



Francis Taylor Building

Property Bar Association and Planning and Environmental Bar Association Joint Seminar

“Town and Village Greens in the light of *R (Lewis) v Redcar and Cleveland Borough Council (No.2)*”

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TOPICALITY

1. Report of Ross Crail (26 August 2010): *Application to register land at Ashton Vale, Bristol (proposed Bristol City FC's stadium)*
2. Report of Vivian Chapman QC (19 May 2010): *Application to register land at the Disused Railway, Bridgemarky, Gosport, Hampshire (South East Hampshire Bus Rapid Transit Scheme)*
3. "The scheduled works may be constructed and maintained under the powers of this article *regardless of anything contained in or done pursuant to section 53 of the Nottingham Inclosure Act or Part 1 of, or Schedule 2 to, the Commons Act 2006*": Art. 5(11) to The Nottingham Express Transit System Order 2009 (*NET Phase 2*)

2010 (so far...)

- *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11; [2010] 2 WLR 653; [2010] LGR 295; [2010] JPEL 1135 (“Lewis”)
- *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and another) v Oxfordshire County Council* [2010] EWHC 530 (Admin); [2010] LGR 631; [2010] JPEL 1106 (“Oxfordshire NHS”)
- *Leeds Group PLC v Leeds City Council* [2010] EWHC 810 (Ch) (“Leeds”) [under appeal]

Lewis background

1. Significance of “(No 2)”

2. Tension between:

- *Fitch v Fitch* 2 Esp 543 (“give and take”)
- *R (Laing Homes Ltd) v Buckinghamshire County Council* (2004) 1 P&CR 573

Leading to Court of Appeal [2009] 1 WLR 1461:

- Simple test of adjustment
- *Fitch v Fitch* confined to post-registration



Lewis background (2)

3. Highly unusual facts

Before: as found by Inspector [Lord Walker para 10]

After: *“In the real world, the dog walkers and golfers will never have to co-exist on the disputed land if it is registered as a village green”* [Lord Rodger para 83]

What does *Lewis* decide?

1. No free standing test of deferment/adjustment. “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” [Lord Hope para 75] - **end of major safeguard to owner**
2. Focus on “the quality of the user...the critical question in this case” [Lord Hope para 69; also Lord Brown para 107 and Lord Kerr para 114]. “The question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as the assertion of a public right” [Lord Hope para 75] - **all still to argue about**
3. “The position may be that the two uses cannot sensibly co-exist at all” [Lord Hope para 76] – **therefore no registration: hope for owner!**

What does *Lewis* decide (2)?

4. “If confronted by such use [nec vi, nec clam, nec precario] over a period of 20 years, it is ipso facto reasonable to expect an owner to resist or restrict the use if he wishes to avoid the possibility of registration” [Lord Kerr para 116] - **caveat owner!**
5. “If ...[the owner] has done nothing with his land [during the 20 year period], he cannot complain that upon registration the local gain full and unqualified recreational rights over it” [Lord Brown para 105] - **de facto expropriation all the owner’s fault!**
6. Where “the owners and the locals are using land in theoretically conflicting ways but in fact harmoniously...the owner remains entitled to continue his use of the land as before” [Lord Brown paras 104-5]; “where it is feasible, co-operative, mutually respecting uses will endure after the registration of the green” [Lord Kerr para 115] - **owner’s crumbs of comfort**

Applying *Lewis* in practice

ISSUE (1): What is the intensity and quality of the user by locals needed to make land registrable, and when is it that “the two uses cannot sensibly co-exist at all”? [Lord Hope para 76]

1. In the nil use case, no change – e.g. *Beresford* [2003] UKHL 60; [2004] 1 AC 889; *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25; [2006] 2 AC 674

Applying *Lewis* in practice (2)

2. In the low-intensity farming cases, registration should follow, as already in *Sunningwell PC* [2000] 1 AC 335 and *McAlpineHomes* [2002] EWHC 76 (Admin); [2002] 2 PLR 1. On this point *Laing Homes* [2003] EWHC 1578 (Admin); [2004] 1 P&CR 573 *may* have been wrongly decided (“finely balanced” [Lord Walker in *Lewis* para 28])
3. In the medium-intensity farming cases, it is a matter of fact and degree: note the advice in the *Bristol City FC’s* application that 42 acres which had been used for “cattle and sheep grazing, hay and silage cropping, manuring, fertilizing, seeding” [IR para 561] were registrable

Applying *Lewis* in practice (3)

4. Where land is used for intensive agriculture (arable crops or intensive grazing when for periods the locals are excluded), the land is probably not registrable [Lord Walker para 27]
5. The position in relation to school playing fields, where use by locals is *as of right* and not *by [some statutory] right*, remains contentious
6. The position in respect of land used by the owner for occasional car parking, or markets/fetes etc, is that the land is probably registrable. What of land used by the occasional train, where appropriate notices have not been “affixed at the station on the railway nearest to the place” under s.55(3) of the British Transport Commission Act 1949?

