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Redcar

Full name of case
R (Lewis) v *Redcar and Cleveland Borough Council*

Case reference
[2010] UKSC11 On appeal from: 2009 EWCA Civ 3
http://www.bailii.org/uk/cases/UKSC/2010/11.html

Summary
The Supreme Court has ruled that Coatham Common, Redcar is to be registered as a village green. The judgment was that 'deference' by local people to the landowner's use of the land did not prevent their recreational use being as of right.

Issues considered
The land (350 yards by 150 yards) is on the north side of Redcar, adjoining the beach on the North Sea coast. Until 2002 it was used as a golf course.

The decision sets a helpful precedent for those seeking to have greens registered, and provides clarification of what the position will be after registration.

The question in *Lewis* was whether 'deference' by local people to the landowner's use prevents their use being 'as of right' (and therefore prevents them from meeting the requirements for registration as a green). The land had been used extensively for recreation but it had also been used as a golf course. Walkers had (quite sensibly) not interfered with the playing of golf on the land, but had waited to cross the green until after a shot had been played.

Those with some experience of the law of prescription (whether in relation to greens or, perhaps, rights of way) will know that the expression 'as of right' is generally understood to mean '*nec vi, nec clam, nec precario*', or in English 'not by force, nor stealth, nor licence'. Use had met these requirements, but it was argued for the landowner that there was an additional requirement, namely that it must have been reasonable for the landowner to have resisted the use by local people. In this case, it was said that it would not have been reasonable for the landowner to resist the local people's use because their deference to the golfing use would have indicated that no right was being asserted.

Crucial question
The five Supreme Court judges agreed that the crucial question was how matters would have appeared to the landowner (or, in the formulation of some of the justices, what was the quality of the user by local people). The court unanimously concluded that the fact the residents had acted with courtesy and common sense did not mean that they would not have appeared to be asserting a right. Therefore, although there had been 'overwhelming deference' to the landowner's use, the land should be registered.

The doctrine of ‘deference’ was previously a hindrance in getting greens registered. The landowner’s use in *Lewis* (and the consequent deference) was unusually extensive. Normally, the landowner might have done no more than take a hay crop. Nevertheless, the mere fact that locals did not step in front of the tractor has led inspectors to refuse applications for registration.

As a result of *Lewis*, that obstacle has been removed. Registration will no longer be prevented because local inhabitants have acted with courtesy and common sense. This is a welcome development.

The judgment in *Lewis* may also allow some decisions based on earlier rulings to be overturned. Applicants who have failed because of ‘deference’ should seek advice on this point.

The position after registration was of clear concern to the justices, several of whom described it as ‘the critical question’. The landowner argued that registration would mean that golfers would have to start deferring to those using the land as a green, effectively reversing the position pre-registration.

Lord Hoffmann said, in the seminal *Oxfordshire County Council* v *Oxford City Council* [2006] Ch 43 (Trap Grounds) decision, that land, once registered, can be used generally for sports and pastimes. In other words, use is not limited to pre-registration activities.

This was confirmed by the court, although the possibility raised by Lord Hoffmann (and much debated since by lawyers in this field) that land might be registered as a green on the basis of an annual bonfire was strongly doubted.

Conflict

The question therefore was: what would happen if there was a conflict between local people and golfers? What if local people started to carry on sports and pastimes incompatible with golf, like cricket? What if they became more assertive and refused to give way to golfers?

The justices thought that, in practice, there was little chance of such conflicts materialising (and indeed in this case the golf club had been shut years ago and the land earmarked for development).

Any conflict that did arise could be dealt with either under the council’s powers to make by-laws or under further legislation. In the absence of these solutions, disputes would be resolved under the simple principle of ‘give and take’ which was described as the ‘constant refrain’ in this area of the law. Local people using the land in a manner that was ‘all take and no give’ would be restrained by a court order if necessary.

Implications

The idea of ‘give and take’ is not new. In practice this is how the use of greens is dealt with up and down the country. The context for it now appears to be that landowners will be able to continue using their land as they did before registration without interruption from local people. This is a change of emphasis from the position that most people had assumed to be the case following *Oxfordshire*.

However, a landowner will still be in difficulty if he tries to expand his use of his land in a way which impinges on recreation by local people. Furthermore, Victorian legislation makes it a criminal offence to carry out development on greens or to ‘inclose’ them. This legislation was not analysed by the court and it is not clear how it will apply to a landowner who is doing what he has always done.

Commentary

The decision of the Supreme Court in *Lewis* is the fourth in a decade to overrule the decisions of lower courts and expand the scope for registration of town and village greens. It removes the concept of deference as a bar to registration and clarifies the position where there are different uses after registration. As such it is a welcome development. It is to be hoped that any future review of the

legislation will not undo the progress that has been made in using the system of registration to protect the recreational rights of local people.

[Written by Cain Ormondroyd, a barrister at Francis Taylor Building in London, who appeared for the appellant Mr Lewis.]