# LAWFUL USE OF TOWN AND VILLAGE GREEENS

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1. Events surrounding the registration and de-registration of Town & Village Greens "TVG" continues to move at a pace that property lawyers are unused to. It is not that the general law of real property moves at a glacial pace rather that this particular area has outpaced any other developments in the area.

2. Whether this is as a result of ill thought out governmental policy underlying the Countryside Rights of Way Act 2000 "CRoW" and in particular the piecemeal reform of the Commons Registration Act 1965 "CRA" by section 98 of the CRoW and its eventual demise by the implementation of the Commons Act 2006 "CA", or something else it is not easy to tell.

3. What is clear is that in England the CA 2006 has been put into force in a way that could not have been foreseen and that in its self is sustaining the vigour of the litigation.

4. In England the bulk of the CA 2006 was brought into force[1] but only in respect of certain pilot areas[2]. Insofar as all other areas the governing provisions of the CRA 1965 (insofar as the matters in this Seminar are concerned) continue to apply.[3]

5. The DEFRA website makes it clear that through lack of government time forced by a number of issues some related to the Act and other political matters it is unlikely that the CA 2006 will be implemented throughout England in the currency of this Parliament i.e. 2015.

6. In Wales, the position is that there is no area where the CA 2006 has been implemented in substance. As is the case in the seven pilot areas in England. Nor is there any timetabling by the Welsh Assembly Government as to when it can be expected to be brought into force.

7. What implementation of the CA 2006 has taken place has been by secondary legislation.[4]

8. The prospect of litigation is bound to continue at the current pace in the highest courts of England & Wales.

9. On the 26th July 2012 the Supreme Court gave permission to appeal in both:

   *i) Taylor v (1) Betterment Properties (Weymouth) Limited (2) Dorset County Council*[5]; and

   *ii) Adamson v (1) Paddico (267) Limited (2) Kirklees Borough Council & Others*[6].

10. The Court of Appeal of the same constitution on the same day gave judgement in both cases. Permission to appeal was given by the Supreme Court and it is understood that they will be heard as conjoined appeals.

11. Both of the appeals to the Court of Appeal were appeals under sections 13 & 14 of the Commons Registration Act 1965. Those sections provide as follows:

[1] The Commons Registration Act 2006 (Commencement No 4 and Savings (England) Order 2008 N0 1960
[2] Blackburn with Darwen Borough Council, Cornwall County Council, Devon County Council, County of Herefordshire District Council, Hertfordshire County Council, Kent County Council & Lancashire County Council
[3] The Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007 no 456
[4] The Commons Act 2006 (Commencement No 1 Transitional Provisions and Savings) (Wales) Order 2007 No 2386
[5] [2012] EWCA Civ 250
[6] [2012] EWCA Civ 262

***"13. Amendment of registers.***

***Regulations under this Act shall provide for the amendment of the registers maintained under this Act where:***

***(a) any land registered under this Act ceases to be common land or a town or village green; or***

***(b) any land becomes common land or a town or village green; or***

***(c) any rights registered under this Act are apportioned, extinguished or released, or are varied or transferred in such circumstances as may be prescribed;***

***14. Rectification of registers. The High Court may order a register maintained under this Act to be amended if:***

***(a) the registration under this Act of any land or rights of common has become final and the court is satisfied that any person was induced by fraud to withdraw an objection to the registration or to refrain from making such an objection; or***

***(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, in either case, the court deems it just to rectify the register."*** [Emphasis added.

12. No one should of course be surprised that the appeal was brought under sections 13 and specifically under section 14(b) of the CRA 1965.

13. The reason for this is the failure to implement the CA 2006 universally in England & Wales. Under the CA 2006 there is no mirror section 14 of the CRA 1965. The main provision under the CA 2006 to effect amendments to the Register is section 19 but this is very restricted.

