Neutral Citation Number: [2017] EWHC 185 (Ch)

Case No: HC-2014-001550

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

In the matter of section 14 of the Commons Registration Act 1965

Royal Courts of Justice
The Rolls Building
Fetter Lane
London EC4A 1NL

Date: 08/02/2017

Before:

THE HONOURABLE MR JUSTICE BARLING

- -

Between :

T W LOGISTICS LIMITED	**Claimant**
- and -	
(1) ESSEX COUNTY COUNCIL **(2) IAN JAMES TUCKER**	**Defendants**

- -

- -

Douglas Edwards QC and Ross Crail (instructed by **Wilkin Chapman LLP**) for the **Claimant**

Andrew Sharland (instructed by **Essex Legal Services**) for the **First Defendant**

Richard Eaton, Solicitor Advocate, of **Birketts LLP** for the **Second Defendant**

Hearing dates: 6 July 2016 (reading), 7 July 2016, 8 July 2016 (view), and 11-15 July 2016

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

THE HON. MR JUSTICE BARLING

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The Hon. Mr Justice Barling:

Introduction

1. This claim involves the question whether an area of land forming part of the Port of Mistley in Essex ("the Land") should remain registered as a town or village green ("TVG") pursuant to the Commons Act 2006 ("the 2006 Act"), or whether the TVG register should be rectified by the de-registration in whole or in part of the Land by the exercise of the court's jurisdiction under section 14 of the Commons Registration Act 1965 ("the 1965 Act").

2. The Claimant, TW Logistics Limited ("TWL"), represented by Mr Douglas Edwards QC and Ms Ross Crail, seeks an order that the TVG register be rectified by the removal of the Land, and a declaration that the Land is not a TVG. The First Defendant, the Registration Authority ("Essex CC"), represented by Mr Andrew Sharland of counsel, contends that the claim should be dismissed on the basis that the Land was correctly registered. The Second Defendant, Mr Ian James Tucker, has worked within view of the Land for many years and is the original applicant for registration. He seeks to uphold the registration, and is represented by Mr Richard Eaton, a solicitor advocate.

3. Each of the parties has supplied me with a detailed skeleton argument. I have also been greatly assisted by the speaking notes and other materials supplied to me both during the hearing and, in relation to certain issues which the parties did not have time to cover fully, after the hearing. At the parties' request I visited the site of the Land, and the surrounding area, on Friday 8 July 2016.

The relevant legislation

4. The registration of the Land as a TVG is governed by the 2006 Act, section 15 of which (so far as relevant) provides:

> "(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.
>
> ....
>
> (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)."

5. The present claim for rectification of the register is brought under section 14 of the 1965 Act, which (so far as material) provides:

> "The High Court may order a register maintained under this Act to be amended if ... (b) the register has been amended in pursuance of section 13 of this Act and it appears to the court that no amendment or a different amendment ought to have been made and that the error cannot be corrected in pursuance of regulations made under this Act; and ... the court deems it just to rectify the register."

It is common ground that no regulations have been made, and that although on its face the section applies only to registrations made "in pursuance of s.13" of the 1965 Act, it also applies to this one made under s.15 of the 2006 Act, by virtue of the Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007 (SI 2007/456).

Overview of the port area and operations

6. The following is intended to be a high level and non-controversial description of the layout of the port of Mistley, and of commercial operations there.

7. Mistley is a small town in Essex, lying on the southern bank of the tidal estuary of the River Stour, upstream of Felixstowe. It has been a port for several centuries and remains one to this day. The port of Mistley is owned in part, and operated by, TWL. Both inward and outward bound trade passes through it. Cargoes, typically of grain, fertiliser, bricks, aluminium, or zinc, are brought to and taken from Mistley by HGVs. The vessels serving the port have become larger over the last thirty years or so. During 2007 about 90 vessels docked at Mistley to unload or load cargo or both. The average cargo in that year was about 1,900 tonnes per vessel, whereas in 1977 432 ships docked, each carrying on average 256 tonnes. Overall tonnage passing through the port peaked at 445,000 tonnes in 1986. In 2007 the corresponding figure was 173,552.

8. Certain features of the port area and town of Mistley, including the Land itself, are marked on the plan at Annex 1 to this judgment ("the Plan"). In general terms the port consists of an elongated frontage to the Stour estuary, running on roughly an east/west axis, with port storage areas including both warehouses and open storage in certain locations. At the west end of the port is an area which includes the main warehouse and a fenced storage area. These are known respectively as the Stockdale warehouse and the Stockdale compound. Running roughly along the south side of the Stockdale area is the main access route for HGVs and other port traffic from the town of Mistley. This road is known, unsurprisingly, as the Port Road.

9. The Land forms part of an area of the port known variously as Thorn Quay or Allen's Quay.[1] It is situated immediately to the east of the Stockdale compound, and

[1] In this judgment I will refer to this area, in which the Land is situated, as "Allen's Quay".

includes a stretch of the water frontage. On the eastern boundary of the Land is a warehouse known as the Thorn Quay warehouse ("TQW") and the beginning of a section of dock frontage known as the Eastern Transit. The Eastern Transit is so called because it is the route which HGVs and other vehicles must take in order to access those parts of the port which lie to the east of the TQW, including in particular Baltic Quay. The latter is the area of the port where virtually all the ships which call at Mistley now tie up to unload and load, because the larger vessels currently in use require the deeper water available there. Cargoes are either stored on Baltic Quay until shipped or collected by HGV, or are moved (usually by the port's own unlicensed "dock runners") to the Stockdale warehouse or compound to await collection by HGV or onward transit by sea. The Eastern Transit is also used by residents of a converted commercial building known as the Maltings which lies to the east of the TQW, between the TQW and the Baltic Quay. The residents of the Maltings have a right of way, granted by TWL, over the Eastern Transit and the Land, in order to get to and from their apartments.

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

11. Running alongside part of the south western boundary of the Land is a block of buildings comprising both residential and industrial units. This block is called the Grapevine (after a public house that was once there). Between the Grapevine and the Land runs a short stretch of public highway. There is a dispute (which does not concern me) as to the precise extent of this public highway, but it forms at least part of the link between the Port Road (a few yards to the north west) 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 warehouse and compound in the west to the Baltic area in the east. Although there is apparently no formal agreement or right, it is possible (depending on the location of the disputed boundary between the short stretch of public highway north of the Grapevine and the Land) that the cars of Grapevine residents and of their visitors, parked outside their properties, are parked wholly or partly on that public highway and/or on the part of the Land adjoining it. To the south, on the other side of the Grapevine, is the High Street, which is the main street of Mistley.

Background to the claim

The original application and the public inquiry

12. On 17 September 2008, following protracted correspondence with the Health and Safety Executive ("HSE") about the risk to employees and other persons of falling into the water from Allen's Quay, and following the threat by HSE of enforcement action, TWL erected a 1.8 metre high chain link metal fence all along the line of what had before been open quayside. The fence is positioned about half a metre from the edge of the quay.

13. On 18 August 2010, Mr Tucker, who was then living and working in Mistley, applied to Essex CC to register an area on Allen's Quay as a TVG pursuant to subsection 15(3) of the 2006 Act. The application was for a larger area than the Land, which I will call "the Application Site". The application stated that use of the Application Site by inhabitants of Mistley for lawful sports and pastimes had occurred "as of right" throughout a twenty year period ending on 17 September 2008, when the fence to which I have referred had been erected on it. In May 2013 Mr Tucker sought to vary the area in question by both the addition and subtraction of certain areas.

14. Essex CC appointed a barrister, Mr Alun Alesbury, ("the Inspector") to hold a non-statutory public inquiry to advise it on whether the Application Site should be registered as a TVG. The public inquiry took place in Mistley village hall over eight days between 24 June and 25 July 2013. Mr Tucker and the objectors were all legally represented. The Inspector heard oral evidence from some twenty seven witnesses, who were examined and cross-examined. Of these witnesses, eighteen were local inhabitants called on behalf of Mr Tucker. Eight witnesses gave evidence on behalf of three objectors, namely TWL, Gladedale (South East) Limited ("Gladedale") and Anglia Maltings (Holdings) Limited ("Anglia") - the latter being closely associated with another company, Edme Limited ("Edme"). The witness for TWL was Mr Michael Parker, who was (and remains) the Chairman and Managing Director of that company, and who has also given evidence for TWL in the present proceedings. In addition to this oral evidence the Inspector had before him written witness statements and a considerable amount of other documentary material, amounting in all to some two thousand pages. In the course of the inquiry he made several visits to the port area, both formal and informal.

The Inspector's report

15. On 28 October 2013 the Inspector produced his report ("the Report"), which provides a full and careful account of the evidence and submissions of all parties, and records his conclusions and recommendations. In summary, the Inspector's main conclusions were as follows:

(i) The Application Site should be amended to *exclude* a number of areas. Among these were areas constituting a publicly maintainable public highway (or alleged to be such),[2] the curtilage of an electricity substation, and certain other areas. The Inspector also refused Mr Tucker's application to amend the Application Site to *include* an area towards the north-western end of Allen's Quay which directly fronts onto the Stour estuary, on the grounds that an amendment at that late stage would prejudice TWL. (This small area was called "the ABC area" during the hearing before me, and is marked as such on the Plan.)

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[2] This is the stretch of public highway to which I referred in paragraph 11 of this judgment.

(ii) The net result of the conclusions at (i) above was that an area representing the "main part of Allen's Quay which lies to the north-east of the line where the established publicly maintainable highway ends" [3] was the only area which, in the Inspector's opinion, could be considered for registration as a TVG under the 2006 Act. (This area constitutes the Land, and is shown on the Plan.)

(iii) The registration authority (Essex CC) had the power to consider whether to register the Land as a TVG, notwithstanding that the Inspector was of the view that a substantial portion of the Application Site was ineligible for consideration, and it was appropriate for Essex CC to do so.[4]

(iv) The relevant "locality" for the purposes of subsection 15(3) of the 2006 Act was the civil Parish of Mistley, that having been "sensibly identified" as such on the balance of the evidence, and none of the parties having pursued an argument to the contrary.[5]

(v) In the light of all the evidence there could be "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."[6] That use was "a general use by local people for informal recreation" and was not just "occasional or sporadic trespass by individuals."[7] The use was "quite extensive over the years", and was for purposes which constituted "lawful sports and pastimes".[8]

(vi) Although it was true that "some of the activities referred to [in evidence], such as jumping/diving into the water to swim, crabbing, mooring and embarking/disembarking from pleasure vessels, etc, could only take place at the edge", the evidence as a whole had not led the Inspector to the conclusion that material use for "lawful sports and pastimes" had been restricted to a narrow strip a metre or two wide at the water's edge: there was "extensive evidence of other informal recreational activities by local people on the surface of the Quay more generally, which were not necessarily reliant on a position right next to the water's edge. Most notable in this category was the evidence of informal walking or wandering, with or without dogs, and not on a fixed route, and of people often standing and having a chat with others in association with such wanderings. Other informal games and social activities were also referred to by a number of witnesses, but the informal walking or wandering seemed on the evidence to be the most common feature." There was "abundant evidence" of such informal recreational walking or wandering on the Land by local people during the relevant period. This

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[3] Report, paragraph 16.42.

[4] Report, paragraphs 16.44-16.49.

[5] Report, paragraph 16.51.

[6] Report, paragraph 16.52.

[7] Report, paragraph 16.58.

[8] Report, paragraph 16.59.

amounted to a "lawful sport or pastime" and was "a very significant component of the totality of such activity on [the Land]."[9]

(vii) As for mooring and related operations at the quay, the Inspector stated that it was not clear on the evidence that the mooring, loading or unloading of leisure boats had constituted a lawful sport or pastime 'as of right', at least from 2004. From the summer of that year it had become known locally that yachts were being discouraged from mooring at the quay. Signs to that effect were also being erected around that time, even if their precise intent was not always clear. In those circumstances the Inspector discounted boating activities of this kind from consideration in deciding whether there is sufficient evidence of 'lawful sports and pastimes' on the Land.[10]

(viii) The Inspector also found that crabbing was established as a "lawful sport or pastime" carried on by local inhabitants over the relevant period, but as it only took place at or close to the water's edge, it did "not in itself contribute to my overall finding of lawful sports and pastimes use over the remaining application site more widely."[11]

(ix) He made a similar finding in respect of the practice of swan feeding. However, the Report indicates that the swan feeding by locals began in earnest in 1994 when, with the ending of the traditional mode of operation of the Maltings in Mistley, the abundant source of food in the form of "sweepings" into the water, which had generated a large flock of swans, was no longer available. It was from that time that local groups, including "Swans in Distress", were formed. The Inspector found that the predecessor of TWL and the owner/occupier of the TQW, Edme, cooperated with these groups by, for example, providing guidance notes recommending *inter alia* the use of fluorescent jackets by the feeders. These notes contained disclaimers of responsibility by both the land owner and the group. The Inspector did not regard the cooperation of the land owner as amounting to permission by that company, or as "in any way inconsistent with a clear local belief that people had a right to be on Allen's Quay in any event." He saw "no reason why swan feeding by local people should not, in the years to 2008, be seen as a component element of the various 'lawful sports and pastimes' which they indulged in on the open quay." However, as with crabbing, it took place largely at or near the water's edge.[12]

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[9] Report, paragraphs 16.61-72.

[10] Report, paragraphs 16.74-80.

[11] Report, paragraph 16.86-87. The Inspector dealt separately with the question of fishing at paragraphs 16.84-85, as it raised issues as to the effect of signage, which are also before me, and which I will refer to later in this judgment.

[12] Report, paragraph 16.88-93.

(x) The Inspector found that painting and drawing was "only a very minor element of the total 'sports and pastimes' use by Mistley inhabitants of [the Land], but nevertheless it was part of the overall pattern."[13]

(xi) He did not consider parking on the Land and then sitting in a car to enjoy the view or eat a sandwich – a relatively minor element of local activity on the quay - as making any positive contribution to the totality of 'lawful sports and pastimes' use by local people.[14]

(xii) The Inspector made a number of findings in respect of the short residual length of railway track, part of which is still visible embedded in the concrete/tarmac surface of Allen's Quay. This visible track extends from beyond the west end of the Grapevine and up to the TQW to the east. The location of this track is marked on the Plan. The Inspector recorded that it was not disputed that the last actual use of these rails was in 1984. (It now appears that the correct year was 1986, but nothing turns on the difference.) He also stated that it was not clear (and that it was not for him or Essex CC to decide) whether the land on which the track was located was part of the publicly maintainable highway running alongside the Grapevine. If it was not part of that public highway, then the track was on the TWL-owned part of Allen's Quay and was within the Application Site. He assumed that the latter was the case, and that the embedded rails were contiguous with the recognised area of public highway, from which they were entirely unfenced.[15]

(xiii) The Inspector held, in response to a submission of law on the part of TWL, that the existence of these residual tracks on Allen's Quay did not render the use of the Land "unlawful" for the purposes of subsection 15(3) of the 2006 Act.[16] (A similar submission was made to me, and I will return to this issue in due course.)

(xiv) Importantly, the Inspector concluded that the Land had been used for the identified lawful sports and pastimes *"as of right"* for a period of at least 20 years.[17] In particular, the signage present in the relevant period, and relied upon by the objectors, had not been such as to prevent such use being "as of right".[18] The Inspector identified three categories of signs: First, the signs on or close to the fencing of the Stockdale compound, including those fixed to the buildings constituting the Stockdale warehouse. He found that none of these signs would be understood by a reasonable observer as applying to any area other than the Stockdale compound and buildings. He concluded that "TWL's argument that these signs clearly 'warned people off' the whole of the port road and Allen's Quay etc. is

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[13] Report, paragraph 16.94.

[14] Report, paragraph 16.95-96.

[15] Report, paragraphs 16.106-7, and 16.115.

[16] Report, paragraphs 16.103-16.121.

[17] Report, paragraphs 16.122-16.190.

[18] Report, paragraphs 16.123-16.140.

manifestly wrong and unjustifiable."[19] Second, the "No Fishing….from these Quays" sign affixed to the wall of the TQW which faces Allen's Quay. The Inspector held that was "a reasonably clear prohibition on fishing from Allen's Quay (among other quays)." However, he did not consider it as otherwise particularly relevant to the issue before him "save for its positive implication that people (including local inhabitants) might legitimately be on the quay doing other things than fishing."[20] Third, the other[21] signs on either side of the entrance to the Eastern Transit from Allen's Quay leading to the Baltic area of the port. The Inspector concluded that "no reasonable, normal person, on seeing these signs would have drawn any other sensible conclusion than that they (individually and collectively) were intended to relate to people and vehicles passing through from the more obviously 'public' seeming space of Allen's Quay via the narrow quayside passage route to Baltic Wharf etc. The signs to my mind, in their context, give no impression at all that they are intended to apply to the open area of Allen's Quay where the notional reader is standing, or to the area behind that reader which he/she will have crossed in the first place, in order to read these signs."[22]

(xv) The Inspector found port-related commercial activities to have taken place on the Land throughout the relevant period (with the possible exception of the very edge of the quayside near the bollards located there, and even that area was, he found, used in the earlier part of the period for tying up commercial "lash" barges). These activities consisted of the passage of dock-related commercial vehicles, including HGVs and forklift trucks, also, to a lesser extent, the loading and unloading of commercial vehicles, and occasional temporary storage of materials. In addition, he noted that other motor vehicles, by no means always port-related, parked there.[23]

(xvi) Finally, he concluded that the "lawful sports and pastimes" carried out on the Land were not incompatible with the commercial activities identified. The two types of activity had co-existed for very many years including throughout the relevant 20 year period, and local people from time to time sensibly got out of the way of a passing lorry or forklift truck, in a spirit of give and take which, in the light of the case law, did not vitiate the claim that they were using the Land "as of right".[24] He noted an estimate by Mr Parker (based on recorded tonnages through the port) of the number of dock-related vehicle movements per day across Allen's Quay in various years in the relevant period, and also the evidence of surveys carried out by Nancy

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[19] Report, paragraph 16.128.

[20] Report, paragraph 16.130. See also paragraph 16.85, and Addendum 4 to the Inspector's Report. In the latter he made clear that he did not regard the sign as purporting to give permission for people to be present on the Land for other leisure purposes.

[21] ie other than the "No Fishing" sign.

[22] Report, paragraph 16.137.

[23] Report, paragraphs 16.141-143.

[24] Report, paragraphs 16.141-16.176.

Bell (a resident living within sight of the Land) of both vehicle and pedestrian movements on Allen's Quay during six days in 2013, being three days in winter and three in spring, made up in each case of one weekday with a ship unloading, one weekday with no ship unloading, and one weekend day with no port activity. The Inspector took the view that these sources of evidence, although not precise, provided "a reasonable overall feel for and understanding of the intensity of use, and are in reality not very far apart from each other." He concluded that on busy working days, when a vessel was unloading, "a little over an hour in aggregate[25] within such a working day would consist of time when a significant dock-related vehicle was crossing the Quay…..On working days with no ship unloading, dock-related traffic on Allen's Quay would have taken up on aggregate very much less time." Although there was evidence of some weekend working in the relevant period, his overall impression was that weekends were typically very much quieter than the non-unloading weekdays when there could be "prolonged periods of very little commercial activity on Allen's Quay at all." The Inspector also took into account that, in addition to these ship and cargo-related vehicle movements across the Land, during the relevant period Edme took regular deliveries at the TQW, some of which involved HGVs standing on the Land while they were unloaded by Edme's forklift trucks. The evidence before the Inspector as to the frequency of this occurring varied considerably. His general impression was that it was not a major feature of activity on the Quay but a relatively minor, temporary interruption to the usability of the Quay for informal recreation.[26]

16. In light of these conclusions, the Inspector recommended *inter alia* that the Land met the criteria in subsection 15(3) of the 2006 Act and should be registered as a TVG.[27]

Subsequent events

17. Following the delivery of the Report the parties raised a number of issues with the Inspector. These included: pointing out a minor factual error, submitting that in certain respects the position of Gladedale and/or Anglia had been insufficiently considered by the Inspector, adducing further submissions and evidence relating to the "railway issue", and making further submissions on the signage issue. The Inspector dealt with these further matters in, respectively, Addenda 1 to 4 to the Report. None of the further matters caused him to alter his conclusions or recommendations.

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[25] This was based on undisputed evidence that a commercial vehicle took about 20 seconds to cross Allen's Quay.

[26] Report, paragraphs 16.156-168.

[27] Report, paragraphs 16.194 -16.195.

18. By a decision of its Development and Regulation Committee on 25 July 2014 Essex CC accepted the Inspector's recommendations, and on 30 July 2014 notified TWL of the decision to register the Land as a TVG.

19. On 23 October 2014, TWL issued a claim for judicial review challenging the decision on the ground that it was unlawful because (a) the application for registration was brought too late; (b) the use of the Land by local residents was not "as of right"; (c) no relevant sports and pastimes were carried out there; (d) the use of the land for lawful sports and pastimes was incompatible with the use by commercial vehicles in the course of dock operations; and (e) the use was contrary to a statutory prohibition (the railway issue).

20. Collins J granted TWL permission "on the papers" to apply for judicial review to challenge Essex CC's decision only on ground (b), expressing the view that the other grounds were unarguable. TWL sought an oral hearing to renew its application for permission in respect of the other grounds, but in the meantime the parties agreed to stay the claim for judicial review pending determination of the present proceedings.

The present claim

21. TWL issued the present claim under CPR Part 8 on 28 November 2014. Pursuant to section 14 of the 1965 Act, TWL seeks an order that the TVG register maintained by Essex CC be rectified by the removal of the Land, and a declaration that the Land is not a TVG. Mr Edwards submitted that the effect of this relief would be to remove the right of inhabitants of the locality to carry out sports and pastimes on the Land. However, he pointed out that they would still have access to the public highway that runs immediately adjacent to the Land through the western end of the port past the Grapevine, and that there is no demarcation or barrier between that highway and the Land.

The grounds

22. The grounds of the claim, as formulated in TWL's skeleton argument, are:

(1) any qualifying recreational user of the Land had been rendered contentious, and so not "as of right" for the purposes of the 2006 Act, well in excess of two years before Mr Tucker made his registration application, which was therefore out of time;[28]

(2) during the 20 year period to September 2008 there had been various signs in place which were effective to render recreational user of the Land contentious, alternatively permissive, and so not "as of right";[29]

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[28] Details of Claim paragraphs 25-32, 39.
[29] Details of Claim paragraphs 17-19, 40.

