

## Deference and dual uses in the light of *Lewis v Redcar* – some thoughts

**“In what circumstances, if at all, is dual use relevant to the rejection of a claim to registration of a village green?”**

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1. In 1865, when the Commons Preservation Society was formed, “the great questions of the rights of the public in...commons, and of the importance to the community and especially to the inhabitants of great towns of the maintenance of open spaces in their neighbourhoods, were coming to the front”<sup>1</sup>. 100 years then passed until the Commons Registration Act 1965; and then a further 41 years until the modern codification in the Commons Act 2006, which (as Lord Walker remarked in *Lewis*) “has made it easier, rather than more difficult, to register a village green”<sup>2</sup>. At the time *Scrutton* was writing, what was evident was “direct collision” of “the interests of individual landowners...with the interests of the general public”<sup>3</sup>. Today that “collision” is still manifest, with references by Lord Walker<sup>4</sup> to “applications for registration being used as a weapon of guerilla warfare against development of open land”. The law has also become increasingly complex, described very recently by His Honour Judge Behrens, in a further military metaphor, as “the minefield of TVG law”<sup>5</sup>. Meanwhile it has become clear that “the interests of the general public” are themselves more complex than supposed in 1865, and that the public interest may on occasions be infringed, rather than

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<sup>1</sup> *Scrutton Commons and Common Fields* (1887) p.164, “being the Yorke Prize Essay of the University of Cambridge for the year 1886”.

<sup>2</sup> *R (Lewis) v Redcar & Cleveland BC (No 2)* [2010] 2 WLR 653 para 48.

<sup>3</sup> *Op.cit.* p.164.

<sup>4</sup> *Lewis* para 48.

<sup>5</sup> *Leeds Group PLC v Leeds City Council* [2010] EWHC 810 (Ch) para 112.

protected, by the modern law of village greens, which – unlike the law of planning and compulsory purchase, or the approach to property rights in Article 1 of the First Protocol of the European Convention on Human Rights - permits no investigation in particular cases of where the balance of public interest lies.

2. Undoubtedly *Lewis* (together with the *Mental Health Trust*<sup>6</sup> and *Leeds* cases) constitute further advances against the interests of landowners. I regard the decision itself as problematic in at least four respects.

(1) First, the test adopted by the Court of Appeal<sup>7</sup> – one of adjustment or adaptation, rather than deference – was relatively simple to apply, and afforded protection to the landowner in a way which accorded with common sense and objective standards of justice. It was an easy question to apply: did the inhabitants adjust/adapt their behaviour/use of the land on account of the landowner's own activities? If so, no village green could be registered. This was inconsistent with some of the case law on public rights of way and private easements<sup>8</sup>, but would have been a creative evolution of the common law.

(2) Second, the test of “give and take” post-registration is highly problematic. Could a Golf Club in a *Lewis*-type situation fence off land for a new driving range or practice putting green? Could it recontour the land, by for example bunding and the creation of new bunkers? Can a farmer move from grazing sheep (compatible with the use by inhabitants) to the keeping of one or more bulls on the land (arguably incompatible)?

(3) Third, to what extent during the 20 year period can the inhabitants' user be interrupted by the owner's exclusive activities before a claim must fail for lack of continuity? Lord Walker appears to

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<sup>6</sup> *R (Oxfordshire and Buckinghamshire Mental Health Trust) v Oxfordshire County Council* [2010] EWHC 2010.

<sup>7</sup> [2009] 1 WLR 1461 para 45 per Dyson LJ.

<sup>8</sup> *Thomas v BRB* [1976] QB 912 (public right of way across operational railway); *Miller v Emcer Products* [1956] 1 Ch.304 (right to shared lavatory); *Dowty Ltd v Wolverhampton Cpn* [1976] 1 Ch 13 (easement to land at an aerodrome), all cited in the Appellant's Case in *Lewis*.

have seen no problem in a period “of the order of three months” needed to keep people off the land whilst the hay crop was growing, not including the time for cutting and drying the hay, and for its collection<sup>9</sup>.

(4) Fourth, is, or is not, there a test that the use must objectively appear to be “as of right”? The Court of Appeal said “yes”. The House of Lords seem to have said “Yes and no”. Thus Lord Hope was clear that there were only three vitiating circumstances (*nec vi, nec clam, nec precario*)<sup>10</sup>. But in the same paragraph he emphasized the importance of “the quality of the user that is relied on” which must be “of such amount and in such manner as would reasonably be regarded as being the assertion of a public right”, a statement specifically endorsed by Lord Brown and Lord Kerr<sup>11</sup>. Lord Walker also implicitly referred to a test of asserting a right so that it should be recognized<sup>12</sup>. If “the focus must always be on the way the land has been used and, above all, the quality of that user” (the phrase of Lord Brown<sup>13</sup>) are we not still very close to an additional test of how that user appeared? Yet Lord Brown, earlier in the same paragraph, specifically disavowed the superimposition of “a further requirement that it would appear to a reasonable landowner that the users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging”.