Applying *Lewis* in practice (4)

ISSUE (2): What can an owner do on registered land, and how are disputes to be resolved?

1. “Conflicts over competing uses...are capable of resolution by the “constant refrain of the law of easements that ‘between neighbours there must be give as well as take’” [Lord Walker para 48] – **wishful thinking?**
2. The owner can continue to use his land “as before” [Lord Brown para 105]
3. Presumably he can change his use, but not so as to interfere (by quality or intensification) with the lawful sports and pastimes of locals – **problems for farmers and developers**

Applying *Lewis* in practice (5)

4. Presumably a landowner could be restrained by injunction or by criminal proceedings under s.12 of the Inclosure Act 1857 or s.29 of the Commons Act 1876
5. Locals also cannot increase the intensity of their use to the disadvantage of the owner's activities
6. "If any of the local inhabitants were to exercise their rights by way of all take and no give in a way to which legitimate objection could be taken by the landowner they could, no doubt, be restrained by an injunction" [Lord Hope para 76]

OTHER OUTSTANDING ISSUES IN THE LAW OF VILLAGE GREENS

1. Is the effect of prohibitory notices to make use *vi*? [see Lord Rodger, obiter, paras 87-90; *Oxfordshire NHS* para 17ff]. In both *Lewis* at first instance and in *Oxfordshire NHS*, the right was reserved to argue that prohibitory notices were of no legal effect if use was disregarded: see also the *obiter dictum* of Lord Hoffmann in *Godmanchester* [2007] UKHL 28; [2008] AC 221 para 24
2. What is a locality or a neighbourhood? The clarification in *Leeds* paras 89 and 103-105 is subject to an outstanding appeal. A High Court decision in *Betterment Properties (Weymouth) Ltd v Dorset CC and Taylor* is imminent which may be significant on this and other issues

OTHER OUTSTANDING ISSUES IN THE LAW OF VILLAGE GREENS (2)

3. Whether there can be more than one locality or neighbourhood? The clarification in *Leeds* paras 95-97 is subject to appeal
4. Must users come predominantly from the relevant neighbourhood or locality? Not so, according to *Oxfordshire NHS* paras 68-78 and *Leeds* para 95, but *Leeds* is subject to appeal
5. Is there is a requirement for “spread” of locals over the relevant locality or neighbourhood? Rejected in *Leeds* para 90, but *Leeds* is subject to appeal. The concept of “spread” has been applied in a number of Inspectors’ Reports, including that of Alun Evans (29 July 2010) (application to register land at Hesketh Meadows, Lowton, Warrington)

SOME RECENT COMMENTS

In addition to Lord Hope para 56 and Lord Rodger para 97, see:

- “The plethora of cases must surely indicate that the current state of the law is unsatisfactory.....It is high time that Parliament grappled properly with the issues of balancing the local public interest against the wider public interest...How about beginning with the question: is there any need or justification for the registration of new town and village greens?” *[Case note in [2010] JPEL 1126-7]*
- “My worry is that over the years, we have established a body of legislation that allows the law to be used in ways that were not intended by Parliament. That misuse amounts to abuse when it is used deliberately to thwart an otherwise legitimate planning permission”*[Tom Levitt MP, House of Commons, 25 March 2008, cited in Case note in [2010] JPEL 1164]*

SOME RECENT COMMENTS (2)

- “Legislation covering the registration of open spaces as town and village greens was not designed to cover such a substantial piece of land [as the 42 acre Bristol City FC’s site], nor to prevent entirely appropriate and needed regeneration. In my view, this case raises issues around the operation of this piece of legislation, and implications for regeneration elsewhere in the country. As a matter of urgency, I hope you may consider a review of the town and village green process” *[letter from Dawn Primarolo MP to the Secretary of State for CLG, September 2010]*



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