(3) the commercial vehicular use of the Land had been incompatible with its use for "lawful sports and pastimes" and registrability as a TVG, and/or any recreational use of the Land had not been of the requisite quality to amount to the assertion of a right;[30]

(4) the Land had not been used for "lawful sports and pastimes" within the meaning of section 15 of the 2006 Act, but rather in the manner of a highway;[31]

(5) registration of the Land as a TVG would be incompatible with the statutory regime under which the Port of Mistley is operated;[32]

(6) recreational use of the Land would have involved the commission of a criminal offence (trespassing on a railway line or siding contrary to s.55 of the British Transport Commission Act 1949).[33]

23. Ground (5) and the second part of Ground (3) had not been in TWL's original Details of Claim, and were added later when Amended Details of Claim were filed by TWL, no objection being taken by the Defendants.

24. Mr Edwards pointed out that Grounds (1) and (2) stand or fall together, as they essentially raise the same point.

The evidence and witnesses

25. On 19 February 2015 Morgan J directed *inter alia* that the evidence heard by the Inspector at the public inquiry, together with the Report itself and the four Addenda, be admitted in evidence. At the same CMC, and at a subsequent one before HH Judge Barker QC in July 2015, orders were also made for the filing of documents setting out the parties' position on alleged factual discrepancies in the Report.

26. Such documents were duly produced, but at the hearing before me little if any reference was made to them or to the alleged discrepancies. This is not surprising given the nature of this court's jurisdiction under section 14 of the 1965 Act (see below). The discrepancies had mainly related to the degree of intensity of commercial activity and of recreational activities on the Land in the qualifying period. In the present claim TWL has adduced expert evidence on this aspect, not heard by the Inspector. In the course of submissions, Mr Edwards acknowledged, in relation to the alleged discrepancies in the Report, that it would make no difference whether, for example, there were six or ten HGV movements per day at Edme's premises (the TQW). However, he submitted that where the court is considering a subject which is addressed in the discrepancies documents, I should consider the

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[30] Details of Claim paragraphs 20-24, 42 and Amended Details of Claim paragraphs 2-20.
[31] Details of Claim paragraph 41.
[32] Amended Details of Claim paragraphs 21-27.
[33] Details of Claim paragraphs 33-38, 43.

parties' respective positions in respect of the alleged discrepancies alongside the Report and other evidence concerning those issues.

27. In addition to the public inquiry material admitted in evidence pursuant to the directions of Morgan J, the parties have filed further evidence and/or have called witnesses to give oral evidence and to be cross-examined. I heard evidence from five witnesses, including one expert witness. These witnesses, and the general scope of their evidence, were as follows (in order of being called):

(1) Kevin Gill (who had not given evidence at the public inquiry) gave a witness statement and was called by TWL. He is the Managing Director of a road haulage company based in the West Midlands which has regularly collected goods from the port of Mistley for about twenty five years. Mr Gill gave evidence about the level and nature of HGV activity at the port and the manoeuvres which his vehicles would perform there and in particular on Allen's Quay and the Land. Exhibited to his statement were photographs taken in 2007 showing his vehicles parked on or near the Land. He was cross-examined by Mr Eaton, and stated that he had made about two visits to the port in the twenty year qualifying period and his information about the situation there was mainly obtained from his drivers, although he was familiar with the layout. He did not know who had taken the photographs.

(2) Michael Hibbert, an expert in the field of transportation, provided a detailed report (with appendices). He was commissioned and called by TWL, and cross-examined by Mr Eaton. He had not given evidence to the Inspector. He described the scope of his evidence as considering:

> "from a transport and highways perspective, the use of the [Land] and other land in the vicinity of such land by commercial and other traffic during the Relevant Period and the likely impact of this use on the recreational use of such land by local inhabitants. In considering the respective activities, it is necessary for me to examine whether these uses would have been compatible with each other."[34]

Whether or not the issue of compatibility in that sense is really one for an expert, and if so whether it is a matter for a transportation expert, is open to question. Mr Hibbert acknowledged in his oral evidence, for example, that he had no particular expertise in matters of health and safety. He said that he had used *inter alia* the evidence presented to the public inquiry, weekly shipping logs from 1993, and TWL's records from the vehicle weighbridge in the Stockdale compound in the period January to May 2007, to estimate the intensity of commercial vehicle movements on and through Allen's Quay during the qualifying period 1988 to 2008. On the basis of his findings he concluded that the Inspector had significantly understated the intensity of vehicle movement and other commercial activity, and that

[34] Paragraph 2.8 of his report.

> "during the Relevant Period port-related traffic would have been the predominant use during the week and when operational at weekends, although I would note that there would have been times outside of the working week when little or no port traffic would have been witnessed.
>
> Nevertheless, during operational periods, in my view there would have been very little opportunity, time or space for any type of safe recreational activity.
>
> .....
>
> In these circumstances, I simply cannot conceive suggesting that these different uses are or could have been compatible."[35]

(3) Michael Parker, the Chairman and Managing Director of TWL, provided four witness statements (the first one being the longest), and was cross-examined by Mr Eaton. Mr Parker had also given evidence at the public inquiry. In his first statement he details what he contends to be inaccurate and incomplete recording by the Inspector of his and others' evidence at the public inquiry, particularly in relation to: the intensity of commercial use of the Land, the extent, nature and location of recreational uses of Allen's Quay, the use of the Port Road, and the question as to when and how the public use of the Land was first challenged by TWL. Mr Parker's other three statements are much shorter and deal essentially with the Report's alleged discrepancies to which I have referred.

(4) Keith John Garwood provided a witness statement and was called by the second defendant, Mr Tucker. He was cross-examined by Mr Edwards. He also gave evidence to the Inspector at the public inquiry. Mr Garwood told me that he has lived in Mistley all his life. He worked at the port until 1997 when he was made redundant. He worked for the then owners of Allen's Quay, Allied Breweries, until 1976. From then until 1997 he was operations manager of the Quay, and since then he has continued to visit Allen's Quay several times a week. In his witness statement he said that:

> "Throughout my working life and in retirement I have first-hand knowledge of the recreational and leisure activities enjoyed by local residents on the Quay.
>
> .....
>
> At no time during the relevant 20 year period was the density or frequency of traffic across the Quay sufficient to have any material effect on the recreational and leisure activities claimed to have taken place by the witnesses supporting the Application and observed and also enjoyed by me throughout the relevant period."

(5) Ian James Tucker is the second defendant and the original applicant for registration of the Land as a TVG. He gave evidence and was cross-examined at the public inquiry. He also provided a short witness statement in the present proceedings, and was cross-examined by Mr Edwards. He states that he has been making and restoring early keyboard instruments at his workshop directly

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[35] Paragraphs 7.45-6 and 7.50 of his report.

overlooking Allen's Quay since 1979, and that he lived at 4 High Street, Mistley from 1988 to 2014. During that time it was his practice to walk several times a day between his house and workshop on the Quay, and also to take breaks from work during the day in which he would often wander around the Quay and have lunch there. Like Mr Garwood, Mr Tucker states that at no time during the relevant period was the traffic across Allen's Quay such as to materially impede the recreational activities which he and others enjoyed in that period.

28. For the avoidance of doubt, I should say that these thumbnail sketches of the witnesses and of the general scope of their evidence are not intended to be anything more than that, and are certainly not intended to be a comprehensive account of their evidence to me, or (where applicable) to the Inspector. If and to the extent that it is necessary to refer further to the evidence of any witness, I shall do so in the context of the specific grounds relied upon by TWL. I also record that in my view all the witnesses who gave evidence to me did so honestly, and were doing their best to assist the court.

29. In addition to calling Mr Hibbert, Mr Gill and Mr Parker, TWL submitted a written statement from Ms Stephanie Hall, a pupil barrister at the time of the public inquiry, who took a note of the evidence given at that inquiry. I am told that her evidence as to the methodology of taking the note is not challenged by either of the defendants, but the note itself is not agreed. Essex CC called no witnesses. It submitted a written statement from the Inspector responding to an issue raised by TWL concerning the Inspector's treatment in the Report of evidence about the last year of active use of the vestigial railway line to which I have referred.

The nature of the court's jurisdiction

30. There is no dispute about the approach which I must take in dealing with the claim. It is common ground that the correct approach to a claim for rectification under section 14 of the 1965 Act is to be found in the following passage from the judgment of Lightman J in *Betterment Properties (Weymouth) Ltd v Dorset County Council* [2007] 2 All ER 1000, with which the Court of Appeal expressly agreed ([2009] 1 WLR 334):

> "14.....The language of the section affords no basis for any suggestion that the role of the court is the exercise of an appellate or supervisory jurisdiction or that the jurisdiction should only be exercisable if the registration authority in directing registration made an error on the evidence adduced before it or an error of law...... The section requires only that it should appear to the court on the evidence before it that for any reason (factual or legal) no amendment or a different amendment should have been made and that it is just to rectify the error on the register.
>
> 15 In my judgment on the face of the statute the court is free to adopt the procedure best calculated to enable a just and fully informed decision to be reached whether "no amendment or a different amendment ought to have been made", whether it is just to rectify the register, what should stand as evidence and what evidence should be admitted. The court in exercise of its case management powers will have regard to the process adopted by the registration authority or any panel when the amendment of the register under section 13 of the 1965 Act was made and the evidence adduced before it. It will no doubt have in mind that with the passage of time recollections will have dimmed

and potential witnesses may have died or ceased to be available. It may (for example) direct that evidence (in particular if unchallenged) adduced before the registration authority or any panel shall stand as evidence and any finding by it shall stand: (a) as a finding of fact at the hearing before the court; (b) as evidence; or (c) as a finding of fact in the absence of evidence to the contrary; and in deciding on the admissibility of evidence the court will no doubt bear in mind that no amendment shall be rectified unless it is just to do so and that it may be unjust to order rectification on the basis of new evidence e.g. which cannot now be challenged but could have been when registration took place.

16 This approach accords with what Parliament must have had in mind in conferring the jurisdiction to rectify. First it is no trivial matter for a public or private landowner to have land registered as a town or village green. If the entry in the register cannot be corrected under section 14, registration can effect (potentially catastrophic) blight on user and development.... Second the procedure on the application for registration is intended to be relatively simple and informal. There is no provision for the service of subpoenas or for orders for disclosure. Relevant evidence may only emerge later. It may be difficult (if not impossible) at a later date to identify the exact nature and limits (let alone the credibility) of the evidence adduced in support of (or against) the application or of the registration authority's conclusions as to the credibility or relevance of any particular evidence. Because of the absence (for any of a number of reasons) of objection to the application, it may have been appropriate for the applicant for registration to limit the evidence he adduced or the relevant evidence may have been unavailable. The problem is complicated when (as in this case) there is a change in ownership of the servient land. The new owner is likely to be at a disadvantage knowing the earlier course of events. To limit the evidence available in the High Court to the evidence adduced before the registration authority is calculated to raise serious practical problems, give rise to unfairness and to emasculate the jurisdiction. Parliament must surely have preferred to vest in the court the power to decide whether the admission of any particular evidence was calculated to promote the achievement of justice."

31. Thus, the court's jurisdiction to rectify the register under s.14 is neither appellate nor supervisory in nature. It is not confined to a review of the registration authority's decision, based only on the material which was before the authority when it made its decision. Subject to any directions the court may make, it can receive additional evidence (as it has in the present case), and should determine what (if any) amendment to the register ought to have been made and whether rectification would be "just", having regard to all the information available to it (including, where appropriate, the evidence which was before the public inquiry and/or the findings of the inquiry).

32. In these circumstances, TWL was clearly correct in submitting that the focus in the present case should not be on whether and in what respects the Inspector's (and therefore Essex CC's) conclusions were flawed (although, as I have noted earlier, TWL alleges that they do contain errors), but rather on whether having regard to the totality of the evidence ("old" and "new") before me, the Land or any part of it ought not to have been registered as a TVG pursuant to subsection 15(3) of the 2006 Act. As noted, the Report is part of the evidence but I am not in any way bound by the Inspector's findings, and must reach my own view, applying the relevant law. (See also *Betterment Properties (Weymouth) Ltd v Dorset County Council (No 2)* [2012] 2 P&CR 32, per Carnwath LJ (as he then was), at paragraphs 99-101.)

33. I bear in mind that if I were to conclude that the Land or any part of it ought not to have been registered as a TVG, I must then determine whether it is "just" to amend the register. Neither of the Defendants has raised any specific argument as to why I

should not in those circumstances consider rectification "just". This may be, as Mr Edwards submitted, because of the guidance provided by the Supreme Court in *Betterment v Dorset CC* [2014] AC 1072. There Lady Hale DPSC, in a judgment with which the other members of the Court agreed, indicated that the starting point in such circumstances should be that the landowner's rights have been severely curtailed when they should not have been, and the inhabitants have acquired rights which they should not have had. One should then examine whether there are any countervailing considerations such as those identified by Lady Hale (eg. prejudice to local inhabitants, to the public authorities or to others, by reason of lapse of time or otherwise), and if so what weight is to be attached to them (see paragraphs 33-44 of the judgment).

34. It appears to be common ground that under section 14 my determination is not limited to the binary one of either refusing any amendment to the register or ordering the Land to be removed from the register in its entirety. It is accepted that I also have the power, if the material before me justifies it, to alter the extent of the land currently subject to registration ("...a different amendment ought to have been made..."). No party is arguing for the latter outcome as a *primary* submission, but in the course of argument each (I believe) indicated, with a greater or lesser degree of enthusiasm, that if I were otherwise inclined against their case, I should consider that option. The lesser part of the Land that was the particular focus of this alternative was a strip of the quayside a metre or two wide along the water's edge.

Essex CC's role in this claim as registration authority

35. Before turning to the substance of the case, I should mention one feature which has been the subject of contention between TWL and Essex CC, at least in their written submissions.

36. TWL maintains that Essex CC must adopt a neutral stance with regard to the outcome of this claim, and should not seek to influence the court's decision. TWL points, in particular, to the quasi-judicial nature of the statutory function of determining applications for registration of land as a TVG conferred on registration authorities by the relevant legislation, and to the fact that such proceedings as these are "at large" on the basis of all the evidence, including new evidence. Reliance was placed on *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 where, at paragraph 102, Lord Scott of Foscote referred to the "quasi-judicial role" of the registration authority, and at paragraph 61 Lord Hoffmann said that a registration authority had no investigative duty which required it to find evidence or reformulate the applicant's case.

37. In pre-trial correspondence with TWL, Essex CC responded to these points as follows in a letter dated 25 November 2015:

> "it is accepted that a registration authority ... should maintain a strictly neutral stance in the exercise of its statutory function and we agree that it should not and confirm that it has not predisposed itself either for or against continued registration ... Our client's position is one of neutrality and will continue to remain so."

38. TWL complains that Essex CC has not in fact adopted a neutral position in respect of the claim, and has in correspondence stated its intention to defend the claim and to seek to uphold the recommendations of the Inspector and its own decision.

39. In its skeleton argument, Essex CC states that, whilst seeking to uphold its decision to register the Land on the evidence before the Inspector, it would take a neutral stance in relation to the additional evidence submitted in these proceedings, including the expert evidence of Mr Hibbert. Pursuant to that stricture, Mr Sharland did not cross examine any of the witnesses called, nor did Essex CC call any evidence itself. Mr Sharland did not make submissions in respect of TWL's two new grounds of challenge, as they were not advanced before the Inspector and are, at least to some extent, based on the new evidence. Essex CC submitted that this approach is consistent with that adopted by the registration authority in *Leeds Group Plc v Leeds City Council* [2010] EWHC 810 (Ch) (see per HH Judge Behrens at paragraph 8), and accepted as appropriate by the Court of Appeal in that case.[36]

40. In the passage referred to above, HH Judge Behrens records the neutral stance taken there by the registration authority, but the learned Judge does not comment on it, still less does he state that it is obligatory. It is true that the Court of Appeal does not criticise the neutral stance, but neither does it say that it was obligatory.

41. It seems to me that there is a danger of elevating what may be an appropriate position for such an authority to take depending on the circumstances, into a principle that it is under a duty to apply a self-denying ordinance. I see nothing in the *Leeds* case nor in the dicta in the *Oxfordshire* case which denies the authority the right to take a more active role in section 14 proceedings, should it wish to do so. Lord Hoffmann simply referred to the absence of a *duty* on the part of the registration authority to investigate or to adduce new evidence.

42. Without having heard full argument, I am inclined to the view that the fact that the authority has a quasi-judicial role at the decision-making/registration stage does not and should not preclude it, where appropriate, from fully defending its decision in the context of a subsequent section 14 claim, including by challenging new evidence and new submissions and/or by calling new evidence of its own. By the same token, if, having heard new evidence and submissions, an authority were to take the view that its original decision was wrong, it would surely not be right for it to defend it.

43. Be that as it may, here the Second Defendant's legal representative, Mr Eaton, has been able to cross-examine the witnesses called by TWL and to make submissions about the new evidence and grounds.

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[36] [2010] EWCA Civ 1438.

Grounds 1 and 2: Use was contentious, alternatively permissive, and therefore not "as of right"

TWL's submission

44. As already indicated, grounds 1 and 2 raise the same point and stand or fall together. TWL submits that local inhabitants' use of the Land for lawful sports and pastimes had become *contentious* and therefore not "as of right" well before 17 September 2008 (the end of the qualifying period) because (a) of the signage that was present during that period and/or (b) the conduct of TWL and/or its predecessors rendered the local inhabitants' use of the Land contentious, in such a way as to be so understood by local inhabitants. Alternatively, if neither of those submissions is correct, the use of the Land was not "as of right" because it was by implied *permission.*

The meaning of "as of right"

45. As to the meaning to be attributed to "as of right", there is a good deal of common ground between the parties as to the applicable principles. It is appropriate to refer to the authorities from which those principles are derived.

46. In *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [2000] 1 AC 335 it was held by the House of Lords that use is not "as of right" unless it is *nec vi, nec clam, nec precario*. These are concepts derived from Roman law, translated by Lord Hoffmann in that case as "not by force, nor stealth, nor the licence of the owner" (p.350). They have been given extended meanings in English law, and are central to the acquisition of prescriptive rights. Lord Hoffmann said this about them (at p.351):

> "The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right - in the first case, [*nec vi*] because rights should not be acquired by the use of force, in the second [*nec clam*], because the owner would not have known of the user and in the third [*nec precario*], because he had consented to the user, but for a limited period."

47. The House of Lords also made clear that it was irrelevant for this purpose whether or not the users held a subjective belief that they had the right to do what they were doing. Lord Hoffmann went on to refer (at p.351) to *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, 773, where Fry J had rationalised the law of prescription as resting upon acquiescence by the land owner. He then indicated (at p.352-3) that the English law of prescription is concerned with "how the matter would have appeared[37] to the owner of the land", and (citing Parke B in *Bright v Walker*, 1 C.M

[37] Later case law justifies the addition of the word "reasonably" before the word "appeared" in this sentence, since how the matter would have appeared to the owner of the land must be assessed "objectively": *R(Barkas) v North Yorkshire County Council* [2015] AC 195, at paragraph 21.

& R. 211, 219), that the user by the public must have been "openly and in the manner that a person rightfully entitled would have used it."

48. It is clear that once use of the required quality, for the required time, and *nec vi, nec clam, nec precario* has been established, the use is "as of right" – there is no other requirement (see eg *R (Lewis) v Redcar & Cleveland Borough Council* [2010] 2 AC 70, paragraphs 20 and 67, and *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2012] 2 All ER 554, paragraphs 24-29 and 74).

49. In the present case we are concerned only with an allegation of use *vi* (by force, or contentious) or *precario* (by permission) – TWL does not contend that any relevant use of the Land was *clam* (by stealth).

The meaning of nec vi

50. In *Lewis* (above), at paragraphs 87-92, Lord Rodger of Earlsferry JSC, whose expertise in Roman law was recognised, explained the meaning of *nec vi* as follows:

> "87. The basic meaning of that phrase is not in doubt. In *R v Oxfordshire County Council Ex p Sunningwell Parish Council* [2000] 1 AC 335 Lord Hoffmann showed that the expression "as of right" in the Commons Registration Act 1965 was to be construed as meaning *nec vi, nec clam, nec precario*. The parties agree that the position must be the same under the Commons Act 2006. The Latin words need to be interpreted, however. Their sense is perhaps best captured by putting the point more positively: the user must be peaceable, open and not based on any licence from the owner of the land.
>
> 88. The opposite of "peaceable" user is user which is, to use the Latin expression, *vi*. But it would be wrong to suppose that user is "*vi*" only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant contexts *vis* was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it. In those circumstances what he did was done *vi*. See, for instance, D.43.24.1.5-9, Ulpian 70 *ad edictum*, commenting on the word as used in the interdict *quod vi aut clam*.
>
> 89. English law has interpreted the expression in much the same way. For instance, in *Sturges v Bridgman* (1879) 11 Ch D 852, 863, where the defendant claimed to have established an easement to make noise and vibration, Thesiger LJ said:
>
>> "Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi nec clam nec precario*: for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, *or which he contests and endeavours to interrupt*, or which he temporarily licenses" (emphasis added).
>
> If the use continues despite the neighbour's protests and attempts to interrupt it, it is treated as being *vi* and so does not give rise to any right against him...."

51. Lord Rodger then referred to *Dalton v Henry Angus & Co* (above) and continued:

> "91. In *R v Oxfordshire County Council ex p Sunningwell Parish Council* [2000] 1 AC 335, 350-351, Lord Hoffmann found that the unifying element in the three vitiating circumstances was that each

constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right. In the case of *nec vi* he said this was "because rights should not be acquired by the use of force." If, by "force", Lord Hoffmann meant only physical force, then I would respectfully disagree. Moreover, some resistance by the owner is an aspect of many cases where use is *vi*. Assuming, therefore, that there can be *vis* where the use is contentious, a perfectly adequate unifying element in the three vitiating circumstances is that they are all situations where it would be unacceptable for someone to acquire rights against the owner.

92. If, then, the inhabitants' use of land is to give rise to the possibility of an application being made for registration of a village green, it must have been peaceable and non-contentious. This is at least part of the reason why, as Lord Jauncey observed, in the context of a claim to a public right of way, in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1993 SC (HL) 44, 47, "There is no principle of law which requires that there be conflict between the interest of users and those of a proprietor."

52. Thus, the concept *vi* is not limited to use involving physical force (eg. by cutting through a fence); it is enough for the use to be "contentious".