3. So, with respect, the judgments are not as clear as they might have been, and it is perhaps unfortunate that the appeal came on so fast and the hearing was compressed into so short a time, which undoubtedly benefited the appellant.

4. That said, it is always tempting for the successful advocate to claim particular significance for his own forensic triumphs. The purpose of this Paper is, however, to suggest that in most cases where

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<sup>9</sup> *Lewis* para 24.

<sup>10</sup> *Ibid.* para 69. See also para 107 (per Lord Brown); para 116 (per Lord Kerr).

<sup>11</sup> *Ibid.* para 67 (per Lord Hope); para 107 (per Lord Brown); para 112 (per Lord Kerr).

<sup>12</sup> *Ibid.* para 36.

<sup>13</sup> *Ibid.* para 107.

land is subject to dual uses, that is by the owner (or his tenant/licensee) and by local inhabitants, it will not qualify for registration as a new village green. In other words, *Lewis* is not quite as revolutionary as it may initially appear.

5. My starting point is to remind you of the (perhaps surprising) facts in *Lewis*. “The Inspector found that “as far back as living memory goes, the report land was continuously used as part of the Cleveland Golf Club links”, whilst during the same period of living memory “the open parts of the report land have also been extensively used by non golfers for informal recreation such as dog walking and children’s play”<sup>14</sup>. The inhabitants had not impeded play, but the two uses had co-existed in all other respects. The golfers (in Lord Walker’s words), “simply acted...with courtesy and common sense”; and “A reasonably alert owner of the land could not have failed to recognize that this user was the assertion of a right and would mature into an established right unless the owner took action to stop it”<sup>15</sup>.

6. It is critical to recognize that that golf is rather a special pastime. Save when particular shots are being played, it does not require exclusive use of land, and then only for minutes at a time, even on the putting green. There are numerous golf courses which are common land subject to Schemes under the Commons Act 1899, where the playing of golf co-exists with the inhabitants’ “privilege of playing games”. As Lord Walker said, “Golfers and local residents can co-exist without much friction even when the latter have established legal rights”<sup>16</sup>. The mere fact of “overwhelming deference” by the local inhabitants to the playing of golf, even if it involved, as it did, adjustment of behaviour (which the Court of Appeal erroneously regarded as decisive against registration), was not enough. As

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<sup>14</sup> *Lewis* paras 9 and 10, quoting from the Inspector’s Report.

<sup>15</sup> *Ibid* para 36.

<sup>16</sup> *Ibid.* para 47.

Lord Rodger carefully explained, there were three fallacies with this approach. First, it was “inherently implausible” for the owners to infer from the inhabitants’ behaviour in deferring that the inhabitants were aware of the legal position. Second, it would have been unreasonable to conclude that the deferral was the result of “a conscious decision on their part to respect what they perceived to be the superior rights of the owners of the land”. Third, and in any event, there was another explanation for the inhabitants’ behaviour than “some supposed unwillingness to go against a legal right which they acknowledged to be superior”<sup>17</sup>.

7. The position in relation to golf can be contrasted with the position where football or cricket is regularly (albeit seasonally) played on land. In the case of football, there is a requirement for exclusive use of a pitch for periods of an hour or more at a time. The game simply cannot be played if inhabitants stray onto the pitch during play. This is even more so in the case of cricket, where no doubt some very limited incursion of walkers can be accommodated at the extremities of the outfield, but not on the pitch itself, nor anywhere within the main area of play. Moreover, such is the need to protect the cricket pitch itself, that it will normally be roped off save when a game of cricket is in progress, so that even if local inhabitants recreate on the outfield when cricket is not being played, they will never do so on the segregated pitch. In these circumstances attempts to register most playing fields will fail for two reasons. First, that the land has not been continuously used during the 20 year period – rather there have been extensive periods of time when the owner or his licensees have had exclusive use of the land. Second, in those circumstances it would be much less likely that the deference could be attributed to courtesy and common sense. The inhabitants’ deference (or, to use Lord Hope’s preferred terminology, “the quality of the user”<sup>18</sup>) would be sending a clear message of to the owners that they recognized superior rights of others. They would not be alerting the owner to

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<sup>17</sup> *Ibid.* paras 95 and 96.