14. Save as to the seven pilot areas in England, the Transitional Provisions contained in Commencement Order No1 for Wales and Commencement Order No 2 for England set out how TVGs are registered pending the substantive implementation of the main provisions of the CA 2006.

**Appeal to the High Court Under section 14 CRA 1965**

15. The transitional provisions are broadly similar:

    i) Where a commons registration authority grants an application for the registration of a TVG before section 1 of the CA 2006 is brought into force:

        a) It shall register the land as a TVG under the CRA 1965; and
        b) Until section 1 of the CA 2006 is brought into force, the CRA 1965 Act shall apply as though the registration had been made pursuant to section 13(b) of the 1965 Act.

16. There is no mirror section 13 in the CA 2006 Act. The overall effect is that the registration is effectively deemed to have been made under section 13 of the CRA 1965 with the consequence that there is a completely preserved right under section 14 to apply to the High Court to rectify the registration of the TVG without limit of time.

17. There were two substantive issues raised by these cases. Firstly the right to seek substantive relief to rectify the register in the High Court and in effect get a declaratory judgement that the original registration was made in error. Secondly based upon the erroneous original registration of the TVG to apply for and get rectification of the register. The second issue has been described by

the Court of Appeal as the "Justice" issue. This arises from the closing words of section 14 where the wordings asserts that it must be "just" to rectify the register indicating an element of discretion albeit discretion based on principle to provide consistent results.

18. Taking the Justice issue first as this is likely to be the most interesting point in the Supreme Court It is likely that this point will give rise to the most interesting debate. The outcome of the appeals is not academic however.

19. The real interest will be, whether as a result of the decision of the Supreme the number of claims for rectification of the register is to be limited.

20. Many owners of land who have been subject to an adverse registration of their land as a TVG, will not only have been deeply troubled by the registration but will have held on to their land.

21. There will also, no doubt, have been many speculative purchases of land registered as TVG's in the hope of more favourable conditions legislative or otherwise. No doubt there have also been simple transfers of land between companies or individuals without any speculative element. Lastly there will have been some transfers with overage provisions.

22. The decisions in *Betterment Properties & Paddico (267)* at the High Court and the Court of Appeal is likely to have stimulated a great deal of interest in all land owners with adverse registrations of their land, which to date they have not sought to challenge.

23. There must be a real possibility that many such landowners are simply awaiting the outcome of the decision in the Supreme Court. It is equally likely that many have already issued claims and had them stayed when the *Betterment Properties & Paddico (267)* High Court decisions came into the public domain. There is no way of knowing what is waiting in the wings.

24. However what is clear, notwithstanding the Courts continued disavowal of any TVG culture, is the fact that adverse registration of TVG's has had the effect of preventing many land owners from developing their land in accordance with: (a) any extant permissions attaching to the land at the date of registration; and (b) other case where land had been zoned for certain uses in the Local Development Plan.

***Betterment Properties***

The Facts in the *Betterment Properties & Paddico (267)* were as follows.

25. The registered land (46 Acres) forms the eastern portion of the total holding and is bordered on that side by a built-up area consisting of housing and a school. It is also bisected by two public footpaths; one of which (FP79) runs diagonally across the land from the end of a street of houses on the northern boundary of the registered land (Markham Avenue) to its south-western corner; the other of which (FP92) runs in from the western boundary of the land (Cockles Lane) until it joins FP79 roughly speaking in the middle of the registered land. Cockles Lane is also a public footpath (FP130) which forms the northwestern boundary of the registered land up to the point where it reaches a public highway.

26. The location of the registered land and the existence of public rights of way both over and adjacent to it are important features relevant to its registration. Although the eastern and northern boundaries with the areas of developed housing were largely fenced, members of the public remained entitled to cross the registered land via the public footpaths. But they had no legal entitlement before 2001 to walk or exercise their dogs on the remainder of the land or to seek to enter the land at any points other than the footpath entrances.