53. It is now well established that one of the ways in which use of the owner's land may be rendered contentious is by a notice. *Lewis* and other relevant authorities were reviewed and applied in *Betterment Properties (Weymouth) Ltd v Dorset County Council (No 2)* (above) by Morgan J and the Court of Appeal. Like the present case, *Betterment (No 2)* concerned the effect of signage, and in particular the question whether notices that were present rendered the use of former grazing land, crossed by two public footpaths, "contentious". Inhabitants of the area were said to have used the land for activities such as playing games, dog walking and playing with children "as of right" for not less than 20 years. Registration as a TVG was opposed by the owner on the ground that such user had not been "as of right". Until about 1984 the owner had repeatedly erected and re-erected clearly visible signs, stating that the land was private or that the public were to keep out or that their presence would be a trespass, making it plain that the public were not entitled to go on to the land other than by using the footpaths. The signs had been repeatedly vandalised and removed by members of the public, with the result that they had not been seen by other members of the public. From time to time the owner and the owner's employees had also challenged members of the public.

54. Morgan J held that the user had remained contentious until at least 1984, and his decision was unanimously upheld by the Court of Appeal. In relation to the effects of signage, Morgan J said this:

"116. The effect of notices was again considered in *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust & Anr) v Oxfordshire County Council* [2010] LGR 631. The notices in that case read: "No public right of way". The judge, Judge Waksman QC, sitting as a Judge of the High Court, referred to Pumfrey J in *Smith v Brudenell-Bruce* at [12] and, in particular, to the passage which refers to the servient owner "doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user". The judge then referred to Sullivan J's decision in *Redcar* and to the terms of the notice in *Oxfordshire County Council v Oxford City Council*. He then set out the following principles:

[22] From those cases I derive the following principles:

(1) The fundamental question is what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his information, would have so known;

(2) Evidence of the actual response to the notice by the actual users is thus relevant to the question of actual knowledge and may also be relevant as to the putative knowledge of the reasonable user;

(3) The nature and content of the notice, and its effect, must be examined in context;

(4) The notice should be read in a common sense and not legalistic way;

(5) If it is suggested that the owner should have done something more than erect the actual notice, whether in terms of a different notice or some other act, the court should consider whether anything more would be proportionate to the user in question. Accordingly it will not always be necessary, for example, to fence off the area concerned or take legal proceedings against those who use it. The aim is to let the reasonable user know that the owner objects to and contests his user. Accordingly, if a sign does not obviously contest the user in question or is ambiguous a relevant question will always be why the owner did not erect a sign or signs which did. I have not here incorporated the reference by Pumfrey J in *Brudenell-Bruce*'s case to 'consistent with his means'. That is simply because, for my part, if what is actually necessary to put the user on notice happens to be beyond the means of an impoverished landowner, for example, it is hard to see why that should absolve him without more. ....

In my judgment the following principles also apply:

(6) Sometimes the issue is framed by reference to what a reasonable landowner would have understood his notice to mean--that is simply another way of asking the question as to what the reasonable user would have made of it;

(7) Since the issue turns on what the user appreciated or should have appreciated from the notice, it follows that evidence as to what the owner subjectively intended to achieve by the notice is strictly irrelevant. In and of itself this cannot assist in ascertaining its objective meaning;

(8) There may, however, be circumstances when evidence of that intent is relevant, for example if it is suggested that the meaning claimed by the owner is unrealistic or implausible in the sense that no owner could have contemplated that effect. Here, evidence that this owner at least did indeed contemplate that effect would be admissible to rebut that suggestion. It would also be relevant if that intent had been communicated to the users or some representative of them so that it was more than merely a privately expressed view or desire. In some cases, that might reinforce or explain the message conveyed by the notice, depending of course on the extent to which that intent was published, as it were, to the relevant users."

55. Morgan J continued, at paragraph 121 of his judgment:

"The parties did not dispute that the test identified by Pumfrey J in *Smith v Brudenell-Bruce* [2002] 2 P&CR 51 was a useful general test to be applied for this purpose. I will adapt that test for a case of a town or village green rather than a private easement. For the time being, I will leave in the reference to "means", notwithstanding the comment of Judge Waksman QC in *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust & Anr) v Oxfordshire County Council* [2010] LGR 631. So adapted, the test can be stated thus:

"Are the circumstances such as to indicate to the persons using the land, or to a reasonable person knowing the relevant circumstances, that the owner of the land actually objects and

continues to object and will back his objection either by physical obstruction or by legal action? For this purpose, a user is contentious when the owner of the land is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user." "

56. The Court of Appeal ([2012] EWCA Civ 250) appeared essentially to approve both Judge Waksman QC's and Morgan J's analyses of the correct approach. Patten LJ gave the leading judgment, and Carnwath and Sullivan LJJ agreed with his judgment on this point. At paragraph 41ff Patten LJ said:

"41....Assuming that the notice is in terms sufficiently clear to convey to the average reader that any use of the relevant land by members of the public will be treated as a trespass then it will be irrelevant that individual users either misunderstood the notice or did not bother to read it. The inhabitants who encounter the sign have to be treated as reasonable people for these purposes to whom an objective standard of conduct and comprehension is applied.

......

49. All the relevant authorities in this area proceed on the assumption that the landowner must take reasonable steps to bring his opposition to the actual notice of those using his land. Disputes about whether the wording of the notices was sufficient to make it clear that any use of the land was not consented to and would be regarded as a trespass would be irrelevant if the landowner did not have to make his position known. They assume that some process of communication is necessary. If the landowner keeps his opposition to himself and makes no outward attempt to prevent the unauthorised use of his land he may be taken to have acquiesced.

50. It is therefore important to read the tests set out by Pumfrey J and Judge Waksman as directed to what the landowner in any given case will be required to do in order to manifest his objections to the use of his land. What Judge Waksman refers to as the putative knowledge of the reasonable user means (as he explains) what the reasonable man standing in the position of the actual user should have realised. It does not attribute knowledge to the reasonable user which the actual user walking over the land at the relevant time would not have had. Users of the land are therefore treated as more perceptive than they might actually have been but they are not deemed to have seen things which were not there.

51. The essential criticism of the judge's analysis at paragraph 122 is that it treats the reasonable user of the land as being in possession of knowledge which the actual users who gave evidence in support of the s.13 application said they did not have. As mentioned earlier, the judge has not rejected that evidence or made any finding that they did see or were aware of the warning signs. He says in paragraph 122 that it is not necessary for the landowners to show that every single user of the land knew what the reasonable user would have known. And he seems to have relied on this so as to make it unnecessary to decide whether the signs on the fences were in fact seen by what I have called the lawful users of the land.

52. I agree with the judge that the landowner is not required to do the impossible. His response must be commensurate with the scale of the problem he is faced with. Evidence from some local inhabitants gaining access to the land via the footpaths that they did not see the signs is not therefore fatal to the landowner's case on whether the user was as of right. But it will in most cases be highly relevant evidence as to whether the landowner has done enough to comply with what amounts to the giving of reasonable notice in the particular circumstances of that case. If most peaceable users never see any signs the court has to ask whether that is because none was erected or because any that were erected were too badly positioned to give reasonable notice of the landowner's objection to the continued use of his land."

57. The Court of Appeal recently considered and applied these principles in *Winterburn v Bennett* [2016] EWCA Civ 482. There the issue was whether clear signs stating "Private car park. For the use of Club patrons only" were sufficient to prevent third party trespassers acquiring a right to use land as a car park, on the basis of prescription by "lost modern grant", in circumstances where the third parties had ignored the notices. Referring to the dictum of Pumfrey J in *Smith v Brudenell-Bruce*, David Richards LJ (with whose judgment the other members of the court agreed) said:

> "36…In my judgment, the authorities do not support the proposition that a servient owner must be prepared to back his objection either by physical obstruction or by legal action or the proposition that the servient owner is required to do everything, proportionately to the user, to contest and to endeavour to interrupt the user. As it seems to me, the decision of this court in *Betterment* is inconsistent with these propositions. The court there accepted that the erection and re-erection of signs was all that the owner needed to do to bring to the attention of those using the land that they were not entitled to do so.
>
> ……
>
> 40. In my judgment, there is no warrant in the authorities or in principle for requiring an owner of land to take these steps in order to prevent the wrongdoers from acquiring a legal right. In circumstances where the owner has made his position entirely clear through the erection of clearly visible signs, the unauthorised use of the land cannot be said to be "as of right". Protest against unauthorised use may, of course, take many forms and it may, as it has in a number of cases, take the form of writing letters of protest. But I reject the notion that it is necessary for the owner, having made his protest clear, to take further steps of confronting the wrongdoers known to him orally or in writing, still less to go to the expense and trouble of legal proceedings."

58. Although there was some difference of opinion between TWL and the Defendants as to the correctness of Judge Waksman QC's principles (2) and (5) (and in particular the effect of proportionality) in the light of *Betterment* and *Winterburn,* in the event no party appeared to rely on that difference in relation to any specific submission. In particular, the Defendants did not, as I understand their submission, contend that appropriately placed and worded signage would not, in a case such as the present, be capable of rendering the use in question "contentious", and that something more, eg. physical barriers or legal proceedings, would be required. In my view the principles set out or approved by the Court of Appeal in those two cases provide such guidance as I require in relation to whether the user of the land here was rendered contentious by signage and/or other means.

The meaning of nec precario

59. As to the meaning of *nec precario*, it is clear that a licence or permission can be express or implied from conduct, written or oral. In *R(Beresford) v Sunderland City Council* [2004] 1 AC 889, Lord Bingham said, at paragraph 5:

> "I can see no objection in principle to the implication of a licence where the facts warrant such an implication. To deny this possibility would, I think, be unduly old-fashioned, formalistic and restrictive. A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice, or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner

wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use."

In that case the House of Lords concluded that the conduct relied upon as amounting to an implied licence, namely, the public authority owner's encouragement of activity on the land by mowing the grass and providing seating, did not in itself indicate the grant of a revocable licence such as to preclude a claim for use "as of right".

60. This approach was applied by Judge Robert Owen QC, sitting as Deputy Judge of the High Court, in *R(Mann) v Somerset County Council* (unreported judgment of 11th May 2012). There the owner had held annual beer festivals on part of the relevant land for several days and had charged members of the public for entry to a marquee. The Judge stated that it was "difficult to see, viewed objectively, how the local inhabitants could not have appreciated that in continuing to use the land they were doing so with the (implied) permission of the owner." (Paragraph 75 of the judgment.)

61. In *R(Barkas) v N. Yorks CC* [2015] AC 195, the Supreme Court disapproved aspects of the reasoning of the House of Lords in *Beresford*, and considered that it was wrongly decided. In particular, the Supreme Court took the view that on the facts of *Beresford* the public authority owner had lawfully allocated the land for the purpose of public recreation for an indefinite period, and that, in those circumstances, there was no basis upon which it could be said that the public use of the land was "as of right": it was "by right".

62. However, this criticism of the reasoning in *Beresford* does not cast doubt on the concept and test of implied permission, as explained by the House of Lords in that case. The concept has recently been confirmed by the Supreme Court in *R(Newhaven Port & Properties Limited) v East Sussex CC* [2015] AC 1547. It was there held that byelaws made by a port authority under its statutory powers and which prohibited certain recreational activities, gave inhabitants implied revocable permission to carry on other recreational activities not so permitted, notwithstanding that the byelaws in question had not been published (and therefore communicated to the public) as required. As a result, the inhabitants had carried on the relevant activities "by right" and not "as of right", and no registration of the land as a TGV was possible. In applying the concept of implied permission Lord Neuberger said, at paragraph 58:

"A prohibition can be expressed in such a way as to imply a permission. For instance, it is hard to argue against the proposition that a byelaw which states that dogs must be kept on a lead in a public park implies a permission to bring dogs into the park, provided that they are kept on a lead. It is at least as a matter of pure linguistic logic, possible to interpret the byelaw as solely meaning that, if (and only if) specific permission is obtained from the park authority by a person to bring a dog into the park, then the byelaw will apply. However, any reasonable reader of the byelaw would not consider that it had such a limited meaning. In other words, as with any question of interpretation, a strictly logical linguistic analysis of the words concerned cannot prevail over a contextual assessment of what they would naturally convey to an ordinary and reasonable speaker of English."

63. Mr Edwards submitted that in the light of *Barkas* (per Lord Neuberger at paragraphs 27-29) use of land "as of right" must be trespassory. It is not clear that *Barkas* was adding a criterion for use "as of right" that was not already subsumed within the multiple condition *nec vi nec clam nec precario,* as generally understood. In *Barkas* Lord Neuberger appeared simply to be emphasising the seemingly uncontroversial proposition that if use of land is "by right" (as, for example, in the case of a right granted by public law) it *cannot* be "as [if] of right".[38] It may be that the case law has identified a further sub-category of "precario", namely use "by public law right", as distinct from by permission of a private landowner, express or implied, and that in the former there may be no requirement for permission to be communicated to the user. However, we are not here dealing with a landowner who is a public body, nor with any question of a public law right of recreational use.

64. It will be necessary to look again at the issue of *precario* in relation to TWL's alternative argument based on implied permission.

Did signage render use of Allen's Quay "contentious"?

65. In the course of the hearing a helpful nine-page compilation of photographs and text of the signage on or close to Allen's Quay was produced. This document, the content of which is accepted as accurate and which is reproduced at Annex 2 to this judgment, I shall refer to as "the Clip". Although the Clip includes other signs which might conceivably have a bearing on the use of Allen's Quay, and although submissions were made to the Inspector about the effect of other notices, before me TWL realistically accept that their argument in this regard must depend upon the prohibitory notices attached to the western elevation of TQW facing the Land.[39] These notices ("the TQW Notices") would be seen by those standing on Allen's Quay close to the entrance to the Eastern Transit, and facing east.

66. There are two versions of the TQW Notices: pre- and post- 2004. Both versions contain a sign "No unauthorised vehicles allowed beyond this point" and a sign "No Fishing. Fishing is not allowed from these quays due to injury to swans from discarded tackle".

67. Additionally, the pre-2004 version (see page 6 of the Clip) contains a notice stating "This Wharf Is Strictly Private Property", and under that: "Strictly No Admission To Unauthorised Persons", and under that: "Private Property Strictly No Admittance". There is also a warning that responsibility for loss and damage sustained by trespassers is not accepted and that "This is a dock working area. There is danger whilst machines are in use." Another notice refers to a 5mph speed limit.

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[38] "If they have a right in some shape or form (whether in private or public law), then they are permitted to be there, and if they have no right to be there, then they are trespassers." Per Lord Neuberger at paragraph 27 of *Barkas*.

[39] In submissions TWL referred to these as the "critical" notices.

68. The post-2004 signs (see pages 7-9 of the Clip) are in some cases situated slightly closer to the corner of the TQW and, in addition to the notices in common with the pre-2004 version, include signs stating "Give way to oncoming traffic 10mph", "Danger Fork lift trucks", "Danger This is a multi-hazard area", "No unauthorised admittance", "All visitors must report to reception", "Strictly Authorised Personnel Only", and "WARNING TO PUBLIC This quay area site is private property No unauthorised persons allowed Liability will not be accepted by TWL for any injury sustained by trespassers NOTICE TO PARENTS Parents are especially requested to warn Children of the dangers & consequences of trespassing on this site". Immediately beneath this is a sign, with an arrow apparently pointing towards the Eastern Transit entrance: "Carter Builder Site Access Via Quayside Only".

69. Mention should also be made of notices situated at the other (northern) side of the narrow entrance to the Eastern Transit ("the Northern Notices"), although TWL did not place as much reliance upon them. This signage is shown on page 4 of the Clip. After references to the danger from fork lift trucks and to the 10mph speed limit, a sign states "All visitors and contractors to report to reception to receive safety instruction and quay rules"; others state "Hard hats and safety footwear to be worn on this quay"; "No admittance to unauthorised personnel"; "Quay areas are dangerous Do not play on this quay"; and "Parents are requested to warn children of the dangers and consequences of trespassing on this site".

70. It is common ground that the notices relied upon by TWL were present in one version or the other throughout the qualifying period. TWL submits that the TQW Notices, both pre and post 2004, are plainly prohibitory in effect, that a reasonable person considering them sensibly and in context would inevitably appreciate that they applied to Allen's Quay which is the only location from which the notices can be read, and that the TQW Notices have the effect of rendering use of Allen's Quay contentious and therefore not "as of right".

71. TWL also refer to HHJ Waksman QC's recognition in *Oxfordshire and Bucks Mental Health NHS Trust* (above) that the land owner's intention may be relevant in that it may "explain the message conveyed by the notice". In that regard reliance is placed upon Mr. Parker's evidence that the notices on TQW were intended to apply to Allen's Quay, and that there was no operational reason why TWL would have controlled public access to the land to the east of Allen's Quay but not to Allen's Quay itself. Although TWL accept that such evidence is not of itself determinative, they submit that it reinforces their submission as to the effect of the TQW Notices.

72. It has not been disputed that the notices relied upon are "prohibitory". The issue is: to which land do they refer? TWL criticise the Inspector's findings as to the interpretation and effect of the notices in the port area, and the TQW Notices in particular. TWL argue that he failed properly to take into account the fact that the pre-2004 notices on the west facing wall of the TQW were positioned further south ie further away from the entrance to the Eastern Transit than the corresponding post-2004 notices. Had he done so, he could not have found that the pre-2004 notices applied only to the area of the port to the east of that entrance. TWL also submit that the Inspector's conclusion that the TQW Notices did not apply to Allen's Quay is

irreconcilable with his conclusion that the "No Fishing" notice, which also is attached to TQW, did so apply.

73. I do not agree with TWL's submissions. Having carefully considered the wording and location of the relevant signs, both in photographs and in the course of my site visit, I am of the view that a reasonable person, considering the TQW Notices sensibly and in context, in either their pre- or post- 2004 version, would understand them (with the exception of the "No Fishing" notice and the cautionary notice relating to fork lift trucks) to be referring only to the area of the port to the east of the entrance to the Eastern Transit. A number of factors combine to create that impression.

74. First, the position of the TQW Notices: they are clustered close to the entrance to the Eastern Transit, and would be readable by a person approaching the Eastern Transit; this creates a "gateway" effect. In this respect their pre-2004 location (very slightly more to the south) in my view would have made no difference to the impression given. The latter is reinforced by the positioning of the Northern Notices, which establishes an apparent connection between the two sets of signs on either side of the entrance to the Eastern Transit, enhancing the "gateway" effect.

75. Second, the wording of the TQW Notices: the references to "No unauthorised vehicles allowed beyond this point" and "No admittance", "No unauthorised admittance" or "Strictly no admittance", combined with similar wording in the Northern Notices, contribute to the impression that what is being controlled is the entrance to the Eastern Transit and the port area beyond. This wording, as well as the positioning of the signage, conditions the reader's interpretation of such references as "This quay area site is private property No unauthorised persons allowed", so that a reasonable person would read the latter as referring to the area through the entrance, rather than the openly accessible area to the west of the TQW through which a public highway runs entirely undifferentiated from the surrounding ground.

76. Third, it is common ground that for part of the qualifying period there had been a raisable barrier at the entrance to the Eastern Transit, which was used to prevent vehicular access to the area beyond at certain times. Despite Mr Parker's evidence that there is no operational reason for controlling access to the eastern area of the port, there clearly was a reason at one time. This barrier, traces of which are still visible, would serve to confirm a reasonable person's understanding that the area referred to in the prohibitory signage is that which lies beyond the entrance.

77. In my view a very prominent and explicitly worded notice would have been necessary to counteract the clear impression to which I have referred, particularly if it were placed on the west facing wall of the TQW.

78. I believe it is common ground that the "No Fishing" sign would be understood as applying to Allen's Quay, as well as to other quays within the port area. That is also my conclusion. However, that does not help TWL's case. The sign's express reference to the plural ("these quays") is unique, at least so far as the notices at the

east side of Allen's Quay are concerned, and it would not in my view lead a reasonable person to read the other TQW Notices as also applying to Allen's Quay. Therefore, I do not agree with TWL's contention that there is an irreconcilable inconsistency between the Inspector's conclusions that the other TQW Notices did not apply to Allen's Quay but that the "No Fishing" notice did.

79. The sign "Danger Fork Lift Trucks" is non-specific, and it can be assumed that locals visiting Allen's Quay would have seen Edme's fork lift trucks operating outside the TQW on occasions, and would take the warning to be inclusive of those operations, as well as to any other use of such vehicles in the general area. However, this cautionary (non-prohibitory) sign does not affect the overall impression created by the relevant signage. The other cautionary notice "Danger This is a multi-hazard area" is linked to the "No unauthorised admittance" sign, which contributes to the "gateway" effect.

80. In his submissions Mr Edwards understandably sought to analyse the various notices individually, and to point up those which, taken in isolation, could arguably refer to Allen's Quay in prohibitory terms. However, I do not consider that the reasonable, average reader, faced with the multiplicity of notices on the wall of the TQW, would analyse them in that way. He would interpret them in their context, which includes the "gateway" impression mentioned above.

81. There is a further difficulty in the way of TWL's reliance upon the signage in question: there are several access routes onto the Land available to local inhabitants: from Mistley High Street they can pass onto the Land from either the west or from the east side of the Swan Basin; and they can access from the Port Road, or from the Maltings. Using three of these four possible entrances, a visitor could enter and remain on the Land without ever coming within reading distance of the signage on the TQW wall. Further, there is no sign at any of the four entrances – even using the entrance to the east of Swan Basin, a person would need to have entered the Land before being in a position to see the TQW Notices.

82. I do not accept the suggestion that from a practical point of view there was nowhere except the wall of the TQW where notices intended to apply to the Land could be placed. In my view it would have been possible for notices to have been placed on and/or at the entrances to the Land without obstructing traffic or mooring of barges. It is not clear why, for example, they could not have been painted on the ground.

83. I therefore conclude that the use by local inhabitants of Allen's Quay, and in particular the Land, for the pastimes in question would not have been rendered "contentious" at any time during the qualifying period by the presence of the TQW Notices or any other signage.

Did conduct render use of Allen's Quay "contentious"?

84. TWL contend that if use of the Land by local inhabitants was not made contentious by signage, then the landowner's conduct at various points during the qualifying period up to September 2008 did so. Reliance is placed upon the evidence of Mr

Garwood in respect of the period from 1997, and also upon conduct occurring in two further principal periods: first, 2003 to 2005, and second, during 2008 up to the end of the qualifying period on 17 September 2008.

85. In a witness statement by Mr Garwood dated 16 August 2010, he states at paragraph 5:

> "In the early 1950s only a few boats yachts and small boats used for recreational purposes visited Mistley. However, the numbers increased over the years as yachting became more popular after the war but no charge was ever made for berthing alongside the Quay or landing here. These visiting yachts and boats normally berthed along that part of the Quay opposite Grapevine Cottages. After Mr Parker acquired the Quay in 1997 he did not wish yachts to moor alongside and I was instructed by the then general manager [Mr Forbes] to communicate this on behalf of Mr Parker. He never said that yachts had no right to moor alongside or to disembark crew but just that he did not wish them to come back. It was clear to me that Mr Parker disliked yachtsmen using his Quay. He always made it clear that the Quay was his and he did not like it to be used by other people."