<sup>18</sup> *Lewis* paras 67 and 69.

the assertion of a right that would, unless checked, mature into an established right; they would not have done “everything that was necessary to bring home to the [owners], if they were reasonably alert, that the inhabitants were using that land or recreation “as of right””; the public’s user would not be “of such amount and in such manner as would reasonably be regarded as being the assertion of a public right”<sup>19</sup>. The matter can be tested this way: are there any instances where the playing of organized football or cricket has co-existed with the simultaneous exercise of recreational rights by local inhabitants? But two nagging problems remain. Can the surrounds of a football pitch or cricket ground be registered, the surrounding polo-mint without the hole in the middle? And, if you can have a village green where the inhabitants give way for a period of time to the taking of a hay crop (or more), why should they not defer to the owner’s exclusive right to play games at certain times?

8. What then of the implications of *Lewis* for agricultural land? The answer is that it all depends on the nature, intensity and exclusivity of the particular farming practices. At one end of the spectrum is the situation where the owner is doing no more than growing and cutting grass for hay or silage. As Lord Hoffmann observed in *Oxfordshire*, there was no reason to regard “low-level agricultural activities” as inconsistent with use for sports and pastimes for the purpose of [registration as a village green] if in practice they were not”<sup>20</sup>. There are various similar dicta in *Lewis*. Thus Lord Walker said that:

“Taking a single hay crop from a meadow is a low-level agricultural activity compatible with recreational use for the late summer and from then until next spring. **Fitch v Fitch** (1797) 2 Esp 543 is venerable authority for that”<sup>21</sup>.

<sup>19</sup> *Lewis* per Lord Walker para 36; per Lord Rodger para 93; per Lord Hope para 75.

<sup>20</sup> *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 para 57.

<sup>21</sup> *Lewis* para 28.

Lord Hope was also clear that registration as a village green was possible where it was being used for “growing and cutting grass for hay or silage”<sup>22</sup>. How then is that compatible with the decision in *Laing Homes*<sup>23</sup> where a registration was quashed, even though the land had only been used for taking a hay crop? Plainly Lord Walker doubted the decision in *Laing Homes*, though he did not go so far as to say it was wrongly decided. As he rightly recognized, on the particular facts “some of the [inhabitants’] evidence about their intensive use of the footpaths seems to have weakened their case as to sufficient use of the rest of the application area”<sup>24</sup>. However, that went to a different ground of challenge to the decision, and in my own view *Laing Homes* is no longer good law on the agricultural use issue. Once one accepts both “give and take” and periods of exclusion while the grass is growing, the farmer with very low level activities is now highly vulnerable to registration.

9. What then of the use of fields for grazing, whether of horses, cattle or sheep? Here there is ample scope for co-existence, even if local inhabitants will generally adjust their behaviour so as to avoid the particular parts of the field (which will vary from day to day) where the grazing is concentrated. The case for registration here is rather stronger than in the hay-making cases, for there is no need for inhabitants to stay off the grass whilst it is growing (as mentioned above, this will be “usually...of the order of three months”, according to Lord Walker<sup>25</sup>). After all, there are many traditional village greens where the owner grazes stock from time to time, and where there are commoners with common rights of grazing on the village green. There is no necessary incompatibility. But there is a countervailing factor. If land is to be used for grazing, then normally there will be a need for fencing, and secured gates, to keep the animals in. Such fencing and gates pose two problems for would-be registrants. First, as a matter of fact such fencing will normally deter

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<sup>22</sup> *Ibid.* para 74

<sup>23</sup> *R (Laing Homes Limited) v Buckinghamshire CC* [2004] 1 P&CR 573

<sup>24</sup> *Lewis* para 28.

<sup>25</sup> *Ibid.* para 24.