27. The successful application to register the TVG was made on the 17th March 1997. On the 5th June 2001 the register was amended to record the registration of the TVG. Judicial review proceedings were issued in time in August 2001 but discontinued. In January 2004 *Betterment Properties* acquired the freehold reversion. In December 2005 they commenced proceedings by part 8 seeking relief under section 14(b) of the CRA 1965.

28. *Betterment Properties* conceded that over the time span of 20 years from the date of the application the land had been used for lawful sports and pastimes, but:

    (i) that there was no evidence that the users of the registered land came from a locality sufficient to satisfy the definition in s.22(1);

    (ii) that there had not been at least twenty years' user as of right because:

        (a) before 1980 and after 1994 in relation to the registered land as a whole; and
        (b) between 1979 and 1982 in relation to what was described as the Works Site; that use was contested by the landowners; and

    (iii) in relation to the Works Site there was uncontested evidence that the site had been fenced and not used for lawful sports and pastimes during the period of the works.

29. The judge Morgan J held that user had been contentious at least until 1984. Since the application was made in March 1997, 20 years of user had to be proved to that date i.e. from March 1977 and on the facts and law the qualifying period was not fulfilled.

***Paddico (267)***

The Facts

30. The application to register Clayton Fields (a 6.5 Acre site) as a Class C town or village green under section 13 of the 1965 Act was made on 9th December 1996.

31. The applicants for registration had relied upon user by the inhabitants of Edgerton and Birkby. At the hearing, Counsel representing the principal landowner, Geo. H. Haigh & Co Ltd. ("Haigh"), submitted that the application should be rejected because those using the land for lawful sports and pastimes had to come from a single locality which was an administrative area recognised by law, and Edgerton and Birkby were not such a locality.

32. On the 14th April 1997 Clayton Fields was added to the Register as a TVG the objection being overridden.

33. In May 1997 Haigh commenced proceedings under section 14 for the rectification of the register. In April 2000 those proceedings were automatically stayed for want of prosecution under CPR 51 PD 19(1).

34. In October 2004 Haigh transferred those parts (the majority) of Clayton Fields, which it owned to Paddico (267) Ltd. ("Paddico"), the First Respondent. Paddico was registered as freehold owner on 15th March 2005, and applied on 19th December 2008 to lift the stay. A Deputy Master refused its application, and Sales J refused an application for permission to appeal against the Deputy Master's decision on 24th March 2010. On 28th January 2010 Paddico issued a new claim to rectify the register under section 14. This was the claim considered by Vos J. On 21st June 2010 notice of discontinuance was filed in respect of the 1997 claim.

35. Before the Judge Vos J, *Paddico* persuaded the court that the registration had been wrongly made on an issue of law as to "Locality". That point is beyond the scope of this seminar. The only remaining issue before Vos J was whether given the delay which was well over 12 years, was just to rectify the register. On that he held it was just and he rectified the register.

**Decision of the Court of Appeal on the Justice issue in both Appeals**

36. In *Paddico* both Sullivan & Carnworth LJs dismissed the appeal on the issue of Locality but allowed it on the Justice issue both being of the view that the delay was too long. Patten LJ allowed the appeal on both fronts. It may be of significance that Sullivan & Carnworth LJs were both planning and administrative lawyers at the Bar whereas Patten LJ was a specialist chancery

lawyer and is a former judge of the Chancery Division the same division from which both first instance decisions emanate.

37. In *Betterment Properties,* the appeal was dismissed. Sullivan and Carnworth LJ preferred to adopt their narrower stance on the Justice issue. These were principally grounds of good administration of justice and the sanctity of the public Register.

38. However Patten LJ as he did in *Paddico,* took a much broader view. This was based on the fact, that where the court has found that adverse rights should never have burdened the land at anytime, then in principle the starting point is those rights should be removed and the land vindicated.

39. Another way to categorise the two opposing views is the ascendancy or otherwise of private law rights over public law rights.

