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Case No: C1/2015/1380

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2016

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE TOMLINSON
and
LORD JUSTICE LEWISON

- -

1. MARTIN LITTLEJOHNS
2. SARAH LITTLEJOHNS

Appellants

-and-

DEVON COUNTY COUNCIL

Respondent

-and-

DUCHY OF CORNWALL

Interested Party

- -
- -

Mr Nicholas Le Poidevin QC (instructed by **SW Law Solicitors**) for the **Appellants**
Mr Stephen Whale (instructed by **Devon County Council**) for the **Respondent**

Hearing dates : 17th February 2016

- -

Approved Judgment

The Chancellor of the High Court :

1. This is an appeal by Martin and Sarah Littlejohns ("the Littlejohns") from the order dated 24 March 2015 of Mrs Justice Lang dismissing their claim for judicial review of the decision of the respondent, Devon County Council ("DCC"), on 28 May 2014 refusing their application to register rights of common under the Commons Act 2006 ("the 2006 Act").

2. At the heart of the appeal lies the question of law whether it is possible to acquire a right of common by virtue of an express grant or (as in the present case) user after 2 January 1970 over land registered under the Commons Registration Act 1965 ("the 1965 Act") on or before 31 July 1970. That point of law is potentially of importance to many more people, particularly farmers, than the parties to the present case. It is a point of law on which commentators, among whom is the Department for Environment, Food and Rural Affairs ("DEFRA"), have been in disagreement.

The factual background

3. I gratefully take much of the following summary of the background facts from the judgment of Lang J.

4. DCC is the commons registration authority which maintained the register of common land for its area under the 1965 Act until its repeal by the 2006 Act and now maintains the register under the 2006 Act.

5. DCC registered the land in register units CL 155 (Okehampton Common), CL164 (Forest of Dartmoor) and CL 135 (the Triangle) as common land in 1967 and 1968 pursuant to the 1965 Act.

6. By an application dated 2 March 2010 pursuant to schedule 3 to the 2006 Act the Littlejohns, who are husband and wife, applied to DCC to amend the register of common land by the registration of the right to graze cattle and sheep on those register units The right claimed is for 224 "livestock units" (a livestock unit being one cow or horse or five sheep). The application stated that the right to graze those animals was attached to Minehouse Farm and Estrayer Park which were owned by the Littlejohns. The application also stated that the Littlejohns and their family had exercised cattle and sheep grazing on those commons from 1 January 1970 to 13 April 2001 continuously and referred to statutory declarations which accompanied the application. There were five statutory declarations sent with the application, two of which were made by Mr and Mrs Littlejohns respectively. They rely on the following matters.

7. They claim that they and Mr Littejohns' father grazed sheep and cattle on common land adjacent to the farms for decades until April 2001. Following the introduction of commons registration by the 1965 Act, on 27 May 1968 the National Farmers' Union sent to DCC, on behalf of Mr Littejohns' father, a formal notice of intention to register, as attached to the two farms, rights of common of pasture, piscary, turbary and estovers over Okehampton Common and Dartmoor Forest. DCC acknowledged receipt of the notice. Under the relevant regulations this was required to be followed by a formal application. DCC's records indicate, however, that no formal application was made and so the rights were never registered. Mr Littlejohns stated in his

statutory declaration that his father always assumed that the rights of common had been registered. It was only in 1984 that the Littlejohns were made aware by the chairman of the Okehampton Commoners' Association that the rights had never been registered.

8. Despite the non-registration of the rights of common, Mr Littlejohns' father and then the Littlejohns themselves continued to use the common land in the relevant register units for grazing until the outbreak of foot and mouth disease in 2001, when they were obliged to slaughter their herds. Since April 2001 the common land has been subject to directions under the Stewardship/Wildlife Enhancement Scheme, an agri-environment scheme, under which payments are made to graziers to reduce or forgo grazing. As commoners, the Littlejohns could elect either to graze their herds (subject to restrictions on areas designated as Sites of Special Scientific Interest) or to receive payments.

9. On 28 May 2014 DCC refused the Littlejohns' application. The reason was that, although they had provided evidence that rights of common had been exercised by the owners of the farms over CL 135, CL 155 and CL 164 for more than thirty years, DCC had been advised by leading counsel that a right of common could not be created by prescription after 2 January 1970 over land that had been registered as common land under the 1965 Act.

Rights of Common

10. The pre 1965 Act history and law relating to common land and rights of common were set out extensively in the report of the Royal Commission on Common Land 1955-1958 ("the Royal Commission"), Cmnd 462, which was presented to Parliament in July 1958. A shorter but sufficient account can be found in the speech of Lord Templeman in *Hampshire County Council v Milburn* [1991] 1 AC 325 at pages 338-341.

11. The recommendations of the Royal Commission so far as concerns common land (as distinct from town and village greens) fell into three parts: the need to identify common land and those claiming rights over it; public access to common land; and the management of common land.

The 1965 Act

12. I shall only refer to those provisions of the 1965 Act which concern common land and rights of common as distinct from town or village greens.

13. Section 1(1) provided that there shall be registered, in accordance with the provisions of the 1965 Act, land in England or Wales which is common land, rights of common over such land, and persons claiming to be or found to be the owners of such land.