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most inhabitants from using the fields in question (particularly since many people are fearful of grazing animals). Second, entry which involves climbing over a gate or fence (in the case of a gate, particularly if locked) is a forceful entry, and therefore needs to be discounted as forceful” and therefore *not* “as of right”. As Lord Rodger said in *Lewis*, force does not require physical force, and entry over fences is a situation “where it would be unacceptable for someone to acquire rights against the owner”<sup>26</sup>. In a recent application at Lawson’s Bridge, Scotforth, Lancaster, there was some evidence of trespass on grazing land for a 20 year period. The Inspector found that the relevant qualifying uses were “relatively limited and have not taken place with such frequency and to such an extent that they would be capable of showing a landowner that rights over the Land were being asserted”<sup>27</sup>. She found that “walking around the perimeter was an obvious route for a walker to have taken. That would particularly be the case when cattle were on the Land or slurry had been spread or silage was being grown....a significant amount of the walking on the Land has been more akin to the exercise of a public right of way and should thus be discounted from the qualifying use”<sup>28</sup>. She also found that “a number of users sometimes entered or left the Land climbing over gates, squeezing through gates or climbing under barbed wire. In [her] view, all such occurrences would amount to use by force and so not as of right”<sup>29</sup>. Her conclusion was that “All such use that was not “*as of right*” must be discounted from the qualifying use. That further strengthens my finding that the qualifying use is insufficient to establish the claim”<sup>30</sup>. But where holes are left in the fencing, or where the gate is left unsecured, and where there is evidence of plentiful user of the land, then even grazed fields are registrable. Pastoral farmers beware!

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<sup>26</sup> *Lewis* para 91 (obiter).

<sup>27</sup> Report of Inspector (Ruth Stockley) to Lancashire County Council, 1 February 2010, para 7.16

<sup>28</sup> *Ibid.* para 7.12. See also fn.31 below.

<sup>29</sup> *Ibid.* para 7.19

<sup>30</sup> *Ibid.* para 7.24

10. What then of the third situation, where the land is producing a crop other than grass for hay, in other words what of traditional arable land, ploughed once a year to produce a cereal crop, or to grow vegetables? Here there are no animals to keep in, and therefore no agricultural need for fencing or closed gates. What if the inhabitants share use of the arable field with the growing of crops? Normally, save in the stubble period between harvesting the crop and ploughing, there will be minimal use of an arable field by local inhabitants for two reasons. First, it is difficult to walk across a ploughed field. Second, there is generally respect for the Countryside Code, so that most people take care to avoid growing crops. It will therefore be rare that there is evidence of sufficient use of an arable field to count towards the required 20 years user, particularly when discount is made for perimeter walking referable to the creation of rights of way rather than village green rights<sup>31</sup>. An example would be the attempted registration of a new green at Germany Lane, Fulford, just outside York. The relevant 20 year period was 1986-2006. The northern part of a large field had been in set aside since 1994, but there had been arable cropping from 1990 to 1993. During that period the Inspector found that “there was no significant use of the northern part of the field for any recreational activity in these years at times when the crops were growing.....it accords both with common sense and the standards of behaviour which one would reasonably expect that an arable field which was growing a cereal crop would not usually be the kind of place where local residents would be indulging in informal recreation of lawful sports and pastimes”<sup>32</sup>. The Inspector said that “Another way of putting this would be to say that there has not been continuous use throughout the relevant 20 year period”<sup>33</sup>. That was a relatively simple case, because “No-one says...that he enjoyed walking over stubble in the northern field after the crop had been taken”<sup>34</sup>. If there had been such evidence, then issues of “give and take” would arise in the light of *Lewis*. Lord Hope did not confine the potential for

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<sup>31</sup> *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 para 102.

<sup>32</sup> Report of Inspector, Alan Evans, 22 February 2009, to York City Council para 137.

<sup>33</sup> *Ibid.* para 157.

<sup>34</sup> *Ibid.* para 140.



registration to the hay-crop cases. What he said was that if “give and take” did not apply to village greens, “it would in practice to very difficult, if not impossible, to obtain registration where the owner is putting his and to some use other than, perhaps, growing and cutting grass for hay or silage”<sup>35</sup>. This implies that there can and will be cases where even arable land may be registrable. I suspect, however, that these will be few.

11. Lord Hope was clear that “the position may be that the two uses cannot sensibly co-exist at all”<sup>36</sup>. In my view the football and cricket cases fall into that category, and most of the arable use cases. Similarly land used for car-parking. It will be a question of fact and degree (and quality of use) in each case, depending on the evidence, but now muddied by the acceptance in *Lewis* of a significant (though still to be defined) role for “give and take” both before and after registration. My message to owners is one of “beware!”, and particularly so to farmers. More land will be registrable after *Lewis* than was the case before, and the Supreme Court Justices were altogether too optimistic as to whether disputes would arise post-registration (and how, if they did, they would be resolved). But there are steps a prudent owner can take to avoid his land becoming registrable, and it would be going too far to say that *Lewis* had revolutionized the position in relation to dual uses.

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<sup>35</sup> *Lewis* para 74.

<sup>36</sup> *Ibid.* para 76.