatible with use for lawful sports and pastimes and that those activities were not of the requisite quality, that the land had been used as a highway (rather than in the manner of a green), that registration was incompatible with the statutory regulation of a port, and that user had been contrary to law (being trespass on a railway line: this because the quayside rails were still in place, albeit abandoned). Essentially, TWL asked the court to revisit many aspects of the council's decision.

TWL also criticised the council for seeking to uphold its decision to register, arguing that it should take a neutral stance (presumably leaving the applicant, Mr Tucker, to defend the registration). The judge said, without hearing full argument, that he was 'inclined to the view' that the council's quasi-judicial role did not prevent it from fully defending its decision "where appropriate", but added that if the council recognised its original decision was wrong, 'it would surely not be right for it to defend it.'

### Use not 'as of right'

The judge considered the meaning of use 'as of right' (ie without force, permission or stealth), and reviewed the authorities, concluding with *Winterburn v Bennett*, which found that use is contentious (and therefore 'forceful'): 'where the owner has made his position entirely clear through the erection of clearly visible signs'. And he observed (para 62) that, although the House of Lords judgment in the *Beresford* case (*R (Beresford) v Sunderland City Council*) was overruled by the Supreme Court, it remains good law on the concept and test of implied permission.

The judge then considered whether signs on the quay showed that use was contentious. However, many of the signs (eg 'Private Property Strictly No Admittance'), which were admitted to be prohibitory, were exhibited near the passage to the next adjacent quay, and were found to be clustered there, close to a former rising barrier, so as to make an impression on a person passing that way, rather than to suggest that they applied to the openly accessible Allen's Quay — indeed, the judge found that many visitors to Allen's Quay would never come within reading distance of the signs.

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<sup>1</sup> S.14(b) of the 1965 Act is applied to the registration because of a transitional provision and saving in the commencement order for section 15 of the 2006 Act: see [art.4\(1\)\(b\)](#) of the Commons Act 2006 (Commencement No. 2, Transitional Provisions and Savings) (England) Order 2007 (SI 2007/456).



Steps had been taken to discourage use of Allen's Quay for mooring yachts, but such measures had no bearing on its land-based use by the local inhabitants. The judge concluded (para101) that, 'Neither the effect of notices affecting Allen's Quay nor the conduct of the owners, whether taken together or in combination, was such as to render contentious'.

The judge also rejected submissions that TWL had impliedly granted permission for use. TWL had continued to use the quay for some commercial purposes, including parking of lorries and storage of materials, but this was said to be no more than the sort of 'give and take' to be expected between users and the owner, exemplified in the *Redcar* case (*R (Lewis) v Redcar & Cleveland Borough Council*). 'No fishing' signs said (para108): 'absolutely nothing about what other activities may or may not be permitted'. TWL's co-operation with, and support for, a swan-feeding group active on Allen's Quay amounted to a licence or permission for its endeavours (although it was admitted the group may have been unaware of the subtlety that its activities were not 'as of right'), but there was doubt about where the activity took place, it was not clear the activity was comprised in 'lawful sports and pastimes', and it was outweighed by extensive evidence of other recreational activities.

#### Incompatible commercial use

TWL said that commercial use of Allen's Quay had displaced recreational use during the 20 year period, and was incompatible with it.

Both the inspector and the judge relied on the *Redcar* case for assistance. The Supreme Court in that case ruled that there was and could continue to be sensible co-existence between the golf played by licensees of the owner, and the recreational activities of the local inhabitants, but did not explore in what circumstances two potentially conflicting uses might not be able to co-exist at all. The judge thought that such circumstances would manifest where either the recreational users withdrew to times or places where there was less interference, or the owner would contest the recreational use long before the 20-year period expired. Summarising the Supreme Court's conclusions in the *Redcar* case, the judge said he discerned two schools of thought: '1. The owner may continue to use the land as before, provided he does not "interfere" with the right of the recreationers (*sic*) to indulge in any activity which constitutes "lawful sports and pastimes". 2. The recreationers do not obtain the right to use the land inconsistently with such use of the land as the owner himself has historically been, and wishes to continue, making.' He thought the preponderance of opinion came down in favour of the second, where the owner's rights appear to prevail.

The judge had reviewed the witness evidence of commercial activity on Allen's Quay, and was confident that witnesses for both parties were not far apart: there were long periods when little activity took place, some spells with more sustained activity (eg when a boat was unloading), but rarely if ever any occasion when the activity might be sufficient to discourage



recreational use. He concluded that there was no incompatibility: instead, there was (para160), ‘sensible and sustained co-existence between the two groups of users.’