86. Mr Garwood confirmed this in cross-examination, and added that after being instructed to do so by Mr Forbes he had "passed the word around." However, it is to be noted that he was made redundant in 1997 – the same year that Mr Parker (TWL) took over the port. Further, in the same witness statement Mr Garwood says:

> "I have never been challenged nor have I been aware of anyone else having been challenged in respect of the right to use the Quay opposite Grapevine Cottages and across the whole width of Allen's Quay. There has never been any sign or physical or oral challenge to this use."

87. TWL submits that on the basis of Mr Garwood's evidence use of Allen's Quay was made contentious from 1997. I do not agree. The evidence goes little further than Mr Parker expressing his concerns to Mr Forbes and Mr Garwood, and instructing them to communicate to yachtsmen that the owner did not wish them to moor alongside Allen's Quay. Since he was made redundant the same year, it cannot be assumed that he "passed the word" to a significant number of yachtsmen. I do not consider that Mr Garwood's reference to "other people" indicates that he made such communications to people other than those mooring there. Indeed, the second passage quoted above makes it clear that he did not. In my view Mr Garwood's evidence does not assist TWL.

88. In relation to the period 2003-2005, TWL relies upon a number of documents.

89. A letter of 9 July 2003 from Stour Sailing Club to the Managing Director of Mistley Quay and Forwarding, the predecessor of TWL, records that skippers had been informed by a representative of the company that mooring would no longer be available at Mistley.

90. A cutting from the "Manningtree and Harwich Standard" for 16 April 2004 records that "big increases in public liability insurance and the compensation culture have been blamed for the public no longer being able to use Mistley Quay". The piece continues: "...people were extremely concerned that those using the river would no longer have access to the quay....Boating is one reason why people chose to come and live in this area...." It was recalled that "years ago river users had to have a

licence to use the quay and ….this might be a way forward." TWL submit that this piece should not be read as limited to use of Allen's Quay by sailors, but in my view it clearly is so limited. In that respect it is entirely consistent with the subject of the earlier letter from the Sailing Club, and with Mr Garwood's evidence. A local person reading the cutting would not take it as relating to his or her access to and use of Allen's Quay for the land-based leisure activities which formed the basis of the Inspector's conclusions.

91. A letter of 11 May 2004 from the clerk to Mistley Parish Council to Tendring District Council Planning Department, in commenting on a planning application by Gladedale for car parking associated with the residential development of the Maltings, states: "It is not only visually incongruous but, at a time when Trent Wharfage is making great play upon the need to keep the public away from the quay side, would introduce a safety hazard." On the assumption (which in my view is by no means clearly correct) that this comment relates to access onto Allen's Quay, it is unclear whether the clerk's remarks are directed to TWL's contemporaneous challenge to access to the quay side by boatsmen or to access by others.

92. On 23 May 2005, under a headline "Ban on mooring sparks concerns", the "Manningtree and Harwich Standard" reported that "A ban on yachtsmen putting into a Stour port has led to fears that tourists will bypass the village. River users claim fishermen and sailors have been mooring up at Mistley Quay for hundreds of years. But owners [TWL] said the move had been prompted by health and safety and security issues. "This is a working port with lorries and fork lift trucks on the quay and you can't have people climbing ladders, walking around or bringing cars down to load or unload yachts" said port manager, John Jenkins. He explained that since 9/11 security had been tightened at all ports and the Health and Safety Executive had been to Mistley and said that the public should not be allowed access. The argument over access to the quay has been festering for more than two years when new fencing meant people could no longer get to a ladder at the eastern end of the port." It is clear from the above and from later passages that this newspaper story, too, is about the issue of mooring/access to and from boats.

93. TWL point out that at the time of the latter article TWL was in discussions with the HSE about the company's duty to protect the health and safety of its employees and members of the public who might be affected by its activities at the port. In a letter to TWL of 16 June 2005, the HSE state that a risk assessment should be undertaken and reasonable controls put in place to remove or mitigate identified risks. They continue: "It is the company's decision as to which areas to classify as operational, but you will need to consider whether any consequential decision to exclude members of the public is justified at all, or [at] specific, times given the activities being undertaken. You will also need to consider whether control measures such as pedestrian segregation – bollards, walkways, crossing points, areas designated (either by time or space restrictions) as pedestrian/vehicle only etc – would be reasonably practicable." This letter was followed by a visit by HSE on 16 August 2005 and a further letter of 17 August 2005, reiterating the company's duty to

ensure public safety on the port, including the need to consider "whether prohibiting pedestrian access/mooring in particular, or all, areas is required…"

94. Save that it is clear that the intervention of HSE was the immediate cause of TWL's decision to fence off the water's edge at Allen's Quay in mid-September 2008, bringing the qualifying period to an end, it is difficult to see that the correspondence with HSE takes the "as of right" issue much further. Nor do I consider that there is any real assistance for TWL's argument to be found in the other documents referred to above, which all concern the question of mooring/access to and from boats. Save in that regard this material provides no evidence of any steps being taken by TWL in this period to contest the use of and access to Allen's Quay by members of the public.

95. In relation to 2008, TWL relies upon further documents and other evidence, which I will summarise.

96. In his written and oral evidence, Mr.Parker referred to a 2007 inquiry into the Tendring Local Plan, which included a proposal that port operations at Mistley be concentrated in the eastern Baltic area, with the western part of the port being used for residential development and public access. Mr. Parker, on behalf of TWL, had resisted the proposal, which was rejected despite support from the Parish Council. TWL submit that the fact of its resistance in a public forum in 2007 to public access is an indication that local inhabitants' use of Allen's Quay was contentious. However, the real burden of Mr Parker's submissions to the 2007 inquiry appears, on his own evidence, to have been to get across the point that the adoption of the proposal would have meant the closure of the port – not because of public access to Allen's Quay but because the plan would have involved the cessation of all port activities at the Stockdale end of the port where the Stockdale warehouse and compound are situated. I cannot see that TWL's resistance to this proposal could have put local inhabitants on notice that their continued access to and use of Allen's Quay was contentious.

97. By early 2008 the pressure on TWL from HSE was intensifying. HSE's letter of 15 February 2008 reveals that they visited Allen's Quay on 12 February that year in response to a "concern raised with HSE by the local Parish Council about the removal of a ladder at the quayside." After recording that they could not become involved in any "civil disputes as to rights of access and usage of the quay" the letter stated that the matter of public safety was unresolved and TWL must decide whether or not Allen's Quay was an operational area of the dock. If it was such an area, HSE considered that it did not comply with the requirements of the Docks Regulations 1988. If it was not operational, then the quay should be fenced "such that pedestrians and vehicles will not fall into the water." Enforcement action was threatened unless TWL made a decision and agreed a timetable for remedial action.

98. In an email dated 27 February 2008, HSE confirmed that if TWL wished to treat Allen's Quay as an "operational" part of the port, by virtue of its being an access route to different parts of the port, then HSE would not object if TWL fenced it so as to stop people falling into the water.

99. By a letter to HSE the next day Manningtree Town Council ask HSE to "reconsider the alternatives with which you have presented [TWL]". The Council would like to see "a return to the previous status quo: a lifebelt, a ladder and vessels using the river to be able to moor across a tide." This letter followed a meeting of the Council on 21 February, the minutes of which (under the heading "public access at Mistley Quay" recorded the Council's view that "the fencing option played into the owner's hands in the access dispute". TWL later confirmed their willingness to fence the quayside on the basis that it was operational. That is what was done in mid-September 2008, as I have said.

100. TWL placed particular reliance upon this material, although I was also shown other press cuttings relating to the access issue. Even if this amounted to evidence of TWL's objections being adequately brought to the attention of local inhabitants (which in my view it does not), I cannot agree with TWL's submission that in so far as the issue referred to in the documents formed a backdrop to the HSE intervention, it concerned more than access to Allen's Quay for boating purposes. It is quite clear from the documents shown to me, including those mentioned above, that that is the nature of the concern being expressed to HSE by Manningtree Town Council and also by the Parish Council. In fact, none of the documentary or other evidence put before me supports the existence of a wider dispute such as would encompass the ability of locals to have access to the quay area in order, for example, to stroll or walk their dogs there. Nor, for example, has my attention been drawn to a single instance of a person who was indulging in such activity being warned off or otherwise challenged. It was all about boats.

Conclusion on the "contentious" issue

101. In the light of the material before me, I conclude that at no time during the qualifying period had the owners of Allen's Quay done what was reasonable and proportionate to bring to the attention of persons using the Land that they objected and would continue to object to the user in question and would endeavour to interrupt it. 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 and therefore not "as of right" its use by local inhabitants for those pastimes.

Implied permission

102. In the alternative, TWL submits that if their contention that use of Allen's Quay for lawful sports and pastimes was made "contentious" within the qualifying period is incorrect, then such use was by the implied permission of TWL granted by virtue of TWL's conduct, and for that reason was not "as of right".

103. I have already referred at paragraphs 59ff above to the case law explaining the meaning of *nec precario* and the test for implied permission. In the context of this argument "as of right" means other than by the actual permission (express or implied) of the owner, communicated to the user. Permission may be implied by reference to a notice, as in Lord Neuberger's example at paragraph 62 above, or (to

borrow the words of Lord Bingham),[40] a "landowner may so conduct himself as to make clear, even in the absence of any express statement, notice, or record, that the inhabitants' use of the land is pursuant to his permission."

104. TWL rely upon the following specific factors:

(a) TWL and its predecessors used Allen's Quay for port purposes as and when they needed to; such uses included parking and turning HGVs, and licensing others to do so e.g. Edme; this had the effect of displacing recreational users temporarily, as was the case in *Mann*;

(b) TWL and its predecessors have excluded the public from other parts of the port when they chose for commercial purposes, for example from the ABC area next to the Stockdale compound, and from the land to the east (the Eastern Transit and Baltic Wharf);

(c) TWL and its predecessors put notices up to prohibit mooring and fishing, giving rise to the implication of permission for other forms of recreation, as in *Newhaven*;

(d) the landowner had encouraged swan feeding on Allen's Quay by *inter alia* sponsoring local groups such as "Swans in Distress", by selecting the Land as the place from which the swans should be fed, by storing the feed storage bin in a warehouse and then on the Land itself, by providing feed guidance notes and safety procedures, including the requirement to wear fluorescent jackets, and by disclaiming responsibility for any injury. This also demonstrated that local people understood and accepted that access to the port was regulated by the landowner.

105. Save in relation to swan feeding and the "No fishing" sign, these points do not appear to have been argued before the Inspector.

106. Point (a) (temporary displacement of recreational use by use for port purposes), provides little assistance. Although I will need to consider carefully the issue of incompatible uses and displacement of recreational activity, including Mr Hibbert's evidence, when I come to ground 3, there is on any view a body of evidence before me indicating that local inhabitants did not consider their recreational use of the Land to be impeded in a significant way by the transit or parking of HGVs and other dock transport, or by the temporary storage of goods thereon. It seems to me that the situation is very far from the kind of exclusion to which Lord Bingham was referring in *Beresford,* which sends an unequivocal message to users that the owner is regulating access to and use of his land. It is much closer to the *Lewis v Redcar* position, where walkers paused while golfers took their shots. In any event, I do not see how, on the facts of this case, by simply continuing their commercial activities the land owners could be said to be communicating to locals their permission for recreational pastimes to take place.

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[40] See paragraph 59 of this judgment.

107. Point (b) (fencing of the ABC area[41] and exclusion from the eastern port): Similarly, this point does not advance TWL's case. Exclusion of the public from areas of the port *other than* the Land cannot amount to the communication to the public of the land owner's permission to pursue recreational activities on the Land. Further, the Inspector found that the ABC area was fenced off in September 2008, at about the same time as the fence was erected along the waterfront of Allen's Quay. It is therefore difficult to see how the fencing of the ABC area, coming at the end of the qualifying period, can assist TWL in showing that use of the Land during all or some of the period was permissive.

108. Point (c) (notices prohibiting mooring and fishing): the "No mooring" signs are not visible from or referable to the Land, and this point was really only actively argued in respect of the "No fishing" sign on the TQW wall. The argument is that the prohibition of fishing carries with it implied permission to carry out other forms of recreational activity. I do not consider that the notice would or could reasonably be interpreted or understood in that way. It is very different from Lord Neuberger's "dogs must be kept on a lead in the park" example. There the very nature of the requirement clearly spells out what is permitted – "dogs on a lead" - there is hardly a need for any implication. Here, by contrast, the ban on fishing says absolutely nothing about what other activities may or may not be permitted – the sign is purely concerned with fishing.

109. Point (d) (swan feeding): it will be recalled that the Inspector found that, like crabbing, swan feeding only took place at or close to the water's edge, and as such it did not contribute to his overall finding of recreational activities carried out over the Land generally. He acknowledged that the predecessor of TWL and Edme cooperated in various ways with local groups dedicated to rescuing the swans at Mistley after their thitherto plentiful source of food had ceased to exist, and they had become malnourished. However, he did not regard that cooperation as amounting to permission, or as "in any way inconsistent with a clear local belief that people had a right to be on Allen's Quay in any event." He saw "no reason why swan feeding by local people should not, in the years to 2008, be seen as a component element of the various 'lawful sports and pastimes' which they indulged in on the open quay."[42]

110. The documentary material relating to swan feeding consists mainly of minutes of meetings of the various incarnations of a group of volunteers originally called Swans in Distress. These minutes strike one less as manifestations of an activity that would be regarded as a "lawful sport or pastime" than of a coming together of a group of people concerned for animal welfare seeking to meet a perceived need to keep the Mistley swans alive and nourished. The minutes include discussion of feeding rotas, the legal status of the group, the opening of a bank account and fund

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[41] See paragraph 15(i) of this judgment.

[42] See paragraph 15(ix) of this judgment.

raising to pay for food and equipment. In one document the group is described as a "volunteer feeding force". Although it was not argued, I harbour some doubt as to whether a "rescue mission" such as this really falls within the admittedly very wide concept of "lawful sports and pastimes".

111. There is also some doubt as to the precise location of the area used for feeding. The minutes of a meeting of Swans in Distress on 26 August 1995 record that Mr Garwood (then still an employee of TWL's predecessor) had suggested "that the safest place to feed would be the open quay towards the towers." He was asked about this when he gave evidence before me, and stated that he believed it to be a reference to what is now the compound just outside the Stockdale warehouse, although in cross-examination he accepted that, not having been at the minuted meeting, he was not sure precisely what was signified by the area "towards the towers".

112. Whilst various companies, including TWL's predecessor and Edme are described by the swan feeding groups as "our Sponsors"[43], and clearly cooperated with the various volunteer groups, there is nothing in any of the documents I have seen, or in the other evidence, to indicate that either these companies or the feeding groups understood that the latter needed and were benefiting from permission to be present on Allen's Quay (as distinct from being there "as of right"). The Notes for Feeding Guidance used by the groups include a disclaimer of responsibility by both the landowner and the swan feeding group. On the other hand, at that time the owner was clearly not objecting to the presence and activity of the swan feeding groups, and was cooperating with them.

113. Mr Edwards submitted that by encouraging use of Allen's Quay and cooperating with the swan feeding groups, the landowner's conduct prevented the swan feeding activity being trespassory and therefore in the light of *Barkas* it could not be "as of right".

114. It is trite law that there is an important distinction in this area of law between use pursuant to the permission or licence of a landowner and use which is merely passively tolerated or acquiesced in by him or her. The use in the former case cannot be "as of right" – it is *precario*. The use in the latter case is likely, all other conditions being satisfied, to be "as of right". See, for example, *Barkas,* per Lord Neuberger at paragraphs 17-19, and 28-29. Which side of the line does a case such as the present fall, where a landowner goes further than mere toleration and takes some (relatively modest) steps to cooperate with the users or to encourage the use? It is difficult to see how the landowner was not at least impliedly consenting to the activities of the feeding groups or how it could have successfully brought an action against them for trespass upon whatever part of Allen's Quay was involved.

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[43] In his evidence to me Mr Parker did not know why TWL's predecessor was regarded as a "sponsor", unless it was because they had supplied bins in which to keep the food for the swans.

115. On the other hand, was the landowner's conduct here such as to make clear to the feeding groups that the latter's use of Allen's Quay was, in Lord Bingham's words, "pursuant to" the landowner's permission. The example commonly given in the case law is where the public are temporarily *excluded* from the area in question for a period. In such cases they can be left in no doubt that when the landowner later permits access it is "pursuant to" his permission, and that it is revocable. Here, by contrast, there was no such temporary exclusion, but merely some limited acts of cooperation with the swan rescue efforts. As we have seen, the Inspector found that that cooperation did not amount to a licence for this purpose, nor was it "in any way inconsistent with a clear local belief that people had a right to be on Allen's Quay in any event."

116. I have considerable sympathy with the Inspector's view, but in all the circumstances I conclude that there was permission express or implied, and (assuming that, at least in a private law context, communication is a prerequisite for such permission to be effective in changing the legal nature of the user), the landowner's permission was sufficiently communicated to the volunteers by virtue of their awareness of the cooperation – whether or not they believed they had the right to be there in any event. The swan feeding activity was therefore *precario* and not "as of right". (I do not need to decide the tricky question whether, if there has been a permission in a private law context, such that an action for trespass could not be maintained, but that permission was insufficiently communicated to the user, the use of land could still be "as of right".)

117. However, this finding does not really advance TWL's case. First, there is, as I have said, considerable doubt as to where the feeding activity took place, and in particular whether it took place to any significant extent or at all on or from the Land. Second, even if (as to which I am dubious) swan feeding by volunteers in a rescue context represents "lawful sports and pastimes" for the purposes of the 2006 Act, it was on any view a discrete and special activity, as Mr Edwards accepted. For that reason he expressly disavowed any argument that permission by the landowner for this activity would "open up" the case for other lawful sports and pastimes to be *precario*. That, in my view, was a proper and realistic approach. By the same token, even if this activity was within the 2006 Act, was carried out "as of right", and related to the Land, for my part I would discount it as providing at best only an extremely modest contribution to the substantial evidence of other, more main stream, recreational uses of Allen's Quay.

Conclusion on nec precario arguments

118. With the possible exception of the discrete activity of feeding endangered swans, none of the lawful sports and pastimes in which local inhabitants engaged on the Land during the qualifying period was carried out *precario*.

Conclusion on grounds 1 and 2

119. For the reasons set out above grounds 1 and 2 of TWL's claim fail. The recreational uses relied upon by the defendants were not rendered "contentious" by notices or by

conduct, nor were they (save possibly in the case of the discrete activity of swan feeding) *precario,* at any time in the qualifying period. Even if it was *precario* and referable to the Land, the swan feeding activity was not such as to prevent other recreational activities described in the evidence being pursued "as of right".

Ground 3: (1) incompatibility between use as a TVG and commercial use (2) recreational use is not of the requisite quality

Ground 5: incompatibility with relevant statutory regime

120. It is convenient to discuss these grounds together as they are closely related, and the parties in their submissions have in large measure elided them.

Summary of TWL's submissions

121. In essence TWL's submissions under these grounds are:

(1) On the evidence, the commercial use of the Land during the qualifying period has not been compatible with its use for lawful sports and pastimes, and/or recreational use has not been of the quality required for the assertion of a right; there has not been true co-existence between the inhabitants' recreational use of the Land and the commercial activities carried on there, but rather exclusion or displacement of the former has taken place when the latter were in progress. For this reason, and/or by reason of the matters set out in (2) and/or (3) below, the two sets of activities cannot co-exist now or in the future, either in fact or in law.

(2) The effect of registration of the Land as a TVG is that the continued commercial use of the land by the landowner amounts to a criminal offence under legislation intended to protect TVGs and their use, namely, s.12 of the Inclosure Act 1857 and/or s.29 of the Commons Act 1876, and/or exposes the landowner to a significant risk of criminal liability on an uncertain and ill-defined basis. Further, to drive over a TVG is a criminal offence under s.34 of the Road Traffic Act 1988, so that TWL and any person authorised by them (eg. the residents of the Maltings and drivers of any of the HGVs which pass over or manoeuvre on the Land in connection with port activities) commit a criminal offence each time the Land is crossed by a vehicle.

(3) Compliance by TWL with the obligations which apply to operations at the port by virtue of the health and safety regime is incompatible with the public's use of the Land as a TVG. In particular, s.3(1) of the Health and Safety at Work Act 1974 requires TWL to operate their undertaking to ensure as far as reasonably practicable that persons not in its employment are "not exposed to risks to their health or safety". Further flesh is put on these bones by various Regulations and Codes of Practice with which TWL must comply or risk prosecution. Compliance is irreconcilably inconsistent with the public's rights in respect of a TVG.

122. Submissions (1) and (2) were considered and rejected by the Inspector. Submission (3) does not appear to have been addressed to him. On (1) the Inspector said:

"16.178. In my view, this argument is not consistent with what the Supreme Court actually said and did in *Redcar*, when the same reasoning is applied to the facts of the present case. People clearly stood to one side, and did not get in the way – for reasons both of natural courtesy and personal safety – when shots were being played by the golfers in that case. That was not found to cause 'displacement' which re-started the 20 year 'prescription' period every time a group of golfers played through – in a situation where that use by golfers was said to have been extensive and frequent. There is no logical reason, in my view, why such a 'displacement' theory should be applied to the present site, because lorries or forklift trucks pass through from time to time.

16.179. I can see that there might be cases where a 'displacement' argument is stronger. The example was posited of school playing fields which during school days are only used by pupils and staff to play games, but where in the evenings and weekends (and perhaps in school holidays) local people habitually came out to walk their dogs or take an informal stroll. The argument would be that a claim of 20 years continuous 'as of right' use would be 'displaced' by the regular, quite long periods during which locals were firmly excluded from enjoying informal recreation.

16.180. I am not sure that this argument has yet been fully addressed by the courts, but I can understand its potential force. If the truth was that Allen's Quay at Mistley had only been used recreationally in the evenings or at weekends, but was much too busy and congested for that to happen during the working week, then the argument might have more pertinence here. But my finding is that, even during the working week, the Quay has not by any means typically been so busy and congested that coexistence with recreational users has been impossible. And, furthermore, that type of coexistence of recreational and commercial use has in fact regularly and consistently occurred both on weekdays and those weekend days when any port operations were taking place."

