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Allen's Quay, Mistley, Essex (Supreme Court)

Full name

TW Logistics Ltd (appellant) v *Essex County Council and another (respondents)*

Neutral citation number

[2021] UKSC4

Link to judgment

https://www.bailii.org/uk/cases/UKSC/2021/4.html

Previously heard in high court (2017) and court of appeal (2018).

Summary

The supreme court held that registration of land as a town or village green (TVG) does not criminalise the landowner who continues to carry out activities on the land which were done during the 20-year period. Local inhabitants carrying out lawful sports and pastimes on the land must exercise the principle of give and take.

Background

The land is about 200 square metres of concrete close to the water's edge at Allen's Quay, part of the working port of Mistley in Essex. Mistley lies on the southern bank of the tidal estuary of the River Stour, upstream of Felixstowe. There has been a port here for centuries. It is privately owned and not subject to any statutory regime governing its use as a port. It is largely owned by the appellant, TW Logistics Ltd (TWL).

The land was registered by Essex County Council as a TVG in 2014, following an application in 2010 by Mr Ian Tucker, based on 20 years' use by local people up to September 2008. The council held a public inquiry, at which Mr Alun Alesbury presided as inspector. He found that the tests for registration were met

and recommended that the land be registered as a TVG. The council registered it in July 2014.

TWL challenged, on a number of grounds, the registration in the high court, the court of appeal and finally the supreme court.

The three grounds for the appeal to the supreme court were:

1 land should not be registered as 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.

2 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.

3 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.

Discussion

By a unanimous decision the supreme court dismissed the appeal. Lord Sales and Lord Burrows gave the leading judgment, with which Lady Black, Lady Arden and Lord Stephens agreed.

The judges considered ground 2 first since, if the appeal on ground 2 were to fail, it would not be necessary to consider ground 1. However, it was noted that this was a high-risk strategy for TWL since, if it were to succeed on ground 2 and then to fail on ground 1, it would have argued for, and exposed, its own criminality to no avail.

The Lords reviewed previous judgments on TVGs as well as the two previous judgments in this case.

These authorities mapped out the position that registration of land as a TVG 'has the effect that the public acquire the general right to use it as such' but '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' [para 65].

They continued: '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.' They go on to conclude that '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.' [para 66]. However, the judges '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' [para 67].

The judges then considered the effect of the Victorian statutes on the use of the land for purposes other than lawful sports and pastimes. These statutes are section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876.

They referred to Lord Hoffmann's *obiter dicta* in the *Trap Grounds* case, para 57, in which he said that there was virtually no authority on the effect of the Victorian legislation, and that neither Act was intended to prevent the owner from using the land consistently with the rights of the inhabitants. Lord Hoffmann's view was that the Victorian statutes did not have the effect of criminalising activity of the landowner which was 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 [para 70]. However, Lord Hoffmann did not spell out in detail why those statutes have that effect.

The judges considered that the correct approach was to interpret the Victorian statutes in the light of modern conditions rather than the conditions that prevailed in Victorian times. 'Modern conditions include the introduction in 1965 … 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' [para 73].

At common law, the criminal offence which operated to protect the interests of the public in being able to enjoy the TVG was that of a public nuisance. The judges referred to the leading recent case on the crime of public nuisance, *R* v *Rimmington* [2005] UKHL 63; [2006] 1 AC 459. Here it was held that a person is guilty of a public nuisance if he does an act not warranted by law. Therefore, Lewison LJ in the court of appeal was correct to hold that the activities of TWL would not be criminalised by the Victorian statutes if those activities are 'warranted by law' [para 80].

This 'leads to a sensible and readily comprehensible result in the present case, which is consistent with the overall legislative scheme in relation to TVGs'. TWL 'has the legal right in the period after registration of the land as TVG to carry on

what it has been previously doing on the land, its activities are "warranted by law"' [para 81]. Therefore, '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' [para 82]. The same applies to driving heavy-goods vehicles across the land: this is not an offence under section 34 of the Road Traffic Act 1988 because it is with lawful authority, TWL having given consent for these activities [para 88]. Similarly, registration as a green makes no difference to the application of health and safety legislation—TWL has always been required to take action to safeguard workers and the public [para 90].

Having dismissed ground 2, the court did not reach a conclusion on ground 1. The court considered that ground 3 was based on a distortion of the concept of use 'as of right'. As Lord Hoffmann said in *Sunningwell*, the concept of use 'as of right' is a feature of the law of prescription and involves use of land by local inhabitants in a way which would suggest to a reasonable landowner that they believed they were exercising a public right in doing so. In this case the landowner had acquiesced to such use over a long period and had failed to take steps to prevent this [paras 95 and 96].

Comment

We welcome the confirmation of the registration of Allen's Quay as TVG. However, we are concerned that this judgment clarifies that the Victorian legislation does not outlaw landowners' activities which were carried out pre-registration and that these could extend to new and different activities, provided they do not conflict with the use of the land for lawful sports and pastimes, and that the recreational use by local inhabitants is restricted to relying on give and take with the landowner. If local inhabitants believe a landowner's activities exceed his pre-existing rights and interfere with their rights their only recourse will be to challenge this in the courts, or to see a declaration as to their rights.

The judgment further undermines the protection afforded to TVGs by the Victorian statutes. Already antiquated and uncertain in effect, it now seems that any potential breach by the landowner, or his licencees, which might otherwise incur criminal liability, must now be tested against the circumstances prevailing prior to registration. While those circumstances amply are documented in relation to Mistley Quay, there will be many TVGs where recollection of such circumstances is beyond living memory.