#### Criminal offences following registration

TWL explored novel territory by arguing that, once registered as a green, commercial use would be contrary to the Victorian statutes which protect greens<sup>2</sup>, driving on it would be illegal under section 34 of the Road Traffic Act 1988, and compliance with health and safety obligations arising on commercial premises were incompatible with the public’s rights. TWL conceded that criminality under section 34 of the 1988 Act, which creates an offence of driving on land (other than a road) without lawful authority, could arise only if driving also offended under the Victorian statutes (so that TWL would be unable to confer lawful authority).

The judge declined to hold that Allen’s Quay could not be registered because of the potential illegality of TWL’s commercial activities post-registration, distinguishing the judgment of the Supreme Court in the *West Beach* case (*R (Newhaven Port & Properties Limited) v East Sussex CC*) as self-avowedly confined to circumstances of statutory incompatibility (TWL is not a statutory port operator). He therefore did not have to consider whether TWL’s future operations would attract criminal liability, but did so, and drew support (para181) from the judgment of Lord Hoffmann in the *Trap Grounds* case (*Oxfordshire County Council v Oxford City Council*), who observed in that case that, ‘I do not agree that the low-level agricultural activities [such as taking a hay crop] must be regarded as having been inconsistent with use for sports and pastimes for the purposes of [registration] if in practice they were not.’ The judge thought that there was little reason to distinguish TWL’s commercial use from the ‘low-level agricultural activities’ in *Trap Grounds*, and makes a detailed comparison (para182). He continued:

‘a prosecution under either s12 or s29 of the Victorian statutes<sup>2</sup> brought against TWL, its successor in title, or licensee would in my view be unlikely to succeed where the activity complained of was not materially different in kind or intensity from that which has been carried out by TWL and its predecessors and licensees in the qualifying period. Such an activity would be unlikely, for example, to represent an act “to the interruption of the use and enjoyment [of the TVG] as a place for exercise and recreation” within the meaning of s12, given that on the evidence it has not had that effect during the qualifying period.’

As to the offence under the Victorian Acts<sup>3</sup>, viz: ‘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’, the judge found (para184) that: ‘In the light of the

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<sup>2</sup> S.12 of the Inclosure Act 1857 and s.29 of the Commons Act 1876.

<sup>3</sup> S.12 of the 1857 Act.



*eiusdem generis*<sup>4</sup> rule, the related references in the statute to “manure, soil, ashes, or rubbish” and “or do any other act whatsoever to the injury of [the TVG], or to the interruption of the use or enjoyment” etc, very arguably condition and limit the nature of “any other matter or thing”.’ Finally, he found (para185), as regards the offence<sup>5</sup>, viz: ‘occupation of the soil thereof which is made otherwise than with a view to the better enjoyment [of the green]’, that ‘the reference to “occupation” connotes something more than a temporary use’. It was therefore not necessary to consider the point about s34 of the 1988 Act.

#### Incompatible with statutory regulation of port

TWL argued that registration would put it in an impossible position in reconciling public rights with statutory obligations to ensure health and safety, particularly in the context of a quay. But this argument failed for the same reason as the previous, in that, in practice, TWL *had* successfully reconciled the competing demands during the 20-year period, and there had been no threat of prosecution by the Health and Safety Executive (HSE). As to the fence which had already been erected near the quayside following representations by the HSE, pragmatically the judge thought this could be replaced by a compromise low-level railing through which people could climb, but which would still protect unwary members of the public.

#### Use not of requisite quality

TWL questioned whether much of the activity comprised in lawful sports and pastimes was no more than recreational walking which might establish a public footpath (rather than a green). But the judge found that criticism of the inspector’s analysis on this aspect was unjustified — indeed, the inspector had recommended the exclusion of certain areas of the application land on precisely such grounds. The recreational activity was not merely incidental to use of a right of way — it was the reason people went to the quay: ‘it is clear that the Land with its proximity to, and views of, and across the water, constituted the main attraction for inhabitants who visited it. The picture painted by the evidence is not one of walkers stopping or diverting to take in a pretty or interesting view as they walked a linear route or circuit, but one of people using the access roads with the aim of getting to, lingering on, and enjoying the amenity of the Land.’

#### Use illegal trespass on railway

TWL argued that it was an offence to trespass on railway lines servicing Allen’s Quay embedded in the quayside, under s55 of the British Transport Commission Act 1949, and that use which was criminal under s55 could not amount to ‘lawful’ sports and pastimes.