See also paragraph 15(xv) and (xvi) of this judgment.

123. On submission (2) he said:

"16.183. I ought also to refer to the line of argument taken, principally on behalf of the First Objector, based on such cases as *Massey v Boulden* [2003] 1 WLR 1792 and *Attorney-General v Southampton Corporation* [1970] 21 P&CR 281, and *Abercromby v Town Commissioners of Fermoy* [1900] 1 IR 302. The gist of this argument ran as follows: Since arguably it would be unlawful, on an already registered town or village green, for anyone (even the landowner or its licensee) to start driving lorries or forklift trucks over it – or to stop and unload them – then it must be impossible to register as a town or village green an area where these things already happen – either because it shows that the activities are mutually incompatible, or because a situation would be produced where things lawfully done on its land by the landowner or its licensees would be rendered unlawful, or even illegal, on the new 'town or village green'.

16.184. It seems to me however that this argument was effectively 'putting the cart before the horse', and was doing so in precisely the way that was rejected by the Supreme Court in the *Redcar* case. It was just as arguable that, on an existing town or village green which was not also already a golf course, it would be unlawful, and quite possibly illegal (in the criminal sense) to set up a new golf course on that land, with parties of golfers regularly firing off volleys of potentially dangerous shots through the local inhabitants on the village green. It is not as if the golf course in *Redcar* was only occasionally or irregularly used. It is clear from the reports that it was in regular, frequent use.

16.185. It was the history of actual, relatively cordial coexistence, with courteous common sense and mutual 'give and take', which led their Lordships in *Redcar* both to see the two uses as mutually compatible, and to say that the golfing use could carry on lawfully into the future, even after a 'town or village green' registration. It seems to me that exactly the same principle applies here. The commercial activities on the quayside within the remaining application site, have sensibly coexisted with informal recreational use during the qualifying period, and there is no reason why that same coexistence should not continue after registration in this case. That is exactly what *Redcar* says, in my understanding of the case."

Lewis v Redcar

124. In their submissions each of the parties placed reliance on different aspects of the judgments of the Supreme Court in *Lewis v Redcar* (above), and it is therefore appropriate to consider it in more detail. In that case the main issue was whether an application for registration as a TVG of a former golf course had been correctly rejected on the ground that local inhabitants' recreational use (typically dog walking and children's play) had not been "as of right", because the inhabitants had "overwhelmingly deferred" to any golfers using the course at the same time, by refraining from walking on the playing areas when play was in progress, and instead waiting until the golfers passed or until they were waved across by them. The lower courts upheld that reasoning, but the Supreme Court disagreed.

125. The Supreme *Court* reiterated that the familiar tripartite test *nec vi, nec clam, nec precario* remained the governing principle to determine whether use was "as of right". Lord Walker referred to:

> "the general proposition that if the public (or a section of the public) is to acquire a right by prescription, they must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him. That was in line with what Lord Hoffmann (in *Sunningwell* [2000] 1 AC 335, 350-351, quoted at para [18] above) called "the unifying element" in the tripartite test: why it would not have been reasonable to expect the owner to resist the exercise of the right."[44]

126. Therefore, what mattered was "how the matter would have appeared to the owner of the land"[45]. He continued:

> "But I have great difficulty in seeing how a reasonable owner would have concluded that the residents were not asserting a right to take recreation on the disputed land, simply because they normally showed civility (or, in the inspector's word, deference) towards members of the golf club who were out playing golf. It is not as if the residents took to their heels and vacated the land whenever they saw a golfer. They simply acted (as all the members of the Court agree, in much the same terms) with courtesy and common sense. But courteous and sensible though they were (with occasional exceptions) the fact remains that they were regularly, in large numbers, crossing the fairways as well as walking on the rough, and often (it seems) failing to clear up after their dogs when they defecated. A reasonably alert owner of the land could not have failed to recognise that this user was the assertion of a right and would mature into an established right unless the owner took action to stop it..."

127. Thus, the "critical question" in the case was said to be the quality of the use that was being relied upon.[46] In that regard the Supreme Court held that the "deference" shown by recreational users (which the Court considered to be simply civility,

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[44] Per Lord Walker at paragraph 30.

[45] Per Lord Walker at paragraph 36.

[46] Per Lord Hope at paragraph 69.

courtesy and commonsense) was not inconsistent with the assertion of a right to use the land for lawful sports and pastimes, and that the two uses (by local inhabitants for lawful sports and pastimes and by the golfers for golf) had in practice co-existed.

128. However, there could be cases where co-existence would not be possible:

> "once registration takes place, the landowner cannot prevent use of the land in the exercise of the public right which interferes with his use of it: *Laing* [2004] P & CR 573, para 86. So it would be reasonable to expect him to resist use of his land by the local inhabitants if there was reason to believe that his continued use of the land would be interfered with when the right was established. Deference to his use of it during the 20 year period would indicate to the reasonable landowner that there was no reason to resist or object to what was taking place. But once one accepts, as I would do, that the rights on either side can co-exist 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. The question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. Deference by the public to what the owner does on his land may be taken as an indication that the two uses can in practice co-exist.
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> Of course, the position may be that the two uses cannot sensibly co-exist at all."[47]

129. The Court did not discuss where the boundary between possible and impossible co-existence might lie. That is hardly surprising, given that the question is highly fact-specific. Nor did the Court expressly consider the consequences of impossibility of co-existence. In such a case the impossibility would presumably have one of two results: either it would mean that the recreational use was so subordinated to the owner's use that lawful sports and pastimes could only occur intermittently at times or in areas where they did not coincide or otherwise interfere with the owner's activities (which is more or less what TWL argues here), or the recreational use would be made "contentious" by the owner long before the end of the 20 year period (as Lord Hope suggests in the above quotation).

130. The Supreme Court did, however, discuss the effects of registration, and in particular the extent to which upon registration the rights of local inhabitants would be "enlarged" beyond the actual uses on the strength of which the TVG rights had been established, and how registration affected the owner's rights. This point arose because in *Lewis v Redcar* the owner had argued that any equilibrium between golfers and recreationers would end on registration, and that there would thenceforth be such asymmetry of rights that the golf club would no longer be able to function. In this regard Lord Walker referred with approval[48] to the treatment of

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[47] Per Lord Hope at paragraphs 75-6.

[48] At paragraphs 45-47. Lord Walker disagreed only with Lord Hoffmann's use of an annual bonfire as an example of a relevant recreation.

this question in *Oxfordshire County Council v Oxford City Council and another* [2006] 2 AC 674, where Lord Hoffmann had said:[49]

"49....Although the Act provides for the registration of rights of common, it makes no provision for the registration of rights of recreation. One cannot tell from the register whether the village green was registered on the basis of an annual bonfire, a weekly cricket match or daily football and rounders. So the establishment of an actual right to use a village green would require the inhabitants to go behind the registration and prove whatever had once satisfied the Commons Commissioner that the land should be registered.

50. In my view, the rational construction of section 10 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.

51. This does not mean that the owner is altogether excluded from the land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants. There has to be give and take on both sides."

131. Although in *Lewis v Redcar* Lord Hope indicated that Lord Hoffmann's statement at paragraph 51 of *Oxfordshire* was not a statement of principle, as the issue had not arisen in that case, Lord Hope stated:

"It has to be recognised, of course, that once the right to use the land for lawful sports and pastimes is established and the land has been registered its use by the local inhabitants for those purposes is not restricted to the sports or pastimes that were indulged in during the 20 year period.....

.... as long as the activity can properly be called a sport or pastime, it falls within the composite class. This approach indicates that, while the principle of equivalence tells one in general terms what the land may be used for, there may be some asymmetry as to the manner of its use for that purpose before and after it has been registered. But it does not follow that, where the use for recreation has co-existed with the owner's use of the land during the 20 year period, the relationship of co-existence is ended when registration takes place."

132. Lord Brown, at paragraph 102, asked:

"Is there, then, anything in the case law which precludes our deciding, as I have already indicated I would prefer to decide, that registration does not carry with it a right in future to use the land inconsistently with such use as the owner himself has been making and wishes to continue making of it?"

133. Having found that there was no such authority, he concluded:

"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 *Oxfordshire* 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.

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[49] Per Lord Hoffmann at paragraphs 49-51.

> 106. In short, on the facts of this case, had the use of the land as part of a golf course continued, the locals would in my opinion have had to continue "deferring" to the golfers."

134. Lord Brown made clear that were it the law that, upon registration, the owner's continuing right to use his land as before was 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 use, he would have held that more was required to be established by the locals than use of the land for the stipulated period *nec vi nec clam nec precario*.

135. Similarly, Lord Kerr of Tonaghmore JSC said that

> "Whatever may have been the position previously.....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."[50]

136. The Supreme Court considered that, had the land still been let as a golf course, the historical co-existence which had existed between the golf club and the recreationers could have continued after registration as a TVG and that the creation of TVG rights for the local inhabitants would not put an end to the landowner's right to use the land for that purpose.

137. The following propositions obtain support from the various statements in *Lewis v Redcar*:

(a) There are only three vitiating criteria which can prevent a recreational use being carried out "as of right", and there is no fourth such criterion (subject to Lord Brown's qualification).

(b) Land registered as a TVG can be used generally for sports and pastimes, and the use is not restricted to the sports or pastimes that were indulged in during the 20 year period: as long as the activity can properly be called a sport or pastime, it falls within the composite class.

(c) The quality of the use relied upon was capable of affecting (i) whether the user in question was "as of right" and (ii) the nature and extent of the rights which would be exerciseable by local inhabitants *after* registration.

(d) After registration (i) the owner retains the right to use the land in any way which does not interfere with the recreational rights of the inhabitants (per Lord Walker, approving Lord Hoffmann in *Oxfordshire* [2006] 2 AC 674, paragraph 51); (ii) registration does not carry with it a right for inhabitants in future to use the land inconsistently with such use as the owner himself has been making and wishes to

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[50] At paragraph 115.

continue making of it. The owner remains entitled to continue his use of the land as before (Lord Brown); (iii) "where it is feasible, co-operative, mutually respecting uses will endure after the registration of the green. Where the land has 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" (Lord Kerr).

(e) There may be cases where the two uses (that of owner and that of recreationer) cannot "sensibly co-exist".

Thus, while their lordships were *ad idem* on the main issue and outcome in the case, their emphases differed to some extent on other questions. On the issue of post-registration rights, two schools of thought are discernible: 1. The owner may continue to use the land as before, provided he does not "interfere" with the right of the recreationers 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. These two approaches are not easy to reconcile: in the first, the TVG rights prevail, and in the second it is a case of (in the words of Lord Kerr) "cooperative, mutually respecting uses" where feasible. The preponderance of opinion in the Supreme Court appeared to come down in favour of the second.

The Newhaven case

138. The parties also referred to the decision of the Supreme Court in *Newhaven* (above) in relation to statutory incompatibility. I have already outlined the facts of this case.[51] Although the Court had decided the appeal in favour of the landowner/port authority on a separate ground, Lord Neuberger and Lord Hodge (with whom Lady Hale and Lord Sumption agreed) went on also to decide in the port authority's favour a further argument on statutory incompatibility.

139. The argument was as follows: given the port authority was a statutory undertaker, s.15 of the 2006 Act should not be interpreted as extending to the harbour which was the site of the claimed TVG, because it was reasonably foreseeable that registration would conflict with the port authority's future exercise of its statutory powers. Section 15 contained no express exclusion of land held by statutory undertakers for statutory purposes, and so any restriction on the scope of that provision would have to be implicit. The port authority argued that statutory incompatibility provided such restriction. This argument had been upheld by Ouseley J but unanimously rejected by the Court of Appeal.

140. The Supreme Court examined the English and Scottish case law on prescription and dedication in relation to rights of way. Lord Neuberger and Lord Hodge (with whom Baroness Hale and Lord Sumption agreed) then said:

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[51] At paragraph 62 of this judgment.

"93. The question of incompatibility is one of statutory construction. It does not depend on the legal theory that underpins the rules of acquisitive prescription. The question is: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker (whether by voluntary agreement or by powers of compulsory purchase) and which is held for statutory purposes that are inconsistent with its registration as a town or village green?" In our view it does not. Where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire by user rights which are incompatible with the continuing use of the land for those statutory purposes.....

94. There is an incompatibility between the 2006 Act and the statutory regime which confers harbour powers on [the port authority] to operate a working harbour, which is to be open to the public for the shipping of goods etc on payment of rates (section 33 of the 1847 Clauses Act). [The port authority] is obliged to maintain and support the Harbour and its connected works (section 49 of the 1847 Newhaven Act), and it has powers to that end to carry out works on the Harbour including the dredging of the sea bed and the foreshore (section 57 of the 1878 Newhaven Act, and articles 10 and 11 of the 1991 Newhaven Order).

95. The registration of the Beach as a town or village green would make it a criminal offence to damage the green or interrupt its use and enjoyment as a place for exercise and recreation - section 12 of the Inclosure Act 1857 - or to encroach on or interfere with the green - section 29 of the Commons Act 1876. See the *Oxfordshire* case [2006] 2 AC 674, per Lord Hoffmann at para 56."

141. Lord Carnwath would have preferred not to decide this point, as it was unnecessary to do so. He identified a problem relating to the consequences of registration:

"Lord Neuberger and Lord Hodge (para 95), citing Lord Hoffmann in the *Oxfordshire* case, proceed on the basis that registration of the Beach as a town or village green would make it subject to the restrictions (subject to criminal sanctions) imposed by the 19th century village green statutes. It is easy to see why such restrictions are likely to be incompatible with future use for harbour purposes, even if that has not proved a problem hitherto.

However, it is to be noted that the supposed incompatibility does not arise from anything in the 2006 Act itself, but rather from inferences drawn by the courts as to Parliament's intentions. In the relevant passage (para 56), Lord Hoffmann expressed agreement with the courts below on this issue, including by implication my own rather fuller reasoning in the Court of Appeal ([2006] Ch 43 paras 82-90). However, he did not see this issue as impinging directly on the question whether the land should be registered. Having noted and disposed of some of the arguments on the effect of the 19th century statutes, he added:

"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" (para 57).

It was not necessary in that case to consider the issue which arises here: that is, the potential conflict between the general village green statutes and a more specific statutory regime, such as under the Harbours Acts. It is at least arguable in my view that registration should be confirmed if the necessary use is established, but with the consequence that the 19th century restrictions are imported subject only to the more specific statutory powers governing the operation of the harbour."[52]

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[52] Paragraphs 138-9.

142. In other words, Lord Carnwath considered it at least arguable that the beach in question should have been registered as a TVG on the basis of the established period of recreational use, with the consequence that the criminal Victorian statutes would apply but subject to the overriding statutory powers of the port authority.

The Oxfordshire case

143. Given the references to it in subsequent case law, it is appropriate to describe the decision of the House of Lords in *Oxfordshire*. That appeal arose out of an application to register the so-called Trap Grounds as a TVG under the Commons Registration Act 1965. The Trap Grounds consisted of nine acres of undeveloped land in North Oxford, lying between the railway to the west and the Oxford Canal to the east. About one third was permanently under water and the other two thirds was mainly high scrubby undergrowth, much of which was impenetrable to walkers. The registration authority had sought guidance from the court on a number of issues, including whether the 1965 Act applied the Victorian statutes to land registered as a TVG under the Act. The majority of the House of Lords held that it did. In the course of his speech Lord Hoffmann stated:

> "54. Section 12 of the Inclosure Act 1857 recited that it was expedient to provide "summary means of preventing nuisances" on town and village greens and land allotted for recreation. Therefore:
>
> "If any person wilfully cause any injury or damage to any fence of any such town or village green or land, or wilfully and without lawful authority lead or drive any cattle or animal thereon, or wilfully lay any manure, soil, ashes, or rubbish, or other matter or thing thereon, or do any other act whatsoever to the injury of such town or village green or land, or to the interruption of the use or enjoyment thereof as a place for exercise and recreation, such person shall for every such offence, upon a summary conviction thereof [pay a fine]".
>
> 55. Further provision for the protection of town and village greens was made by section 29 of the Commons Act 1876:
>
> "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 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."
>
> 56. The first question is whether the effect of section 10 of the 1965 Act is to apply these statutes to land registered as a town or village green. I agree with Lightman J and the Court of Appeal that it does. There is no special definition of a town and village green in the 1857 or 1876 Acts which might suggest that when section 10 of the 1965 Act said that registration was to be conclusive evidence of the matters registered, and the matter registered was that the land was a village green, Parliament did not intend that it should be a village green for the purposes of the 1857 and 1876 Acts.
>
> 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* (1798) 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 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 paragraph 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."

With these authorities in mind I must now examine the parties' submissions in more detail.

Co-existence or exclusion/displacement/incompatibility in fact

144. It is TWL's submission that the evidence shows that when Allen's Quay was being used commercially recreational users generally stayed away, or at best would confine themselves to the ABC area or the Stockdale compound, which are not within the TVG. This, they submit, is not a relationship of co-existence but rather of exclusion or displacement when commercial activity was taking place on Allen's Quay.

145. No issue was taken by any of the parties with the manner in which the Inspector summarised the commercial use of Allen's Quay:[53]

"....it is undoubtedly the case on the evidence (and was throughout the whole relevant 20 year period) that the application site on the quay has also been subject, on a regular basis, to being crossed by, or otherwise used by, vehicles including HGV's engaged in the business of the wider port, and to a lesser extent by some of the vehicles of or associated with EDME Ltd. I find as a fact that effectively the whole of the [Land] has been used by dock or EDME-related vehicles, even if at varying frequencies, on many occasions during the relevant years. The only possible exception to this is the very edge of the Quay, among or to seaward of the bollards set there, and even that small part of the site would, on the evidence, have been used for the tying up of commercial lash barges and the like from time to time during the earlier years of the period."

146. Nor does it appear to be in dispute that the number of ships using Mistley and the tonnage handled at the port reduced over the qualifying period, and that therefore the amount of port activity would have been more substantial during the earlier parts of the period. This emerged clearly from the material produced by TWL's expert witness, Mr. Michael Hibbert.

147. In relation to the intensity and level of commercial use of that part of the port which includes Allen's Quay (and therefore the Land), TWL points to a number of documents that were put to Mr Garwood in cross-examination. These fall roughly

[53] The Report, paragraph 16.143.

into the following categories: (i) correspondence between TWL's predecessor and Edme in 1997; (ii) comments of Mistley and Thorn Residents Association ("Mithras") in 1989 and 1990; and (iii) Minutes of the port owner's safety committee in 1994-6. In (i) the port owner complained that Edme sometimes had "up to 4 vehicles operating in this confined space" without the port owner's permission; there had also been unauthorized storage and use of fork lift trucks. In (ii) Mithras complained of storage and overnight parking of lorries on the quay, excessive lorry speeds along the quay, revving of vehicle engines and other noisy activities on Sundays and unsociable hours. In (iii) the safety committee discussed the unauthorised use of the quay by Edme's forklift trucks and vehicles, the committee's expectation that the "considerable congestion on our quay" would be relieved when Edme's rebuilding works were completed, the need to exercise "extreme care" when travelling through the congested area, and the fact that "on occasions so many lorries are loading at one time that [Edme's] fork lift presents a real danger to passing traffic between our warehouse and quays." The intensity of commercial use of Allen's Quay was also the subject of representations by Mr Tucker to Tendring District Council on 2 November 1994 in the context of a planning application by the port owner. He stated that "residents in the properties that adjoin the quay have never had to endure the intensity of use that [is] currently carried on today."

148. Mr Garwood, who as safety officer of the port owner attended the safety committee meetings, accepted in cross-examination that a photograph taken in 2006 of a lorry and fork lift truck outside Edme's premises was a fair representation of that company's operations on Allen's Quay. He also acknowledged that with the passage of time he did not have as clear a recollection of what took place 20 years ago. Nevertheless, he did not resile from his evidence that throughout the time he had known Allen's Quay it had been a popular destination for local people, who had enjoyed visiting for a variety of pastimes, and that at no time in the qualifying period had the commercial operations on the quay materially affected the recreational activities of locals.

149. TWL have pointed to a number of photographs dating from the qualifying period as presenting the impression of a busy commercial quayside. They also rely upon the evidence of Mr. Parker and Mr. Hibbert to demonstrate the operational necessity for HGVs to pass across, and to turn, manoeuvre and park on Allen's Quay, particularly at periods of intense activity at the Baltic Wharf and the Stockdale warehouse and compound.

150. Mr Parker told me that he had never visited Mistley before 1994 but had become more familiar with the port after 1996 when he was conducting due diligence on behalf of TWL. He eventually visited once a week. He said that HGVs would use the Land to turn around when the Stockdale compound was congested, which he estimated would occur on 10% of occasions on average. He stated that when the port was busy HGVs might queue or wait on the Land before going onto the Stockdale weighbridge. Storage of materials on the Land was not as frequent nowadays as in the 1990s. He described the activity at TQW as falling within two

distinct periods: prior to 1999 (when TQW ceased to be a syrup production facility) some of Edme's witnesses at the Inquiry had spoken of as many as 5-8 HGVs per day, loading or unloading, although he mentioned that one Edme witness, Mr Powell, had said it was about one per week; post-1999 (when TQW was only used for storage) the levels of activity there were much reduced. On the type of cargo coming to the port, Mr Parker told me that whereas in 1989/1990 grain imports represented about 30% of throughput (and not 50% as Mr Garwood had estimated), it was all discharged at the Baltic quay and removed by the secondary exit, not via the Eastern Transit. He stated that neither the data provided to the Inspector nor Mr Hibbert's weighbridge data included any grain shipments.

151. I have already referred to Mr Hibbert's report and its conclusions, which were not before the Inspector. For the purposes of his report Mr Hibbert visited the port 4 or 5 times in 2015-2016, including days when ships were present and days when they were not. He noted that when ships were in the port there could be "some significant dock running". On 1 July 2016 a fertilizer ship was in port and two HGVs were shuttling back and forth from the Baltic Quay to the Stockdale end throughout the day. The turnaround time for each vehicle was about 10 minutes, with a vehicle spending in all 24 minutes on Allen's Quay. On other days it was "much quieter" but there were still HGVs using the weighbridge and/or loading/unloading in the vicinity of the Land. On busy days he did not consider it would be safe to picnic or indulge in crabbing on the Land. Mr Hibbert pointed out that the Nancy Bell survey indicated that when the port was busiest there appeared to be the lowest level of dog walking. This was to be contrasted with weekends, when dog walking was at a high level.

152. Mr Hibbert considered that the level of activity recorded by Nancy Bell in 2013 and that estimated by TWL in their evidence to the Inspector, were significantly below the levels which would have occurred at times during the qualifying period.