40. One could easily look at the narrower or the broader view as a starting point for analysis. There is no doubt that as a starting point the narrower view is not one that could be objected to by Patten LJ in principal so long as it was not entirely utilised to fashion the relief.

41. In the *Paddico* case on the facts, beyond the passage of time there was no demonstrable prejudice that could be relied upon. If anything the prejudice argument could be said to run the other way. That is to say that the locality in whose favour registration was made had enjoyed rights over land to which they had no entitlement and the landowner had no right of recompense.

42. Arguably where the legal right to rectification is secured and there is no demonstrable prejudice it is difficult to argue that Patten LJ was wrong. It will be will his views, which will receive greater scrutiny in the Supreme Court.

**The Broad/Patten LJ's view**

43. First and the inevitable starting point is strength of the landowner having established that no public rights exist over his land, to then have his land freed from those rights.

44. Second, for a landowner to be deprived of the unrestricted right on how he can use his land by a process which has no lawful origin requires substantial justification if it can ever be justified especially when the landowner's rights under Article 1 of the First Protocol to the Human Rights Conventions are engaged by virtue of the degree of control the registration imposes on the land.

45. Third, the fact that *Betterment Properties* is a subsequent purchaser and the evidence is that it paid a price to reflect the impediment of registration but with an element of future hope value is a relevant factor not a significant one. It cannot be ignored that the price paid cannot lessen the right of Betterment to exercise full legal ownership of land simply because it paid the price reflecting the registration of the TVG. The continuance of the registration still amounts to an unjustified interference with the landowner's legal rights.

46. Fourth, as for delay, it is always a relevant factor but should not be determinative of the Justice issue unless some form of relevant prejudice accompanies it. Where the delay is measured in decades it might be possible to infer prejudice but this was the case there.

47. Fifth the sanctity of the register is an important matter in terms of furthering good administration. The register is a public document, which is likely to inform other decisions about planning, development and the purchase of land requires that it should be relied upon for what its states from moment to moment. However decisions made in reliance on the register are almost inevitably decisions in the public law dimension if they are not timeously challenged the Court will invariably refuse any relief by virtue of section 31(6) of the Senior Courts Act 1981 on the basis of undue delay in seeking relief by judicial review.

48. Lastly delay overall in the private law and public law dimension is still a relevant factor. The broader test of justice as required by Section 14 of the CRA 1965 means that the consequences of rectification still need to be balanced in favour the landowner obtaining vindication of his legal

rights. It is important to remember that unlike a challenge to an administrative decision such as a planning decision, the Section 14 application is not a challenge to administrative decision. The whole purpose is for the landowner to be able to re-assert his legal rights over his land free from the adverse registration. It is for this reason that there is no time limit in which that relief can be sought. Therefore mere delay cannot bar relief under Section 14 unless it can be shown in addition that other public and private law decisions are likely to have been taken on the basis of the register as it existed prior to the Section 14 application.

49. It is not always easy to second guess what view the Supreme Court will take but as things stand and in the absence of real prejudice, it is thought that a section 14 Claimant who can show that the adverse registration of the TVG was wrong will ordinarily get rectification as well.

**Decision on Contentious User in the Court of Appeal**

50. The landowners' case at the inquiry was that fences had been maintained on the boundaries with housing and that signs had been erected so as to make it clear to the public that they should not trespass on to the registered land from the footpaths.

51. The evidence from local inhabitants was that they had regularly used the land for games and recreation and did not confine themselves to the footpaths. In doing so they had (they said) never been challenged nor did they recall seeing any signs saying that the fields were private property, which they should not enter.

52. By contrast, the landowners' witnesses gave evidence that signs were put up at strategic points on the perimeter of the land and at the edge of the footpaths. That was sufficient notice to them to the effect that straying from the footpath over which there were public rights, on to private land over which they had no rights and were necessarily trespassers and that such user was contentious.