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<sup>4</sup> A rule of construction which provides that where a list of things within an identifiable class is concluded with general words of embrace, those general words are taken to extend only to other things of the same class.

<sup>5</sup> S.29 of the 1876 Act.



The judge dismissed this argument, deciding that the line was no longer worked for the purposes of s55 and commenting further that:

it was not clear that the subsisting line was actually within the registered area;

the line had ceased to be used operationally before the 20-year period began<sup>6</sup> and was disconnected;

criminal trespass under s55 would not necessarily render use unlawful for the purposes of sports and pastimes;

s55 did not necessarily apply to the line; and

s55(3) provides that conviction is not to occur if specified notices are not displayed at the nearest station, but no evidence had been led as to the presence of such notices during the 20-year period.

### Comment

The judge's endorsement of the council's defence before the court of its decision to register the green (albeit without full argument) is welcome, given that many applicants would neither have the resources to enter a full defence of the registration with legal representation, nor the wish to expose themselves to costs if their defence failed. His suggestion that it would not be right for the council to do so if it recognised the decision was wrong begs the question how it would *know* it was wrong — is that not a question for the court to decide? But perhaps if members had determined an application in the teeth of the inspector's and officers' advice to the contrary, a challenge might call for a more disinterested role.

The decision that the use of Allen's Quay was 'as of right' notwithstanding confrontational signage turned on the positioning of the signs, and the judge's conclusion that it was targeted at persons passing the signs heading further down the quay. TWL had argued that there was nowhere to place the signs more visible to users, but the judge dismissed that claim, and suggested that it could have painted signs on the ground. The evidence of TWL's implied permission for the swan-feeding group's activities was seen as marginal, and may be useful precedent where a strong case of recreational use as of right is punctured by occasional instances of express or implied permission for more exotic activities.

Of more concern is the findings in relation to criminal liability under the Victorian statutes. The judge concludes that the port owner would not be criminally liable because its routine commercial activities did not interfere with recreational use during the 20-year period, and so would be no more likely to do so following registration. That may introduce a neat symmetry to the circumstances at Allen's Quay, but it appears to set the bar high elsewhere. It is not clear whether the judge considers that driving and parking heavy goods vehicles on

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<sup>6</sup> The relevant part of s.55(1) refers to lines 'worked' by British Rail, as it then was (it was common ground that the line was not owned by nor leased to British Rail, which were alternative possibilities encompassed by s.55(1)).

a green will never offend against the Victorian statutes, or only that it will not where such activities were done during the qualifying period — and if the latter, that introduces a sophistication and uncertainty into the interpretation of those statutes which was certainly not in the mind of Parliament when they were enacted.

In essence, the judge appears to say that the test of whether an activity has breached the criminal threshold under the Victorian statutes can be determined by referring back to the 20-year period: if the same activity took place during that period, then by definition it cannot breach the threshold — because if it did, it would have acted as an effective interruption to the qualifying use during that period. But that must mean that the threshold is pitched at different levels on different greens, which is a handy way of avoiding the full rigour of the criminal law in relation to TWL's activities on Allen's Quay — but renders the criminal law uncertain in general. Still, it does dovetail nicely into access over greens to reach neighbouring premises: if the occupier of such premises can show that such access has existed for as long as anyone can remember (and certainly pre-dating registration), then this case lends support to the general view that such access is unlikely to offend against the Victorian statutes<sup>7</sup>.

As to the judge's findings that 'occupation' of the soil of a green requires more than a temporary presence, and that 'any other act whatsoever to the injury of such town or village green' means acts in the same class as putting unpleasant waste materials on the green — these too will make it harder to enforce these sanctions, which are pretty archaic as it is. It is not helpful that the court has set out to construe these Victorian statutes in civil litigation, far removed from the specific fact-based circumstances of a prosecution, and without any role for the public prosecutor to present the public interest, but in such a way as to bind a magistrates' court in any future prosecution. The civil courts are wary of granting a litigant a 'get out of jail free' card to wave in any future prosecution, but that seems to be what TWL has obtained here — albeit the downside is that its challenge to the registration of Allen's Quay as a green failed.

Finally, the judge's comments, *obiter*, on whether criminal trespass can constitute lawful sports and pastimes are interesting, if surprising. A question as to whether criminal trespass can give rise to a public right of way is likely to be decided soon in *Ramblers Association v Secretary of State for the Environment, Food and Rural Affairs and Network Rail Infrastructure Ltd*.

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<sup>7</sup> See also [Massey and Drew v Boulden](#).