> "4.22 [TWL]'s calculations resulted in between 51 and 224 movements through the [Land] depending on whether or not a vessel was in port and whether cargo was being transported directly off site or being transported to Stockdale Warehouse. The figure of 224 was accepted by the Inspector at the TVG Inquiry, although I believe that this significantly understated the actual movements at the busiest times for the reasons already stated and because shipping records have shown that there would have been times when more than one vessel was in port. I refer to records later within this section which evidence that three to five vessels might be present at any one time.
>
> 4.23 As stated at 4.17, the figure of 224 also takes no account of, for example, vehicular movements by Port employees, ship servicing personnel, contractors, customers, or third party occupants of the port estate (during the earlier part of the period). Neither does it include private / residents' movements generally, nor the construction and private traffic movements associated with the Maltings, nor the EDME activity.
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> ......
>
> 5.19 Based on the 2007 weighbridge ticket times sampled, for which I have plotted the known HGV departure times only (those being for 89 HGVs) which would be equivalent to 178 HGVs in a day through the [Land] in both directions, vehicle movements have been shown to have been almost continuous throughout the day. At the busier end of the range there would have been many times

more HGVs. It is difficult therefore to envisage that there would be any periods of significance whereby HGVs would not be passing over the [Land]."

153. Mr Hibbert's re-construction of likely HGV movements across the Land in the sample period February to March 2007 was a somewhat elaborate exercise involving *inter alia* an assessment of which HGVs needed to be excluded from the estimate on the basis that they might simply have loaded at the Stockdale warehouse without needing to cross the Land at all. Taking it as accurate, the re-construction measured the busiest day in the sample period. Like the Nancy Bell survey, this was inevitably a snapshot of the level of activity which, it is common ground, has fluctuated very significantly on a daily basis throughout the qualifying period.

154. It is on the strength of this, and other estimates derived from statistical data relating to, for example, the number of ships and cargo tonnage handled by the port at particular times during the qualifying period, that Mr Hibbert reached the conclusion "that there would have been significant periods throughout the Relevant Period whereby HGV and other vehicle activity would have been almost continuous within and through the [Land]"[54], and that "during operational periods.... there would have been very little opportunity, time or space for any type of safe recreational activity."[55]

155. As against this evidence must be weighed the considerable body of eye witness evidence that throughout the qualifying period, and indeed for many decades before that, without significant interference from commercial activity, local inhabitants have freely, openly and daily visited and used Allen's Quay for walking, playing, looking at the view, feeding swans, crabbing, chatting with acquaintances, and many other pastimes. This testimony was provided by the 17 or so witnesses for the applicant who chose to give evidence and to be cross-examined before the Inspector. Mr Garwood and Mr Tucker chose to repeat the experience before me. Most of these witnesses were asked about the effect of commercial traffic on their and others' recreational use of the Land. A selection of their responses *on this point*, as recorded by the Inspector, follows. I emphasise that this is not an account of all their evidence to the Inspector – just that dealing with the inter-relationship between recreational and commercial activity:

Mr Richard Brooks: [Had known Allen's Quay well since childhood, his family having owned it since 1830, and his father having worked there until 1974. In the last 20 years he had been an occasional visitor]: "There has never been any restriction on public access to the Quay...Vehicular access was also freely allowed to the Quay, even at times of intense commercial activity, and all the uses accommodated each other."

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[54] Paragraph 5.23.

[55] Paragraph 7.46.

Mr Richard Vonk: [Lived in Mistley since 2001. Visits Allen's Quay about once a month]: "As for the commercial use of the Quay, he had seen workmen there…But honestly he did not take much notice of movements on the quay other than avoiding getting run over. It is not a particularly busy port or place compared with others he had seen. There may have been one or two occasions when there was a lot of traffic going past. In such circumstances he would have gone away or stood at the quay edge between the bollards there…[H]e personally had not seen lorries turning around on the [Land]. He did not think that could happen a lot, because he had not seen it. If that activity were happening people would get out of the way…[H]e had quite often seen a traffic jam with lorries parked up on the main road, but there were long periods when the Quay itself was almost devoid of traffic."

Mrs Charlotte Hume: [Has lived in Mistley since 1998, but has known Allen's Quay since 1973.] "When she had used the Quay she had been aware of commercial traffic, sometimes more than at other times. She was generally there with her children and other people were there as well with children, including quite young ones…One was aware of commercial traffic and one would take sensible precautions…As for the commercial activity…on the Quay, that has involved cars, lorries driving along, loading or unloading and fork lift trucks. As for frequency, there has been very little activity at weekends: during the week there has been a bit more, particularly during working hours, especially early in the morning. She thought she might have seen traffic on the Quay and avoided it, one would avoid being in the way. She has never been forced by the weight of commercial activity or traffic on the Quay to avoid using it…She had seen HGVs, forklifts and possibly flat-bed dock runner lorries on the quayside. However, that never presented itself as a problem in relation to her or her children's activities. If there had been traffic they might move away, but she did not in fact recall having to move away…The traffic had never passed that close to her…In all the time she had used the Quay she had not experienced any situation where she was not able to use it because of commercial vehicles or traffic…One would go around [parked vehicles]…[S]he and her family had always experienced very courteous driving by drivers moving vehicles on the Quay…She had never seen large articulated lorries manoeuvring or turning around on the [Land]."

Mrs Margaret Saxby: "…she had lived at Grapevine Cottages for 56 years…She enjoys and has always enjoyed watching swans or boats loading at the Quay, walking on the Quay or sitting in the sun. She goes out there every day…[S]he notices all that goes on. The amount of commercial traffic depends on whether there is a boat up. Sometimes there is a lot of traffic and sometimes hardly any. …There are never lots of lorries on the Quay at the same time. She thought she had seen lorries turning around on the Quay…Her own ability to use the Quay is not much affected by the commercial traffic when it is there…She has never not gone out because of traffic on the Quay…If a lorry happened to be passing she would wait for it to pass…Occasionally the Quay had been used for the parking of commercial vehicles but they were not there for long…They might stop for a couple of minutes perhaps."

Mrs Margaret Wainwright: "She had moved…to Mistley in 1977 and had lived [there] since then…[S]he had never been aware that the Quay was busy continually…Lorries only parked momentarily, it was not the norm…She has never seen a multiplicity of lorries parked on the Quay…She has never had to modify her behaviour because of commercial traffic on the Quay."

Mr Robert Horlock: "…he has lived [in Mistley] for the whole of his life…He continued to the present day to visit the Quay on foot or more usually by vehicle almost every day all year round…As far as traffic on the Quay was concerned…there had always been co-existence. Recreation and commerce both took place, and one did not impinge greatly on the other. He had never encountered any problems in this respect at all. Lorries tend to go wide across the Quay and do not interfere with people using the Quay…[H]e had never seen the central part of Allen's Quay full of parked commercial vehicles…The Quay is essentially a transit area and it was very unusual to have any lorries parked there…He had…seen commercial vehicles loading and unloading by the Edme building…There is plenty of room to pass people who might be on the Quay…The normal position is that there is a whole triangular area which is safe for people to be on, and which lorries moving across the Quay will avoid…It may be that lorries will pass by and people will get out of the way but there is no huge conflict…On his visits often there would be no traffic...There would have been a lorry about every 10 minutes if a boat was in, but that was not normally the situation…"

Mr William Meston: [Lived at Mistley since 1989]: "…he would go dog walking on the Quay 2 or 3 times a week…[C]ommercial traffic on the Quay depends on the time of day. It is small in amount, and maybe there would be a little more activity early in the morning. It had certainly never caused him to alter his use of the Quay."

Mrs Alexandra Smith: [Lived in Mistley since 1989 and had known the port since 1959. Active in the swan feeding groups.]: "As for traffic on the Quay, there is usually none there while she is there feeding the swans. It is only a busy port at times; it depends if a boat is in. There can be three vessels in at times so the traffic can vary hugely. However it does not affect her activities on the quay."

Ms Kate Worsley: [Lived in Mistley since 1999. Regular user of Allen's Quay.]: "…at weekends or in the evenings [the Quay] was usually free of any commercial activity…[I]t was busier when a ship was in, and [she] also saw Edme trucks around the eastern end of the Quay. Nevertheless, her impression had always been that this was a public place, and there was no conflict between people and traffic. All of the traffic moves fairly slowly and it is quite easy to be aware of what is coming when…She had not seen lorries parked on the Quay in the [relevant period]"

Mr Ian Tucker: [I have already referred to his evidence before me.]

Professor David McKay: [Lived in Mistley since 2000. Visited Allen's Quay several times a week]: "He had known the site since 1989 and used it between 2000 and 2010…The busyness of the Quay when a boat is in is highly variable. When no boat is in there is often no commercial traffic at all. They had been able to use the

Quay quite freely and happily, co-existing with vehicles. He had never seen Allen's Quay in a congested state…He had not seen commercial vehicles parked on Allen's Quay or impeding their use of the Quay…He did not suggest that the traffic on the Quay had no impact at all on use of the Quay, but the impact of commercial traffic had been insignificant…"

Mr Clive Saxby: "…He had been born and brought up at 1 Grapevine Cottages, and then moved into Fountain House next door. He had been there basically for the whole of his life… Both as a child and in subsequent years he had used the whole of the area of the Quay…for a variety of purposes…As for traffic, it can be busy on some days, for example if a ship is in port. But on other days there is hardly any traffic. Even when it is busy though, it is not continuous. Some days there is a commercial vehicle movement every 10 – 15 minutes, and on other days one would see nothing. Seeing something every 10 – 15 minutes would be a busy day …He had seen lorries passing each other on the Quay when they had a fertiliser boat in, with two lorries unloading it, doing a circuit... If a vehicle was coming when he was on the Quay himself, he would wait in order to avoid it. It was very rare indeed that there was a commercial vehicle parked on the Quay."

Mrs Nancy Bell: [Has lived at Grapevine Cottages since 2002.]: "In order to assess the inter-relationship of port-related and non-port related activities on Allen's Quay, she had conducted a survey of traffic on that part of the Quay. A number of headline conclusions can be drawn from her traffic survey. In respect of her winter survey, carried out in January and February 2013, when recreational and leisure use of the Quay would be expected to be at a low level, she had observed that: on a working day when no ship was unloading, non-port vehicles outnumbered port vehicles by more than 4:1; on a working day when a ship was unloading, non-port vehicles outnumbered port vehicles; at weekends there is a threefold increase in pedestrian traffic; on working days, whether a ship was being unloaded or not, general public pedestrian traffic was considerably greater than port-related pedestrian traffic; even in the depths of winter there is a broad distribution of recreational activities, with peaks occurring at weekends. In respect of her Spring survey carried out in April/May, 2013 the overall picture of use is very similar, with slightly lower levels of increase in weekend pedestrian traffic. Since her survey was only a snapshot on randomly chosen days, a direct comparison between the days surveyed is difficult. The results for recreational use would for instance be influenced by weather conditions, public holidays and other competing attractions on the day in question. Those factors were unlikely to affect port-related activities… [T]here were some days when there were ships in the port and there was traffic across the Quay, and other days when it was extremely quiet, indeed as dead as a doornail. When the port is busy it is hard to say exactly how often a vehicle passes across the Quay, but that did not stop her or her family going onto the Quay and doing the things that she had referred to in her evidence form. Sometimes when a ship was in…things were unloaded at the Baltic Wharf and did not in fact come out across Allen's Quay…[C]ommercial traffic had had no impact on them as a family, except the need to avoid it if a lorry came along. Parking of commercial vehicles on the Quay was something she very rarely saw. Vehicles passing on the Quay she had seen

now and again. If dock-runners were moving materials there seemed to be a pattern of two vehicles moving, but they do not necessarily pass on the Quay every time. She had rarely seen HGVs turning on Allen's Quay…Before 2008 she and other local people felt that the port and the public co-existed well with no aggravation. People were respectful of what each other did."

Mr John Fairhall: "He had known Mistley Quay since 1971…The Quay is the centre of Mistley life; with their children and grandchildren his family would all go to the Quay to visit it, to bird watch, and …go there in order to see the boat and also take photographs of swans…every weekend...As for commercial vehicles, there was the occasional lorry crossing the Quay, generally slowly and cautiously, and one would just stand aside. These vehicles did not create any hazard."

Mr Ian Rose: [Always lived in Mistley]: "…regards this as an operational port, and he would certainly not park so as to interfere with the port operations. But there never had been a problem, because people co-existed. He had often parked very close to the Quay…He had not known of any lorries parked on Allen's Quay itself, and in particular had not known of them parking on Allen's Quay overnight."

Mr Hubert Ward: [Has owned his house in Mistley since 1978 and has lived here permanently since 1996. Uses Allen's Quay virtually every other day, for dog walking. Does not seem to have been asked specifically about commercial traffic.]

Mr John Wood: [Has lived in Mistley since 1973 and has known the Quay since 1962. He describes his own and others' regular recreational activities there but he does not seem to have been asked specifically about commercial traffic.]

156. Mr Edwards submitted that the real issue is whether uses and rights can co-exist such that the recreational component is consistent with the assertion of a public right, and that that involves a consideration of the *quality* of the uses or rights rather than their intensity. He stated that once the intensity of each of the competing uses was shown to be material, which he accepted was the case here, then the relevant question was how do those uses co-exist, and not how intense or frequent they were. Thus, he submitted, the court's focus should not other than in very general terms be how many HGVs crossed the Land or how many vehicles turned around on it in any given period. I agree with that submission.

157. In *qualitative* terms I consider that there is a remarkable consistency in the ways the witnesses (including those called by TWL) have described the commercial activity on Allen's Quay. Although there are differences in the quantitative assessments provided by the two sides, in the end I am not convinced that there is really all that much between them. It is established beyond doubt that throughout the qualifying period there has often been very little if any commercial movement on the Land for substantial periods, particularly (but by no means exclusively) at weekends and in the evenings. Further, my assessment based on the totality of the evidence put before me is that even during busier periods the commercial activity has rarely if ever been so intense as to preclude or discourage locals from visiting Allen's Quay to pursue their pastimes. I consider the virtually continuous passage of commercial

vehicles across the Land, such as postulated by the re-construction exercise carried out by Mr Hibbert, as unlikely in fact to have occurred other than perhaps in short bursts on relatively infrequent occasions.

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

159. TWL submitted that the present situation was to be distinguished from that considered by the Supreme Court in *Lewis v Redcar*. However, I agree with Mr Eaton's submission that there are striking parallels between the facts in that case and the manner in which Allen's Quay has been used by locals, by port traffic and (formerly) by Edme. Just as pedestrians sensibly gave way to vehicles on the Quay, so it is highly unlikely that it was merely politeness that caused ramblers to wait until golfers had passed by before entering the playing area: a driven golf ball, like a commercial vehicle, presents a danger to persons in its path, and is travelling with much greater velocity and unpredictability than the generally slow moving vehicles on Allen's Quay. It is to be noted that many witnesses in the present case stated that they did not perceive there to be a significant risk in their or their children's use of Allen's Quay. There was no evidence of any member of the public ever having been injured by reason of commercial activity on Allen's Quay. In my judgment the approach of the Supreme Court in *Redcar* is very much in point in this case.

Conclusion: co-existence or exclusion/displacement/incompatibility in fact

160. For these reasons, and notwithstanding the able and forceful submissions of Mr Edwards, I do not accept his submission 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. I am in this regard in agreement with the conclusions of the Inspector, which I have endeavoured to summarise at paragraph 15(xvi) above. In reaching that conclusion I have carefully considered all the points made by TWL, even if each and every argument has not been explicitly recited here. To do so would have rendered this judgment even longer than it is.

Criminal offences - the Victorian statutes and s.34 Road Traffic Act 1988

161. TWL submits that the effect of registration of the Land as a TVG is that the continued commercial use of it by TWL, in the manner in which that use has been conducted in the qualifying period and to date, amounts to a criminal offence under s.12 of the Inclosure Act 1857 and/or s.29 of the Commons Act 1876, or at least exposes TWL to a significant risk of criminal liability on an uncertain and ill-defined basis.

162. TWL also submits that to drive over the Land, being a TVG, is a criminal offence under s.34 of the Road Traffic Act 1988, so that TWL and any person authorised by them (eg. the residents of the Maltings and drivers of any of the HGVs which pass over or turn around on the Land in connection with port activities) commit a criminal offence on each such occasion.

163. It is argued that for these reasons the commercial use of the Land by TWL and the recreational use by inhabitants cannot practically or legally co-exist on registration.

164. The wording of sections 12 and 29 is set out in the citation from the speech of Lord Hoffmann in the Oxfordshire case at paragraph 143 above.

165. S.34 of the 1988 Act provides:

"Prohibition of driving mechanically propelled vehicles elsewhere than on roads.

(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, or (b) on any road being a footpath, bridleway or restricted byway, he is guilty of an offence.

..."

166. Mr Edwards's argument in relation to these statutory provisions has been refined and expanded to some extent in the written submissions supplied (with my prior consent) after the close of the hearing. It is necessary to examine the argument in more detail.

167. The Victorian statutory provisions are, it is submitted, unequivocally worded, with no provisos, exceptions, qualifications or defences included, and there is no warrant for implying any such qualification, whereby activities of the landowner during the 20 year qualifying period may be continued with impunity after registration, as the Defendants appear to contend; to do so would run counter to principles of statutory interpretation, including the principle that where a provision is open to alternative interpretations, that interpretation should be rejected which would introduce uncertainty, friction or confusion into the working of the system. (Sections 313 and 314 of Bennion on Statutory Interpretation (6th ed).) In this respect TWL submits that, given the fluctuating nature of the commercial activity on the Land over the years, together with the ill-defined extent of the inhabitants' recreational right over

the TVG, the implication of an exception or qualification to the criminal provisions would be impracticable and unworkable.

168. Also relied upon is the principle that a person should not be penalised except under clear law, and therefore that a construction of a penal enactment such as s.12 and s.29 should be adopted which makes the imposition of criminal liability clear-cut. The implication of a qualification by reference to historic activities is likely to leave a person uncertain as to what he can lawfully do (Bennion, section 271).

169. In these circumstances, it is submitted that post-registration co-existence of the commercial and recreational uses of the land is not "feasible" or "sensible", because the commercial use in question would constitute "persistent flouting of the criminal law."

170. In particular, TWL's contention is that storing materials or parking HGVs or trailers on a TVG would contravene the s.12 prohibition on "wilfully lay[ing] any … other matter or thing thereon"; that those activities, or moving motor vehicles about on a TVG (for whatever purpose), would contravene the prohibition on doing "any other act whatsoever …to the interruption of the use or enjoyment thereof as a place for exercise and recreation…"; and that storing materials or parking vehicles would also contravene the s.29 prohibition on "occupation of the soil thereof … made otherwise than with a view to the better enjoyment of such town or village green..."

171. In support of the alleged contravention of the statute by "interruption of the use or enjoyment", TWL points to the evidence of some of the inhabitants (referred to in this judgment) as indicating that they only went to Allen's Quay at times when there was little or no traffic using it, and on occasions took refuge from lorries by staying in the ABC area (which is not part of the Land).

172. In relation to parking, TWL draws an analogy with the decision of Foster J in *Attorney General v Southampton Cpn* (1970) 21 P&CR 281, where an injunction was sought to restrain the creation of two car parks on a common in the defendant authority's ownership. The common was subject to ss.193 and 194 of the Law of Property Act 1925 and as a result the public enjoyed "rights of access for air and exercise" over it. In relation to an argument that the proposal would amount to "work whereby access to land…is prevented or impeded", Foster J considered that it would, because:

> "… if you consider the car parks without any cars parked upon them a person can exercise upon them but when the car parks have cars upon them, it seems to me inevitable that the space so occupied cannot be used for exercise or for air".

By analogy, TWL argues that if and so long as a TVG has vehicles parked on it, the space so occupied cannot be used for exercise or for recreation.

173. Similarly, whilst there may be an element of judgment as to whether a particular act interrupts the use or enjoyment of a TVG as a place for exercise or recreation, TWL submits that such margin of assessment cannot be broad enough to accommodate

vehicular use of the commercial nature and scale as that which takes place on Allen's Quay.

174. TWL further argues that even if the legal position is not clear, the fact that in the present case the boundaries of the competing rights are so uncertain demonstrates that the two rights cannot co-exist, since for the reasons referred to above, it is unacceptable as a matter of law for a landowner to be exposed to potential criminal liability on an uncertain and ill-defined basis.

175. As far as s.34 of the 1988 Act is concerned, it is common ground that "land" in that section includes a TVG. TWL acknowledges that criminal liability under s.34 is contingent upon the vehicular activity in question being contrary to s.12 and/or s.29, so that TWL (or its successors in title) could not grant lawful authority for it to take place. However, TWL submits that even if it could continue to use the Land as before registration without infringing the Victorian statutes, s.34 might still be relevant where, for example, TWL authorised other hauliers or operators to drive across the Land.

Discussion and conclusion on the Victorian statutes and s.34

176. I have already found *as a matter of fact* that the commercial activities carried out on Allen's Quay over the 20 year qualifying period were not inconsistent with the use of the Land for the sports and pastimes habitually indulged in there by local inhabitants, and that the two categories of use have in practice co-existed for many decades without significant impediment or inconvenience to either set of users. It is in that factual context that TWL's argument based on the criminal provisions must be assessed.

177. In my view it is difficult to see how, particularly in those circumstances, the commission or probability of a criminal offence by reason of TWL continuing its pre-registration activities after registration would reflect retrospectively upon the quality or nature of the pre-registration recreational use, so as to call into question its having been carried out "as of right" and to negate the clear evidence of sensible co-existence with mutual give and take. That appeared to be the view expressed by Lord Hoffmann in *Oxfordshire* when he said at paragraph 57:

> "Nor do I follow how the fact that, upon registration, the land would become subject to the 1857 and 1876 Acts can be relevant to the question of whether there has been the requisite user by local inhabitants for upwards of 20 years before the date of the application."

