39 from 39, Series 3 Episode 5: Town and Village Greens post TW Logistics in the Supreme Court: Where have we got to and where are we going?

18th March 2021

Richard Wald QC
Richard Eaton
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Starting soon…..

T W Logistics
v
Essex County Council

Reflections on the Site

Angela Sydenham


The Traditional
Village Green

Description

"The traditional village green needs no introduction.

"Village Green" - the very words are evocative of great age and tranquillity, of turf as rich in hue, as it is trim in setting untouched by time

... the traditional village green with its memories of maypole dancing , cricket and warm beer."

So began Lord Justice (as he then was) Carnwath's judgment in the Court of Appeal in *Oxfordshire County Council* v *Oxford City Council and Robinson* (The Trap Grounds) [2005] EWCA CIV 175 [1]

The Site at Mistley

How did we get there ? Commons Registration Act 1965 s22

"town or village green" means land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or ***on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years****."*

Result: Some 20 years later applications for TVGs

Oxfordshire County Council v Oxford City Council and Robinson

The Trap Grounds Case [2005] EWCA Civ 175 [2006] UKHL 25

9 acres of land about a third under water and most of the rest impenetrable scrubby undergrowth registered as a TVG

PURPOSE of new concept in s22 of Commons Registration Act 1965

The **Carnwath View** – expressed in the Court of Appeal:

- To overcome the difficulty and expense of proving the antiquity of customary rights
- Not to create new TVGs after the initial registration period but to record existing customary rights
- No hint of modern class c greens in Royal Commission Report or Parliamentary debates

No Restrictions on Site

Hoffmann's Reasoning – expressed in the House of Lords:

- 8 reasons why there should be no restriction on land which could be registered as a TVG
- Citing examples where Commons Commissioners had registered greens (rocks, land used for annual Guy Fawkes bonfire) and Court of Appeal decision to register a carpark

More Modern Cases on TVG Sites

- R (on the application of Lewis) v Redcar and Cleveland Borough Council [2010] UKSC 11:
  - golf course registered

- Newhaven Port and Properties v East Sussex County Council & Newhaven Town Council [2015] UKSC 7:
  - acknowledged that a beach could be a TVG

Constraints on Registration

Registration of TVG incompatible with Landowners' statutory powers

- Newhaven Port and Properties v East Sussex County Council & Newhaven Town Council [2015] UKSC 7
- R (on the application of Lancashire County Council v (1) Secretary of State for The Environment, Food and Rural Affairs (2) Janine Bebbington
- R (on the application of NHS Property Services Ltd) v (1) Surrey County Council (2) Timothy Jones [2019] UKSC 58

Commons Act 2006 s15C Schedule 1A, (Inserted by s16 of the Growth and Infrastructure Act 2013)

- Claims for the registration of a TVG often arose, where in spite of opposition, permission for development had been obtained. Registration of a TVG would prevent such development.
- The right to apply to register a TVG is suspended when a trigger event occurs. Trigger events include :
  - the publication of planning applications
  - a draft or final development plan, local or neighbourhood plan identifying the land for potential development
- Terminating events:
  - The right will become exercisable again if an application is withdrawn, declined or refused after all means of challenging are exhausted or where permission is granted subject to the development starting within a certain time and that has elapsed.