53. It was not really in dispute that these farmers faced serious (and increasing) difficulties in their use of the land due to the activities of local residents who cut wire fences marking the boundary between the registered land and their houses in order to access the registered land without having to walk to the nearest footpath entrance.

54. These acts of vandalism and trespass (exacerbated by dogs being allowed to worry cattle) eventually made it impossible for the land to be used for grazing and after attempts to maintain the fences intact largely the farmer gave up.

55. But the unlawful activities of those residents using criminal means to effect entry on to the private land was not relied upon for the purposes of the inquiry and the application to the High Court for rectification.

56. The residents who gave evidence to support the s.13 application were all local inhabitants who gained access to the registered land via one or other of the footpaths but whose activities did not include breaching fences or pulling down signs.

57. The issue for the inquiry and for Morgan J was whether the Curtis family (the previous landowners had taken sufficient steps so as to effectively assert that all or any use by local inhabitants of the registered land beyond the footpaths was not acquiesced in. At the inquiry this turned on the presence or visibility of the signs.

58. The appeal proceeded on some common view as to what the law was:

> *"36. It is common ground on this appeal that, following the decision of the House of Lords in Sunningwell, registration of a town or village green on the basis of twenty or more years' user as of right depends upon showing that such user was nec vi, nec clam, nec precario. This test is traceable back to the common law and to the Prescription Act 1832. It has subsequently been applied in Regina (Beresford) v Sunderland City Council [2004] 1 AC 889 and, most recently, by the Supreme Court in Regina (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] 2 AC 70.*

*37. Perhaps the most informative explanation of the content of this principle is that contained in the judgment of Lord Rodger of Earlsferry in Redcar (No 2):*

> *"87. The basic meaning of that phrase is not in doubt. In R vOxfordshire 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 wordsneed 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.*
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> *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.*
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> *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:*
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> *"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 neighbor 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. Similarly, in Dalton v Henry Angus & Co (1881) 6 App Cas 740, 786, Bowen J equated user nec vi with peaceable user and commented that a neighbor,*
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> *"without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakeable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised: Eaton v Swansea Waterworks Co (1851) 17 QB 267." The contrary view, that the only manner in which enjoyment of window lights could be defeated before the Prescription Act was by physical obstruction of the light,*
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> *"was not the doctrine of the civil law, nor the interpretation which it placed upon the term 'non vi' …"*
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> *90. In short, as Gale on Easements, 18th ed (2008), para 4-84,suggests, user is only peaceable (nec vi) if it is neither violent nor contentious.*
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> *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 threevitiating 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 noncontentious.This is at least part of the reason why, as Lord Jauncey of Tullichettle 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"."*

*38. If the landowner displays his opposition to the use of his land by erecting a suitably worded sign which is visible to and is actually seen by the local inhabitants then their subsequent use of the land will not be peaceable. It is not necessary for Betterment to show that they used force or committed acts of damage to gain entry to the land. In the face of the signs it will be obvious that their acts of trespass are not acquiesced in. <u>But in some cases (and this is one of them) the landowner's attempts to assert his opposition to the unauthorised use of his land may face the practical difficulty that a minority of users will not only defy his assertion of ownership but will also take active steps to remove or vandalise the signs which are put up. In these circumstances the failure of lawful users to see the signs may be attributable to their unlawful removal. But the appellant contends that in the absence of the signs, the use of the registered land by the majority of lawful users was peaceable."</u>*

59. If the last point had any legal currency it would not only have been an affront to common sense and would have created a very serious asymmetry between how an absentee landlord of property is treated for the purposes of lawful use being made of his land and that of the trespasser whether he be the person who cut the fences or pulled down the signs or the secondary user. In the end the Court of Appeal did not see this as a serious impediment and they found:

*"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."*

60. This is now all poised before the Supreme Court and we will have to await the outcome of their deliberations. Looking at the matter in the around I would expect the Court of Appeal to uphold Morgan J on the issue of contentious user and Vos J (together with Patten LJ) on the issue of justice.

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**September 2012**