178. In this regard TWL points to the *Newhaven* case where, at paragraph 95,[56] Lord Neuberger and Lord Hodge referred to the fact that the restrictions in the Victorian statutes would apply to the beach in question if it were registered as a TVG, with the implication that the harbour authority might be exposed to criminal liability as a

[56] Quoted at paragraph 140 of this judgment.

result. However, it is important to bear in mind that their lordships were considering the question: "does section 15 of the 2006 Act apply to land which has been acquired by a statutory undertaker ... and which is held for statutory purposes that are inconsistent with its registration as a town or village green?"[57] That is manifestly a very different issue from the one raised in the present case, where the landowner is not a statutory undertaking and does not hold the land for statutory purposes, specific or otherwise. Indeed, in *Newhaven* the majority expressly distinguished, as having no bearing on the case with which they were dealing, cases where the land in question was *not* held for specific statutory purposes.[58] They concluded:

> "In our view, therefore, these cases do not assist the respondents. The ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not of itself sufficient to create a statutory incompatibility. By contrast, in the present case the statutory harbour authority throughout the period of public user of the Beach held the Harbour land for the statutory harbour purposes and as part of a working harbour."[59]

179. I do not consider that *Newhaven* 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. Any potential criminal liability of TWL under the Victorian statutes does not in my view give rise to statutory incompatibility such as to preclude the registration of the Land as a TVG or the continuation in the post-registration era of "feasible" and "sensible" co-existence of commercial and recreational uses of the Land which occurred throughout the qualifying period.

180. This being so, it is strictly speaking unnecessary to consider to what extent the post-registration recreational rights of inhabitants are qualified by pre-registration co-existence with the owner's uses, and whether and to what extent the effect of that co-existence is to imply qualifications and/or exceptions into the restrictions imposed by the Victorian statutes.

181. However, as already noted,[60] there is clear judicial support in *Lewis v Redcar* for the view that on registration recreationers do not obtain the right to use a TVG inconsistently with such use of the land as the owner has historically been, and wishes to continue, making. That view received support from a passage in the speech of Lord Hoffmann in *Oxfordshire,* where he expressed the view that neither of the Victorian statutes:

> "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* (1798) 2 Esp 543. This was accepted by Sullivan J in *R*

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[57] See paragraph 93 of the judgment in *Newhaven*.

[58] See paragraphs 98-101 of *Newhaven*.

[59] Paragraph 101 of *Newhaven*.

[60] Paragraph 137 of this judgment.

> *(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… I do not agree that the low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purposes of section 22 if in practice they were not."[61]

182. TWL submits that these comments were musings made without hearing argument, and that in any event there is a material distinction between "low-level agricultural activities" and all-year-round commercial activities involving HGVs being driven around and parked on the Land, and storage of goods there. However, whether musings or not, Lord Hoffmann's observations were cited with apparent approval by the Supreme Court in *Lewis v Redcar.* Furthermore, I do not agree that the facts of the present case are materially distinct from the "low level agricultural activity" in *Laing* to which Lord Hoffmann referred. On the facts recited in the judgment, the annual taking of the hay crop involved preparatory work of harrowing, rolling with a 3 ton roller, applying fertilizer with a mechanical spinner, then later cutting/crimping with a mower/conditioner, putting the grass into "wind rows" to dry, and finally baling and carting the hay. All these processes were carried out mechanically using tractor- hauled equipment, and people were sometimes asked to leave the field because of the danger. It is worth noting that there is not a single instance in the evidence before me of any inhabitant of Mistley being asked to leave Allen's Quay in the qualifying period or at all because of perceived danger or for any other reason.

183. Applying the approach of Lord Hoffmann in *Oxfordshire* and the Supreme Court in *Lewis v Redcar,* a prosecution under either s.12 or s.29 of the Victorian statutes 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 s.12, given that on the evidence it has not had that effect during the qualifying period. (See also the *dicta* of Simon Brown LJ (as he then was) in *Massey v Boulden* [2003] 1 WLR 1792, at paragraph 31.)

184. Similarly, there appear to be strong grounds for arguing that occasional temporary storage of cargo or other goods on part of the Land, or the occasional parking of HGVs and other vehicles thereon would not amount to "wilfully lay[ing] any …other matter or thing" on the TVG within the meaning of s.12. In the light of the *eiusdem generis* 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". I do not find the case of *Attorney General v*

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[61] Paragraph 143 of this judgment.

Southampton Cpn of assistance here. That case involved a different statute with different wording, applied in different factual circumstances.

185. It is in my view equally unlikely that occasional temporary storage of material on part of the Land, or occasional parking of HGVs there, 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 s.29. In the context of the opening words of the section, "An encroachment on or inclosure of a [TVG], also any erection thereon…", the reference to "occupation" connotes something more than a temporary use of the TVG of that kind.

186. I should not be taken to be suggesting that these would be the only arguments available to TWL should a prosecution be brought against it under the Victorian statutes. But they are sufficient to refute the submission that those provisions are so unequivocally worded (or should be so construed by virtue of the principles of statutory interpretation relied upon by TWL) as to make it clear that by continuing its pre-registration commercial activities TWL would be "persistently flouting the criminal law". For *inter alia* the reasons stated above, I consider such a situation very unlikely to be the case. Further, in my view the alleged difficulty of identifying the nature and intensity of commercial and recreational uses of the Land in the qualifying period (should it be necessary to do so in the future in the event of a prosecution) is greatly exaggerated by TWL: there are detailed findings in that regard in the Report (largely unchallenged by any party) and also in this judgment. For the same reason, I do not accept that the boundaries of the competing rights are so uncertain as to demonstrate that the two sets of rights cannot sensibly co-exist, or that TWL as landowner would be exposed to potential criminal liability on an uncertain or ill-defined basis.

187. In the light of TWL's acknowledgement that criminal liability under s.34 of the 1988 Act is contingent upon the act in question being contrary to s.12 and/or s.29, there is no need to deal at length with s.34. As mentioned, TWL referred to a further argument that the section might still be relevant where TWL authorised other hauliers or operators to drive across the Land. However, that point was not really developed by Mr Edwards. In any event, such use by third parties has taken place throughout the relevant period, and it is difficult to see why they should not have a defence based on TWL's authorisation to continue to do so. Even if they did not, then as already discussed it is difficult to see how any potential criminal liability in that regard could affect the entitlement to registration, all other conditions having been satisfied.

TWL's obligations under the health and safety regime

188. TWL also relies upon the obligations under the health and safety regime which apply to TWL and the port. A summary of the relevant legislative provisions was contained in an annex to Mr Edwards' written opening submissions. In particular, TWL points to s.3(1) of the Health and Safety at Work Act 1974, which requires TWL to operate their undertaking "to ensure, so far as is reasonably practicable, that persons not in [its] employment…are not …exposed to risks to their health or

safety". Section 7(a) of the 1974 Act imposes a duty on every employee while at work "to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work". These provisions are fleshed out by regulations made under s.15 of the Act, and by codes of practice. By virtue of s.33(1)(a) and (c), it is a criminal offence to fail to discharge any duty under ss.2-7, or to contravene any health and safety regulations or any requirement or prohibition imposed under such regulations.

189. In relation to codes of practice, the HSE has power under s.16 to approve and/or issue such codes for the purpose of providing practical guidance as to the requirements of ss.2-7 of the 1974 Act and relevant regulations. Breach of a code does not itself result in civil or criminal liability, but where someone is alleged to have contravened an obligation imposed by ss.2-7 or by a health and safety regulation, then by virtue of s.17 breach of a relevant provision of a code of practice may be admitted as evidence of the infringement alleged. This applies to the code text rather than the supplementary "guidance" also contained within the code of practice. However, the code provides that compliance with the guidance "will normally be…enough to comply with the law."

190. In that regard TWL draws attention in particular to the new code of practice for "Safety in Docks" (which apparently came into force in 2014, replacing an earlier code), and the Workplace (Health, Safety and Welfare) Regulations 1992. The new code describes various "typical workplace transport hazards in docks"; in the supplementary guidance these include "unsegregated vehicle/pedestrian access, eg ro-ro bridges and vessel ramps", and the guidance recommends various means for segregating vehicles and pedestrians. The text of the code states that "Walkways should if possible be laid out so that they do not cross cargo handling areas." In a similar vein, regulation 17 of the 1992 Regulations provides that "suitable measures" must be taken to ensure "where vehicles and pedestrians use the same traffic route, there is sufficient separation between them." By virtue of regulation 17(5), this obligation applies "so far as is reasonably practicable".

191. TWL submits that since local inhabitants have an enforceable right to pursue sports and pastimes over a TVG, TWL cannot comply with the requirement for segregation at the same time as respecting the inhabitants' rights. This, therefore, is a further reason why the statutory regime with which TWL must comply in carrying out its commercial activities is incompatible, both legally and practically, with the public's use of the Land as a TVG.

192. TWL points to the HSE's requirement in September 2008 that the edge of Allen's Quay be fenced, as indicating that if in the future the HSE determined that further measures had to be taken to avoid risk to the public from dock-related vehicle movements, the company might have to stop using the TVG for the passage of HGVs altogether. TWL refers in this regard to the 2005 correspondence with HSE as showing that this is not just a theoretical possibility:

> "Whatever approach is taken, HSE will expect [TWL] to do all that is reasonably practicable to ensure public safety. At an extreme, allowing the public unfettered access to operational areas of the

> Port would clearly be unacceptable, whilst a total prohibition may or may not be logistically feasible."

TWL acknowledges that HSE has not insisted on any specific safety measures on Allen's Quay other than the fencing of the water's edge, and made the following further statements in the 2005 correspondence:

> "HSE cannot become involved in any civil disputes as to rights of access and usage of the quay"

and

> "I would like to take the opportunity to confirm previous advice to all parties that HSE cannot comment upon, nor has any jurisdiction over, other issues raised in relation to Allen's Quay, including customary access or usage rights either for persons on land or approaching by boat ... or alleged trespass".

193. TWL submits, nevertheless, that the absence of enforcement action to date does not mean that HSE will not take such action if the TVG registration is confirmed, particularly if an incident were to occur. Nor does it mean that TWL would be immune from prosecution. There is, TWL argues, nothing that it could do post-registration to avoid or reduce risks to recreating local inhabitants from operational use of the Land, since such measures were not taken during the qualifying period.

Health and safety obligations: discussion and conclusion

194. TWL's argument under this head suffers from the same defect as the submission based on the Victorian statutes, (see paragraph 181 above). However, it presents an additional difficulty for TWL that was not a feature of the other submission. Whereas 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. Further, the Docks Regulations 1988 (referred to by Mr Hibbert in his evidence) which were replaced by the 2014 code of practice, contained not dissimilar provisions.

195. Thus, for *example*, TWL has for most of the twenty year qualifying period been under an obligation pursuant to regulation 17 of the 1992 Regulations to take suitable measures to ensure that "so far as is reasonably practicable" there is sufficient separation between its vehicles and pedestrians, including the many local inhabitants who made a habit of visiting Allen's Quay for recreational purposes. Presumably TWL has taken the view that no measures (other than speed limits) are "reasonably practicable" in all the circumstances. HSE appear to have taken the same view, given the absence of any enforcement action or threat thereof on their part (other than in respect of fencing the water's edge). There is, of course, no guarantee that HSE's view will not change in the future. But there is equally no reason to assume that their view is more likely to change because of registration: it has not apparently done so in the two years since that took place. I therefore do not

consider that TWL is correct in its contention that compliance with the rules in question is irreconcilably inconsistent with the public's rights in respect of the Land.

196. Nor do I consider that the fencing of the water's edge by TWL, following the threat of enforcement action by HSE, has any real bearing on the issue before me, save that it is the act which rendered inhabitants' use of that part of the Land "contentious", and therefore marked the end of the qualifying period and the start of the two year period for applying for registration as a TVG. TWL argue that if the registration is maintained there will be pressure from inhabitants, and possibly even litigation, to compel removal of the fence. It is not difficult to see why the existing (and admittedly temporary) fence would be regarded as unattractive, not least from an aesthetic point of view. However, I do not understand HSE to have indicated that only a fence of specifically this construction and dimensions would be capable of allaying their concerns. One would expect that, if the registration is maintained, a solution acceptable to all and which respects the locals' rights at the water's edge, would be achieved. I see no reason why that would not be possible. As Mr Eaton stated in his submissions, it simply requires a fence that performs a safety function without making the lawful activities of recreational use impossible. For example, it would surely be easy to crab over or through a fence or guard rail of appropriate height and construction. As to the likely outcome in the event of litigation to compel the removal of any kind of fencing, I do not propose to speculate except to say that it would be surprising if a civil court were to grant a discretionary remedy to counteract a lawful and enforceable requirement of the HSE.

197. As to TWL's contention that post-registration there is nothing (consistently with the TVG rights of inhabitants) that it could do to avoid or reduce risks to recreating local inhabitants from commercial use of the Land, suffice it to say that I am not at all convinced that this is necessarily correct, but in light of my conclusion below I do not consider that it is necessary for me to speculate or make any findings on this point.

198. In any event, in my view the continued existence, post-registration, of TWL's obligations under health and safety legislation (and any relevant code(s) of practice) cannot call into question the sensible co-existence between recreational and commercial use which was in practice maintained throughout the qualifying period, or give rise to any practical or legal incompatibility with the 2006 Act which could preclude registration of the Land as a TVG under that Act. The subsistence of those obligations post-registration does not mean that the recreational use during the qualifying period was otherwise than "as of right". This conclusion is, in a sense, *a fortiori* the position under the Victorian statutes, since TWL's health and safety obligations existed for many years prior to registration, and are not changed thereby.

Grounds 3 and 5: conclusions

199. I therefore find that the commercial use of the Land in the qualifying period has not been incompatible with its use by local inhabitants for lawful sports and pastimes; that there has been sensible co-existence between the two sets of uses, with appropriate give and take, throughout that period, rather than exclusion or

displacement of recreational uses. The latter uses have at all relevant times been "as of right". I consider that the two sets of uses can feasibly and sensibly continue to co-exist post-registration as they have in the qualifying period. This conclusion is not affected by the post-registration application to the Land of the Victorian statutes and/or s.34 of the Road Traffic Act 1988; nor is it affected by the continued application to the Land and/or to operations thereon of the health and safety legislation and related rules referred to above.

200. I have noted the decisions of Ouseley J and Gilbart J in, respectively, *R (Lancs CC) v SoSEFRA* [2016] EWHC 1238 (Admin) and *R (NHS Property Services) v Surrey CC* [2016] EWHC 1715 (Admin). However the circumstances in those cases are different from the one with which I am concerned, and it is no doubt for that reason that none of the parties placed any particular reliance upon them.

Ground 4: Land not used for lawful sports and pastimes

201. Under this head TWL submits that the quality of the uses for which local inhabitants visited the Land was inappropriate for those uses to be regarded as "lawful sports and pastimes" within the meaning of section 15 of the 2006 Act: the only relevant use by them was in the manner of a highway.

202. The scope of the argument in relation to this ground was narrow, and there is some overlap with issues dealt with in other grounds.

203. It appears to be common ground (and is in any event clear) that the Inspector found that three main activities amounting to lawful sports and pastimes were carried on by local inhabitants on the Land throughout the qualifying period. These were: swan feeding, crabbing and general walking (with or without dogs) not on a fixed route or, as he also described it, "general recreational wandering and straying over the surface of the relevant part of Allen's Quay".[62]

204. I have already considered swan feeding in the context of grounds 1 and 2, and have concluded that it should be discounted for the purposes of establishing a right to registration.[63] I need therefore say no more on that score.

205. As to crabbing, TWL asserts that the activity can only have in part taken place on the Land, since the latter ends on the edge of the Quay, and that to the extent that it occurs on the Land, it is confined to a narrow strip on the water's edge; it therefore cannot sensibly give rise to a conclusion that the *whole* of the Land was used for lawful sports and pastimes. That was the Inspector's conclusion[64] and the Defendants have not argued to the contrary. I consider that the activity which was the basis for the Inspector's conclusion that lawful sports and pastimes during the

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[62] Report, paragraph 16.72. See also paragraph 16.62.

[63] See paragraph 117 of this judgment.

[64] Report, paragraph 16.86.

qualifying period extended to the whole of the Land (as distinct from a strip of land at or close to the water's edge such as would be used for crabbing) was general walking (with or without dogs) not on a fixed route.

206. As I mentioned earlier in this judgment,[65] all the parties have been somewhat equivocal as to whether they were suggesting that I should exercise my power to alter the extent of the area currently subject to registration. A perception about the stance being taken by Mr Sharland on behalf of Essex CC caused TWL to raise (in a speaking note submitted during argument) a number of objections to replacing the current registered area with a strip of land along the edge of the Quay. These objections included a complaint that no such alternative case had been pleaded in these proceedings by the Defendants or put to the Inspector at the Inquiry, TWL also called into question whether crabbing had taken place on the Land (as opposed to on the ABC area) and whether the evidence of crabbing was sufficient to justify registration of even a narrow strip of land. While Mr Edwards was outlining these and other objections, Mr Sharland interjected to state that Essex CC was not putting forward any positive case in favour of an alternative area for registration, and Mr Eaton stated that the Second Defendant merely wished to point out that it was open to the court to register an alternative area if the evidence justified it and it was "just" to do so. In these circumstances I do not deal further with TWL's objections.

207. The main thrust of TWL's ground 4 relates to the activity of general walking/wandering, not on a fixed route, with or without dogs.

208. It is common ground that recreational walking is capable of amounting to "lawful sports and pastimes" for the purposes of the 2006 Act. However, TWL submits that the Inspector's conclusion that in the present case recreational walking on the Land was and would be perceived as lawful sports and pastimes is untenable. In essence, this was because on the evidence the Land was walked as part of a circuit involving a route which included the adopted public highway from Swan Basin and around the Grapevine and/or Port Road (not a public highway), and with regard to both these the Inspector found that their use was and would be perceived as use in the nature of a public right of way. TWL refers to the Inspector's statement[66] that:

> "There really was hardly any evidence of "lawful sports and pastimes" type use of the port road, other than for activities like walking along it with or without dogs, or to a lesser extent cycling, including children cycling at times. These are activities which are wholly consistent with highway status, or with potential highway status, rather than ones which would put an observant landowner on notice of a potential Commons Act claim."

209. TWL submits that recreational walking on the adopted highway and on the Port Road was no different in nature from that which took place on the Land; in the majority of cases it was all walked as part of a circuit, the Land being a linear strip

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[65] Paragraph 34 of this judgment.

[66] Report, paragraph 16.37.

which in fact and perception is simply a continuation of the Port Road or the public highway coming from the Swan Basin; in those circumstances TWL argues that the objective landowner would not have perceived a walker as indulging in a highway type use when proceeding along Port Road, but as indulging in lawful sports and pastimes when on the Land.

210. As to when recreational walking should be considered to be "lawful sports and pastimes" rather than use of an actual or putative public right of way, I was referred to the guidance of Lightman J at first instance in *Oxfordshire County Council v Oxford City Council* [2004] Ch 253. In that case the learned judge held that the question was how the activity would be perceived by a reasonable landowner and that, given the onerous consequences of TVG registration, if the matter was in doubt the determination should be in favour of the less onerous public right of way (see paragraphs 96-105).

211. TWL submitted that it was nothing to the point that local inhabitants might stop on the Land and stray off their natural route in order to take in the view from the Quay; the case law recognised such behaviour as precisely the sort of incidental use expected of someone using an actual or putative right of way. In this respect TWL relied upon the decision of the House of Lords in *DPP v Jones* [1999] 2 AC 240 (particularly per Lord Irvine LC at p.254), and also upon a report of Mr Vivian Chapman QC to Oxfordshire County Council in respect of a TVG application. In his report, which determined that the recreational walking which he was considering would have been perceived by the landowner as akin to use of a right of way, Mr Chapman observed that this perception would not be affected by the fact that people did sometimes wander off the side of the path for a variety of purposes, including to pick blackberries, or picnic, or allow their children to paddle in the lake. He said that there must be many unfenced public footpaths crossing open land where the public have acted in that way without it being suggested that the public right of way and its margins had been transformed into "an elongated stretch of TVG." Reference was also made to comments by Sullivan J (as he then was) in *R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P.&C.R. 36, (paragraphs 103-4) on the effects of dogs roaming beyond footpaths when off the lead, and of walkers "casually or accidentally stray[ing] from the footpaths without a deliberate intention to go on other parts of the fields". Such strayings to recover an errant dog would not suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use land beyond the footpath for recreation.

212. TWL submits that on this basis recreational walking on the Land was not "lawful sports and pastimes" and, if anything, supported only an asserted public right of way. It is submitted that the Inspector failed to assess the evidence properly and in accordance with the law; he looked at use of Allen's Quay in isolation rather than in the context of the other relevant areas, including in particular the public highway and the Port Road, and he did not consider the general recreational walking or wandering on Allen's Quay from the perspective of the reasonable landowner; the Inspector was therefore wrong to conclude that recreational walking on the Land was and would be perceived as "lawful sports and pastimes".

Discussion and conclusion: ground 4

213. I do not find these submissions convincing. Moreover, whilst this is not an appeal, and it is up to me to make up my mind in the light of all the evidence before me, I do not consider the criticisms of the Inspector's assessment on this aspect to be justified.

214. The assertion that the Inspector failed to assess the evidence properly and/or in accordance with the law is not made out. The Inspector recorded in detail (in nearly 500 paragraphs of section 7 of the Report) the evidence which he received from inhabitants and others about the activities carried on by locals on Allen's Quay. The accuracy of that account (as fairly reflecting the contents of the witnesses' evidence) on those aspects is virtually unchallenged. When assessing the effect of that evidence on the issue of what, if any, areas should be considered for registration as a TVG, the Inspector properly directed himself as to the legal principles to be applied in distinguishing use of land for "lawful sports and pastimes" from use akin to use as a public highway. He referred expressly to *DPP v Jones* in that regard when deciding that certain areas, including the Port Road, should be excluded from consideration for registration as a TVG.[67] Further, at the point where he was considering whether the recreational walking/wandering on the Land constituted "lawful sports and pastimes" he reminded himself that:

> "It has been clear as a matter of law for some considerable time now that activities such as informal walking or wandering, with or without dogs, and not on a fixed route *[and also which are not just minor or incidental deviations from an adjacent or nearby fixed route]* are well capable of being "lawful sports and pastimes".[68] (Emphasis added)

215. Nor is there any reasonable ground for asserting that when examining (as he was bound to do) the use of the Land itself, he shut his eyes to any relevant evidence, or any findings which he had made, in respect of other areas such as the Port Road. He reiterated several times that his conclusions were made in the light of the totality of the evidence. Similarly, far from there being anything to suggest that he did not consider the locals' general recreational walking or wandering on the Land from the perspective of the reasonable landowner, he *expressly* referred to (and applied) that test in the passage of the Report quoted at paragraph 208 above.

216. In assessing the evidence myself, I have not derived much assistance from observations made in the context of the wholly different facts of other cases, such as the Oxfordshire matter in which Mr Chapman QC was engaged, or the *Buckinghamshire County Council* decision of Sullivan J. We are not here dealing with walkers "casually or accidentally" straying from the footpaths in order to retrieve an escaped dog. Every case must be assessed separately on its own facts.