Mistley Village Green

A discussion of the Supreme Court decision in

TW Logistics v Essex CC and another (Respondents) [2021] UKSC 4

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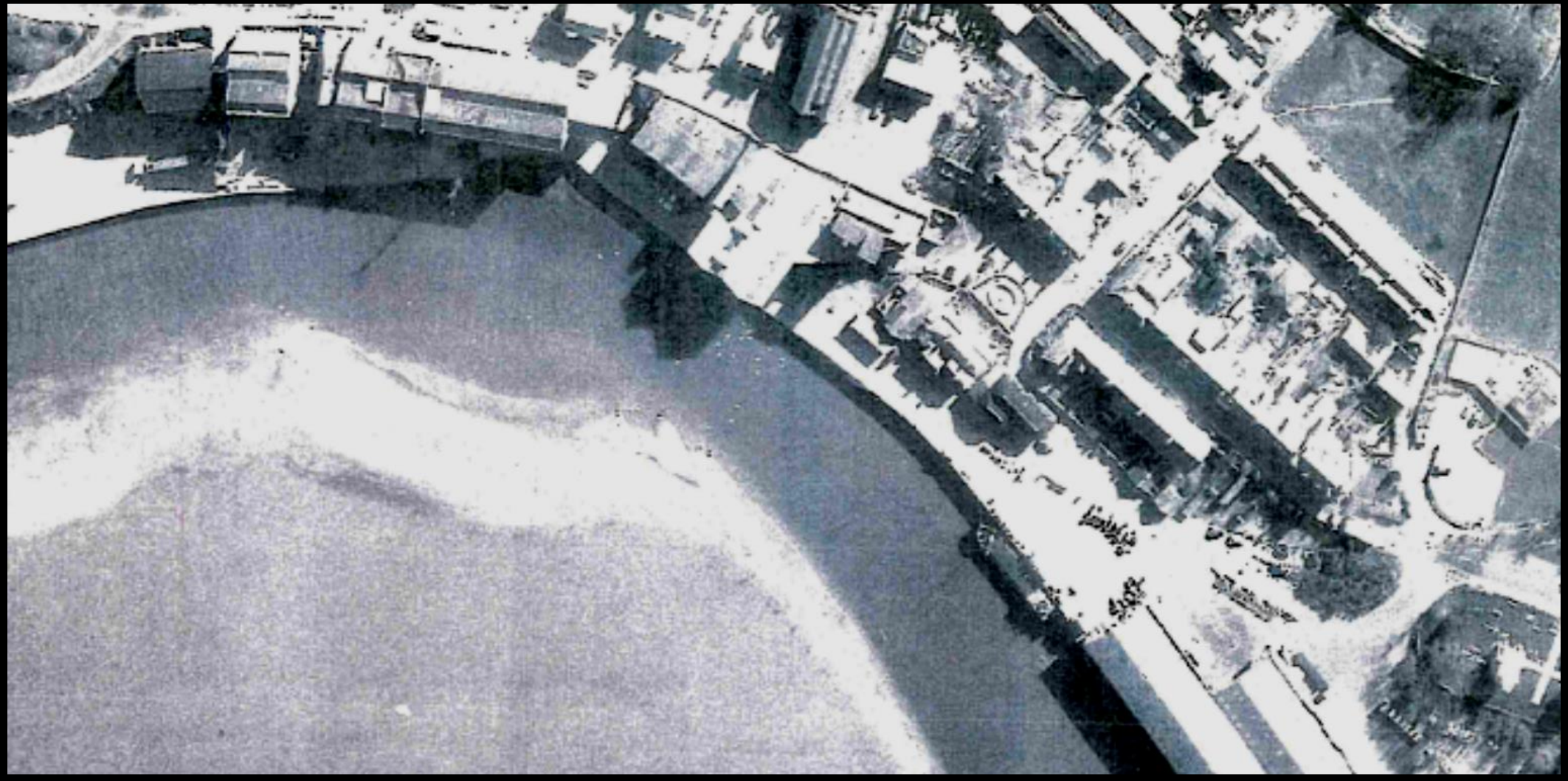

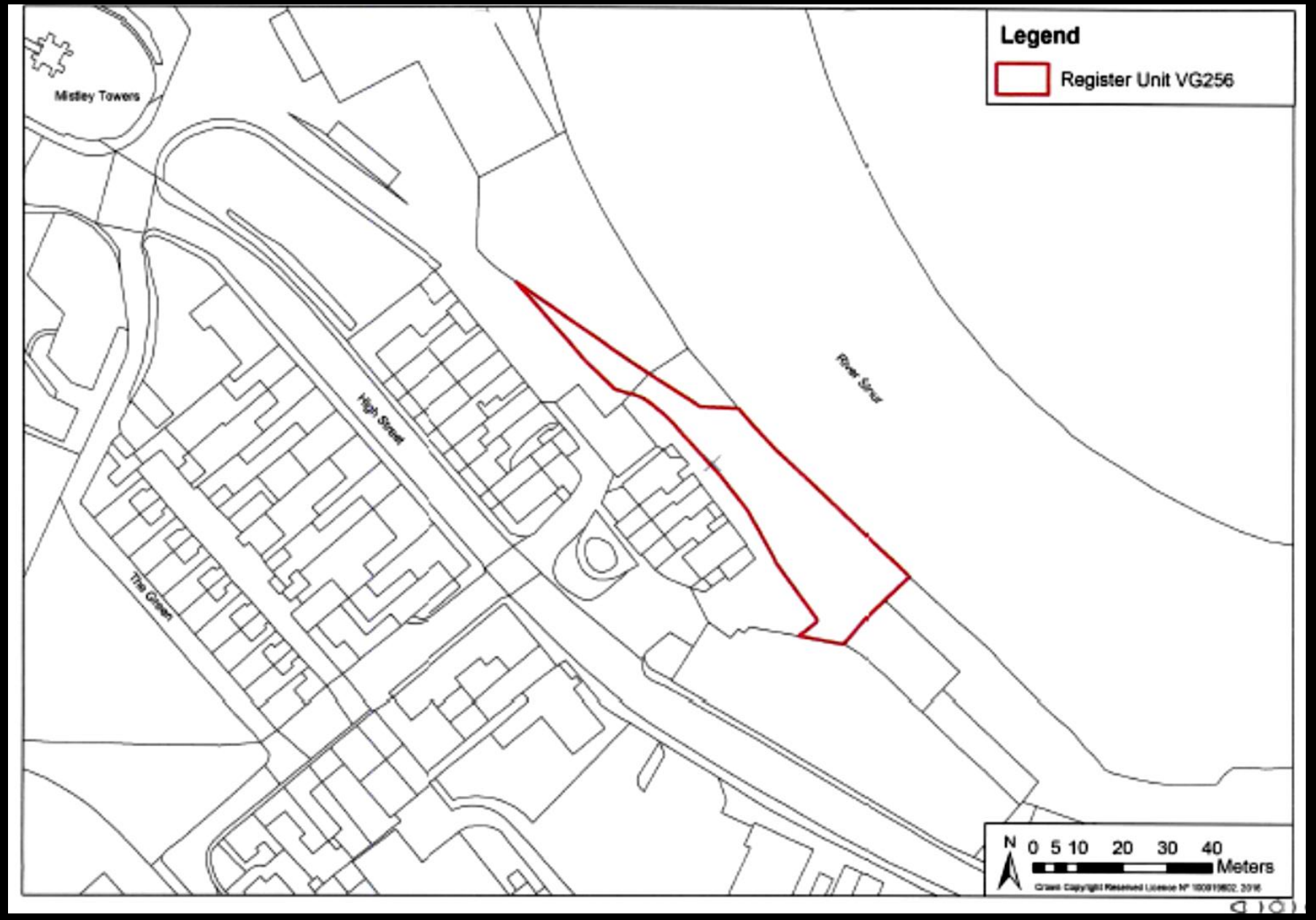
Legend
Register Unit VG256
Mistley Towers
High Street
The Green
River Stour
N
0 5 10 20 30 40
Meters

Co – existing user

Per Lord Sales and Lord Burrows:

The use of the phrase “town or village green”, particularly the word “green”, conjures up an image of the archetypal village green with its area of grass where local inhabitants can walk and play. Hence the initial surprise on reading the facts of this case where the TVG in issue, as registered by the first defendant and respondent, Essex County Council (“the Council”), is an area of concrete of some 200 square metres (which we shall refer to as “the Land”) on, or close to, the water’s edge in a working port and across which port vehicles, including heavy goods vehicles (“HGVs”), are driven”