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[67] Report, paragraphs 16.36-16.42.

[68] Report, paragraph 16.63.

217. The fact that the Land, when combined with the Port Road and/or Swan passage, lends itself to being used as part of a loop or circuit from the High Street, and that some inhabitants have used it as such, does not mean that the use of the Land generally is not distinct from the use of those access roads. In the light of all the evidence before me, including the Report, I am satisfied that the use by inhabitants of the Land was and is clearly distinct. Taking the evidence as a whole, 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. Suffice to say that the Inspector was clearly entitled to reach the conclusion which he recorded at paragraph 16.72 of the Report:

> "... my conclusion in the present case is that the Applicant's evidence does show that there was general recreational wandering and straying over the surface of the relevant part of Allen's Quay by local people during the period I am concerned with, and that this form of recreational walking and wandering was a "lawful sport or pastime", and a very significant component of the totality of such activity on the application site."

218. It is difficult to see how he could have concluded otherwise on the evidence before him. In the light of the material which I have considered, I am of the same view. In relation to inhabitants' activities on the Land during the qualifying period, their general walking and wandering, with or without dogs, not on a fixed route, represented "lawful sports and pastimes" rather than an activity akin to use of a public right of way. It follows that ground 4 must be rejected.

219. For the record, I should say that I have not found that the various references by the parties to evidence given and submissions made at an earlier public inquiry, which related to an application to establish a public right of way over a different area of land (the Eastern Transit and Baltic Quay) by reference to a different qualifying period, provided me with much, if any, assistance so far as this ground is concerned.

Ground 6: the railway issue

220. This ground relates to the fact that there was at one time a railway or tramway at the port, which ran across Allen's Quay. Some reference is made to this issue at paragraphs 15(xii) and (xiii) above. As stated there, a stretch of the track is still visible embedded in the concrete surface of the Quay, extending from beyond the west end of the Grapevine up to the TQW. The Inspector said that it was not clear on the material before him whether that visible length of track, which runs along the southern boundary of the Land, is within or outside the Land. If outside, then the track would be on the publicly maintainable highway running parallel with the Grapevine. His understanding from the evidence was that the highway authority took the view that the track was not on the highway, whereas the applicant at the Inquiry (the Second Defendant to this claim) was of the opinion that it was. The Inspector proceeded on the *assumption* that the track was on the Land. There is nothing on the surface of the ground to indicate where the Land ends and the public highway begins. I am in no better position than the Inspector to form a view as to

whether the track is on the Land or not. I shall make the same assumption as he did. If that assumption is incorrect, then TWL's argument would appear to become much more difficult.

221. TWL's argument relies on s.55(1) of the British Transport Commission Act 1949. This provides (so far as material):

> "(1) Any person who shall trespass upon any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to *or worked by the Commission* or who shall trespass upon any other lands of the Commission in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection with the working of the railway shall on summary conviction be liable to a penalty not exceeding forty shillings.
>
> ......
>
> (3) No person shall be subject to any penalty under this section unless it shall be proved to the satisfaction of the court before which complaint is laid that public warning has been given to persons not to trespass upon the railway by notice clearly exhibited and that such notice has been affixed at the station on the railway nearest to the place where such offence is alleged to have been committed and such notice shall be renewed as often as the same shall be obliterated or destroyed and no penalty shall be recoverable unless such notice is so placed and renewed."

(Emphasis added)

222. The argument is as follows: the rails on the Land formed part of a system of railway lines and sidings serving the port from the 19th century. Although it is accepted that neither British Rail nor any of its various statutory predecessors owned or leased the land over which the rails ran on Allen's Quay, those railway operators had a perpetual easement entitling them to lay rails and operate and maintain them. Whilst it is common ground that there has been no active use of the rails since 1986 at the latest, s.55 of the 1949 Act continued to apply until British Rail released its easement and dismantled or abandoned the rails. In this respect TWL refers to a document dated 21.01.1994 from the Private Siding Manager of Railfreight Distribution headed "Mistley Quay Branch – Bridge No 1051", and stating that "closure of this line is now in hand with the Board's Solicitor, but may take some time". TWL relies upon this as establishing that the tracks in question continued to be "worked" for the purposes of s.55(1) until the formal closure process was completed sometime after the date of that document. TWL submits that the fact that the line was admittedly not operated at any time during the qualifying period does not mean that it was not "worked".

223. Thus, it is submitted, any local inhabitants who indulged in sports and pastimes "as of right" on the Land in the qualifying period until the rails ceased to be "worked" by British Rail sometime after 1994, would be doing so upon the rails and/or would have to cross them in order to do so. Such inhabitants would thereby have committed an offence under s.55(1) of the 1949 Act, and accordingly would not have been indulging in "*lawful*" sports and pastimes.

Discussion and conclusion on ground 6

224. The Inspector considered this argument in the Report, and concluded that there was insufficient evidence to establish that the use of the Land by inhabitants in the qualifying period would have involved a criminal trespass by virtue of s.55.[69] Having considered further submissions and evidence on this issue, he concluded in his third addendum report dated 30 June 2014 that the rails in question, which were physically unusable and unconnected to the national rail network, did not at any time during the qualifying period fall within s 55(1). This was because the land was not owned by, leased to, or worked by British Rail or any of its predecessors. Therefore, the existence of the rails did not render unlawful the "sports and pastimes" carried out on the Land (see paragraphs 19-25 of the third addendum report).

225. The Inspector expressed his conclusion as follows, at paragraph 26 of the third addendum report:

> "... It is...inconceivable, in my view, that anyone could have been successfully prosecuted, between September 1988 and early 1994 (say) for "trespassing" on a railway line or siding "worked" by, or belonging to, British Rail because they had walked over, or engaged in "lawful sports and pastimes" on, the unused and unusable pieces of metal set into Allen's Quay."

226. It was the unchallenged evidence of Mr Garwood before the Inspector that the track on Allen's Quay ceased to be operational "when the access to the rail network was closed in 1986".[70] Mr Sharland and Mr Eaton submit that, in the light of the evidence that the track was closed well prior to the start of the qualifying period in September 1988, there was no possibility of commission of an offence under s.55(1) at any time during that period, because British Rail (or its predecessor) neither owned, leased nor worked the track on Allen's Quay in that period.

227. The Defendants also submit that, in any event, the reference to "lawful sports and pastimes" in subsection 15(3) of the Commons Act 2006 relates to the intrinsic nature of the sports and pastimes themselves, and is not concerned with the route by which a person accesses the land in question: sports and pastimes are only disqualified if they are intrinsically unlawful or illegal or damage the land in question.

228. On the first point, it is common ground that there is no authority on the meaning of "worked" in s.55. I consider that it should be given its ordinary meaning. For a railway track to be "worked" it must, in my view, be used as a railway track ie for the passage of railway carriages or trucks. Since it was not capable of being used by British Rail from the time that access to the national rail network had been closed in 1986, it was not at any time thereafter "worked" by British Rail. It may well be

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[69] Report, paragraph 16.121.

[70] Witness statement 3 May 2013.

correct, as TWL submits, that a railway does not cease to be "worked" during a temporary pause in operations, for example while necessary maintenance or engineering works are carried out. However, the evidence here indicates a permanent cessation of any use of the line by British Rail from 1986. The fact that certain formalities within British Rail were not completed until later does not in my view mean that the line continued to be "worked" by them. I consider that after 1986 a criminal prosecution for crossing or standing on the part of Allen's Quay where the residual strips of metal were embedded in the concrete would have been hopeless. That is sufficient to dispose of this ground.

229. However, I am also inclined against TWL's submission that if the crossing of or walking on the tracks on Allen's Quay constituted an offence under s.55, that would necessarily have the result that any sports and pastimes indulged in by inhabitants on the Land would not be "lawful" within the meaning of the 2006 Act. First, TWL itself contends that to be "as of right" recreational use must be trespassory. Albeit not always criminal, trespassory use is "unlawful" in the sense of being tortious. On that basis, and assuming TWL's submission on trespass is correct, inhabitants could not engage in "lawful" sports and pastimes "as of right", and would therefore never be able to qualify for TVG status. This supports the view that the lawfulness in "lawful sports and pastimes" refers to the nature of the sports and pastimes themselves rather than to some incidental and unrelated tort or crime which is committed on the land or on access to the land in question. This interpretation is also more consistent with the natural meaning of the phrase, and receives further support from the observations of HH Judge Waksman QC at paragraph 90 of his decision in *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust & Anr) v Oxfordshire County Council* [2010] LGR 631. In view of my conclusion on the first point I do not need to decide this issue, but were it necessary to do so I would find that the commission of a trespass under s.55 by reason of crossing or walking on the vestigial line when accessing the Land would not automatically render unlawful for the purposes of the 2006 Act any sports and pastimes carried on there by local inhabitants.

230. Nor in these circumstances do I need to determine certain other issues raised by Mr Eaton. These included whether TWL has sufficiently established that the tracks were subject to the statutory provisions in question, or that a pre-condition for criminal liability under s.55 (3) was satisfied at the material time(s), namely that a public warning notice was 'clearly exhibited' at the nearest railway station.

Conclusion: TWL's claim

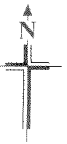
231. It follows that the matters raised by TWL whether taken cumulatively or individually do not provide grounds for the registration to be reversed or amended. Accordingly the claim fails.

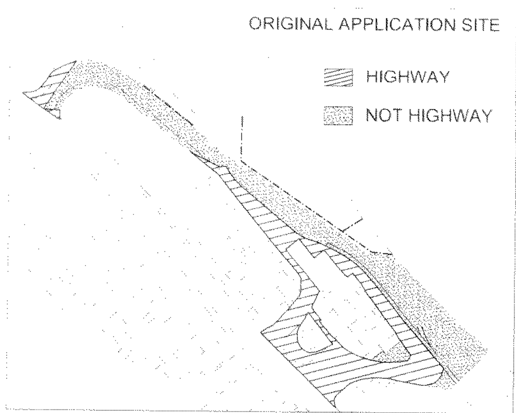
232. I invite the parties to agree an order reflecting this judgment, and any consequential matters.

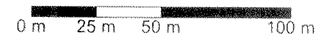
233. Finally, I am grateful for the assistance provided to me by the advocates and their teams.

Annex 1

PORT OF MISTLEY







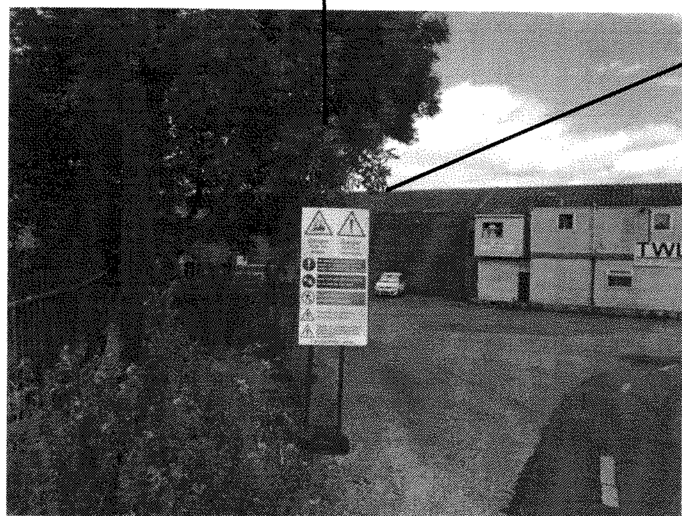
Based upon the ORDNANCE SURVEY maps with the permission of the CONTROLLER OF HER MAJESTY'S STATIONERY OFFICE CROWN COPYRIGHT RESERVED.

FOR THE PURPOSE OF IDENTIFICATION ONLY; THE POSITION OF ALL IDENTIFIED FEATURES IS APPROXIMATE

Annex 2

SIGNS / NOTICES – MESSAGE WORDING (including references to signage plan numbers & photos pp1679-1689)

1. Main Site Entrance



References
Fork lift trucks: No.18 p1685
Vehicles reversing: No.11 p1683
Site Safety: No.1 p1680

Text

Danger Fork lift trucks	**Danger** Vehicles reversing
All visitors and contractors to report to reception to receive safety instruction and quay rules	
Hard hats and safety footwear to be worn on this quay	
No admittance to unauthorised personnel	
Quay areas are dangerous Do not play on this site	
Parents are requested to warn children of the dangers and consequences of trespassing on this site T W LOGISTICS LIMITED	

Location & Aspect
Main (Towers) site entrance
South (High Street) facing

2. Site Office

References
No.19 p1685 (Note: other signs displayed here include No.18 p1685 & No.3 p1680

HAZARDOUS AREA	AUTHORISED PERSONNEL ONLY
THIS WHARF IS STRICTLY PRIVATE PROPERTY	
STRICTLY NO ADMISSION TO UNAUTHORISED PERSONS	
THE COMPANY ACCEPTS NO RESPONSIBILITY FOR ANY LOSS OR DAMAGE SUSTAINED BY TRESPASSERS THIS IS A DOCK WORKING AREA. THERE IS DANGER WHILST MACHINES ARE IN USE. By Order: TRENT WHARFAGE GROUP	

CAUTION
Fork Lift Trucks
operating

Location & Aspect
Site office wall
South (High Street) facing

5 MPH

3. Weighbridge Exit – Adjacent to the Port Road

References
Fork lift trucks: No.18 p1685
Vehicles reversing: No. 11 p1683
Site Safety: No.1 p1680

WARNING Fork lift trucks	DANGER Vehicles reversing
All visitors and contractors to report to reception to receive safety instruction and quay rules	
Hard hats and safety footwear to be worn on this quay	
No admittance to unauthorised personnel	
Quay areas are dangerous Do not play on this site	
Parents are requested to warn children of the dangers and consequences of trespassing on this site T W Logistics Ltd	

Location & Aspect
Weighbridge exit adjacent to Port road
South west facing

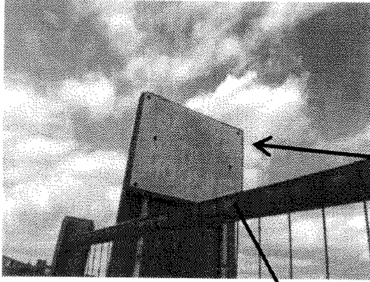
4.1 Thorn Quay – Quay Edge

References
Fork lift trucks: No.18 p1685
Site Safety: No.1 p1680

DANGER Fork lift trucks	10 mph
All visitors and contractors to report to reception to receive safety instruction and quay rules	
Hard hats and safety footwear to be worn on this quay	
No admittance to unauthorised personnel	
Quay areas are dangerous Do not play on this quay	
Parents are requested to warn children of the dangers and consequences of trespassing on this site T W Logistics Ltd	

Location & Aspect
Thorn Quay – quay edge adjacent to transit route
West facing

4.2 Thorn Quay – Quay Edge

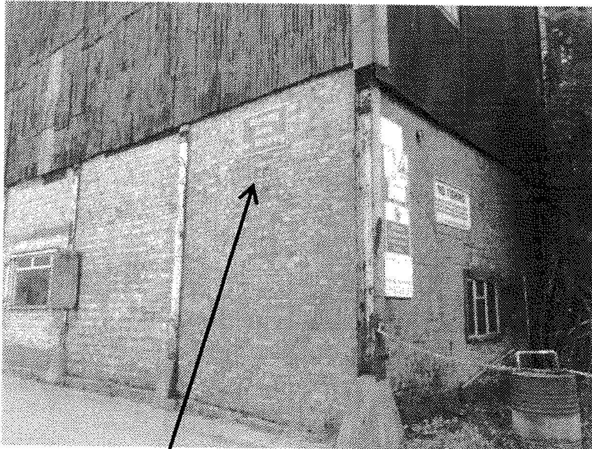


Reference
No.13 p1683

DANGER
NO
MOORING

Location & Aspect
Thorn Quay – quay edge adjacent to transit route
East facing (reverse side of sign at 4.1)

4.3 Thorn Quay Warehouse



Reference
No.26 p1687

Location & Aspect
Thorn Quay Warehouse wall
North facing

Working
Area
No Mooring

4.4 Thorn Quay - Pre 2004 (Note: these signs changed in 2004)

Reference
No.19 p1685

HAZARDOUS AREA | AUTHORISED PERSONNEL ONLY

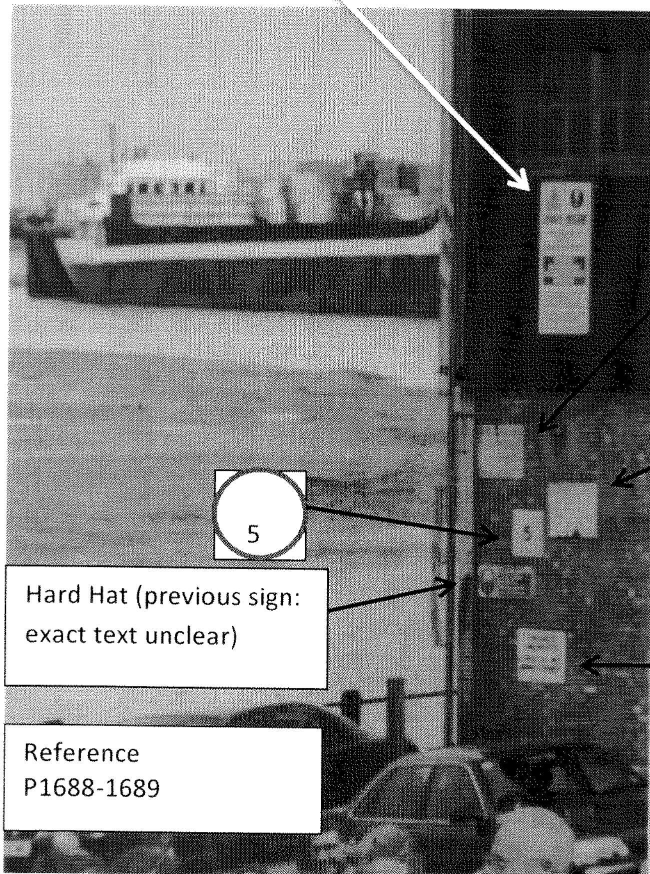
THIS WHARF IS
STRICTLY
PRIVATE PROPERTY

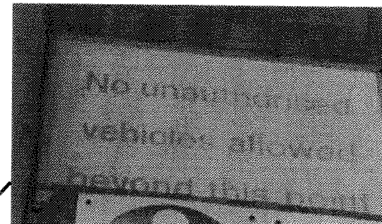
STRICTLY
NO ADMISSION
TO UNAUTHORISED
PERSONS

THE COMPANY ACCEPTS
NO RESPONSIBILITY FOR
ANY LOSS OR DAMAGE
SUSTAINED BY TRESPASSERS

THIS IS A DOCK WORKING AREA.
THERE IS DANGER WHILST
MACHINES ARE IN USE.

By order: TRENT WHARFAGE GROUP





No unauthorised
vehicles allowed
beyond this point

Reference
No.24 p1686

No Fishing
(previous sign: exact text unclear)

Reference
No.23 p1686

5

Hard Hat (previous sign: exact text unclear)

PRIVATE
PROPERTY
STRICTLY NO
ADMITTANCE

Reference
P1688-1689

Reference
P1688-1689

Location & Aspect
Thorn Quay warehouse wall
West facing

4.5 Thorn Quay - post 2004

References
No unauthorised vehicles: No.24 p1686
Give way: No.8 p1682
Fork lift trucks: No.18 p1685
Multi-hazard area: No.4 p1681
Authorised persons only: No.25 p1687
Warning to public: No.15 p1684

No unauthorised vehicles

Give way / Fork lift trucks

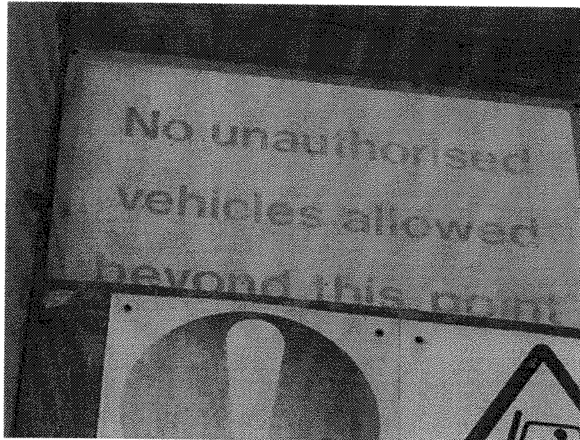
No Fishing

Multi-hazard area

Authorised persons only

Warning to public

Location & Aspect
Thorn Quay warehouse wall
West facing



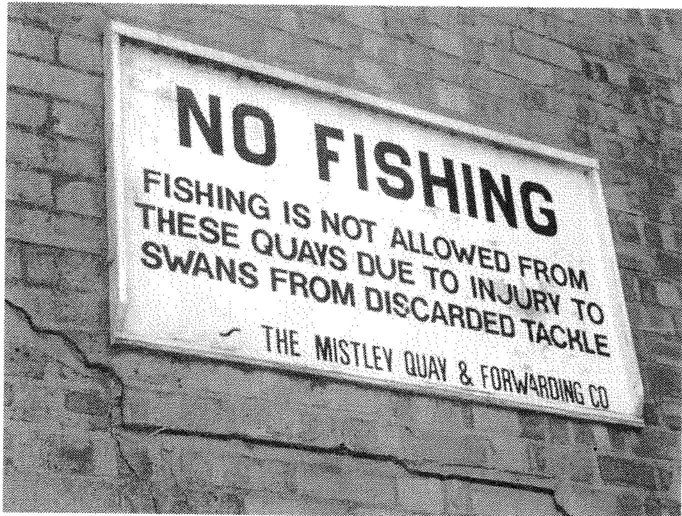
Reference

No.24 p1686

No unauthorised vehicles allowed beyond this point

Give way to oncoming traffic 10 mph

DANGER Fork lift trucks



<u>Reference</u>
No.23 p1686

NO FISHING

FISHING IS NOT ALLOWED FROM THESE QUAYS DUE TO INJURY TO SWANS FROM DISCARDED TACKLE

THE MISTLEY QUAY & FORWARDING CO

DANGER This a multi-hazard area
No unauthorised admittance
All visitors must report to reception

Strictly
Authorised
Personnel
Only

WARNING TO PUBLIC

This quay area site is private property
No unauthorised persons allowed
Liability will not be accepted by TWL
for any injury sustained by trespassers

NOTICE TO PARENTS

Parents are especially requested to warn
Children of the dangers & consequences
of trespassing on this site

Reference
p1693

CARTER BUILDER

SITE ACCESS
VIA
QUAYSIDE ONLY