A “Village Square”

26. The Inspector said this at para 16.142 of his report:

“As it happens, Allen’s Quay at Mistley… could in my view be seen as having the slight air about it of a town or village ‘square’ (albeit in this case on the one side open to the water of the estuary), rather than looking like a classic ‘green’. I mean this in the sense of its being a hard-surfaced, multi-purpose publicly accessible area in or near the centre of a settlement, and with buildings around at least some of the sides.”

The Central Question

2. “Two Victorian statutes, which enacted criminal offences designed to protect the public’s use of TVGs, also have a potential impact on the landowner. The central question on this appeal is whether the registration of the Land as a TVG would have the consequence that the continuation of the landowner’s pre-existing commercial activities would be criminalised under the Victorian statutes…”

S.12 Inclosure Act 1857

"...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..."

S.29 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."

The Court of Appeal's approach

36…Lewison LJ observed: Page 14 "The Victorian statutes should not be construed so as to make illegal that which, under the statutory registration scheme, is legal if another reasonable construction is possible." (para 71) In this case, such a reasonable construction was possible. The purpose of the Victorian statutes was to prevent public nuisances (as shown, for example, in the preamble to section 12 of the 1857 Act)."

An act "warranted by law" does not amount to a public nuisance (in line with the definition of a public nuisance in *R v Rimmington [2005] UKHL 63; [2006] 1 AC 459).*

“Always speaking”

“73. As with almost all statutes, one should regard the Victorian statutes as “always speaking”: see, e.g. R v Ireland [1998] AC 147, 158-159. This means that the correct approach is to interpret the words of the Victorian statutes in the light of Page 28 modern conditions rather than conditions that prevailed in Victorian times. Modern conditions include the introduction in 1965…

76. Again in agreement with Lewison LJ (paras 71-79), we consider that there is a conventional interpretive path available in relation to the Victorian statutes which ensures that they apply in a manner which does not cut across the purpose of the modern registration statutes, as explained in Lewis.”

Supreme Court's approach

"81. Here, as TWL has the legal right in the period after the registration of the Land as a TVG to carry on with what it has been doing previously on the Land, its activities are "warranted by law". TWL would therefore not be committing an offence under the Victorian statutes in continuing its pre-existing commercial activities.

82. Put another way still, the public's statutory right is only to enjoy the land subject to the continuation of the owner's pre-existing rights, as exercised to that extent. There is therefore no interference with the relevant use and enjoyment of the land by TWL continuing with its pre-existing activities."

Health and Safety Legislation

"89. As regards the health and safety legislation, this has always applied irrespective of registration as a TVG, and registration will not make any difference to this. That is, TWL must comply with, as it would appear that it has always been complying with, its duty to ensure, so far as reasonably practicable, the safety of its workers and the public when they come on the Land."

Criminality and statutory incompatibility – a question still open…

"92. There is no point in asking what effect criminalisation of TWL's continuing activities under the Victorian statutes (or other legislation) would have on the question of registration when the analysis under Ground 2 shows that the Victorian statutes (or other legislation) would not have that effect."

Scope of post registration rights of recreation

"65…Registration of land as a TVG has the effect that the public acquire the general right to use it as such, which means the right to use it for any lawful sport or pastime (whether or not corresponding to the particular recreational uses to which it was put in the 20-year qualifying period, evidence of which gave rise to the right to have it registered as a TVG). However, the exercise of that right is subject to the "give and take" principle so that it is potentially misleading to think that there is a "one size fits all" principle. This means that the public must use their recreational rights in a reasonable manner, having regard to the interests of the landowner (which may, or may not, be commercial) as recognised in the practical arrangements which developed to allow for coexisting use of the land in question during the qualifying period."

Thank you

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