14. Section 1(2) is critical to the present case and this appeal. It provided as follows:

> *"*After the end of such period, not being less than three years from the commencement of this Act, as the Minister may by order determine -

> (a) no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered; and
>
> (b) no rights of common shall be exercisable over any such land unless they are registered either under this Act or under the Land Registration Acts 1925 and 1936.*"*

15. Section 3 provided that, for the purpose of registering common land, rights of common over it, and ownership of it, every registration authority shall maintain a register of common land.

16. Section 4 provided for the registration of any land as common land, any rights of common over it and ownership of it. Sub-section (5) provided that the registration under section 4 shall be provisional until it has become final under the following provisions of the Act. Sub-section (6) provided that an application under section 4 shall not be entertained if made after such date, not less than three years from the commencement of the 1965 Act, as the Minister may by order specify.

17. Section 5 dealt with objections to registration under section 4. Sub-section (2) provided that the period during which objections to registration under section 4 may be made shall be such period, ending not less than two years after the date of the registration, as may be prescribed. Sub-section (6) provided for objections which were not withdrawn to be referred to a Commons Commissioner.

18. Section 6 contained provisions for the disposal of disputed claims by Commons Commissioners and that, if the Commons Commissioner confirmed the claim, it shall become final.

19. Section 7 provided that, if no objection is made to a registration under section 4, or if objections are withdrawn, the registration shall become final.

20. Section 10 provided that the effect of registration was as follows:

> "The registration under this Act of any land as common land or as a town or village green, or of any rights of common over any such land, shall be conclusive evidence of the matters registered, as at the date of registration, except where the registration is provisional only"

21. Section 11 provided that the provisions of the 1965 Act shall not apply to the New Forest or Epping Forest and shall not be taken to apply to the Forest of Dean.

22. Section 13 made provision for amendments of the register, so far as relevant to common land:

> "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; …"

23. Section 15 provided for the quantification of grazing rights, as follows:

> "(1) Where a right of common consists of or includes a right, not limited by number, to graze animals or animals of any class, it shall for the purposes of registration under this Act be treated as exercisable in relation to no more animals, or animals of that class, than a definite number.
>
> (2 Any application for the registration of such a right shall state the number of animals to be entered in the register or, as the case may be, the numbers of animals of different classes to be so entered.
>
> (3) When the registration of such a right has become final the right shall accordingly be exercisable in relation to animals not exceeding the number or numbers registered or such other number or numbers as Parliament may hereafter determine."

24. Section 22(1) defined "common land" as follows:

> (1) In this Act, unless the context otherwise requires, "common land" means—
>
> (a) land subject to rights of common (as defined in this Act) whether those rights are exercisable at all times or only during limited periods;
>
> (b) waste land of a manor not subject to rights of common;
>
> but does not include a town or village green or any land which forms part of a highway;"

25. Regulations under the 1965 Act provided for two periods for applications for registration of common land and rights of common over it, the last of which ended on 2 January 1970: The Commons Registration (Time Limits) Order 1966 SI 1966 No. 1470 ("The 1966 Time Limits Order") and The Common Registration (General) Regulations 1966 (SI 1966 No.1471) reg 5.

26. Regulations under the 1965 Act originally provided for the period for objections to registration under section 4 to be until 30 April 1972 but that date was subsequently extended to 31 July 1972: The Commons Registration (Objection and Maps) Regulations 1968 SI 1968 No 1989 reg. 4, The Commons Registration (Objection and Maps) (Amendment) Regulations 1970 SI 1970 No. 384 reg 2.

27. Regulations under the 1965 Act originally specified that the cut-off date in section 1(2) was 31 March 1970 but that was subsequently extended to 31 July 1970: The 1966 Time Limits Order, and The Commons Registration (Time Limits) (Amendment) Order 1970 SI 1970 No 383.

28. The Commons Registration (New Land) Regulations 1969 SI 1969 No 1843 ("the 1969 New Land Regulations"), which came into operation on 3 January 1970 and were made pursuant to section 13(a) and (b) of the 1965 Act provided as follows, so far as relevant to this appeal:

> "3.— Land becoming common land or a town or village green
>
> (1) Where, after 2nd January 1970, any land becomes common land or a town or village green, application may be made subject to and in accordance with the provisions of these Regulations for the inclusion of that land in the appropriate register and for the registration of rights of common thereover and of persons claiming to be owners thereof.
>
> (2) Where any land is for the time being registered under the Act, no application shall be entertained for its registration under these Regulations, and, where any land is for the time being registered under section 4 of the Act (whether or not the registration has become final) no application shall be entertained for the registration of rights of common over it."

The 2006 Act

29. The 1965 Act was considered to have a number of important defects and it did not address the management of commons. It was repealed and replaced by the 2006 Act. The 2006 Act provided for each commons registration authority to continue to keep a register of common land for the purpose of registering land as common land and registering rights of common exercisable over registered common land. It provided that the register would record the land and rights of common registered at the commencement of section 2 and such other rights as may be registered in it under Part I of the 2006 Act.

30. Section 6 contains the following provisions as to the creation of rights of common:

> "6 Creation
>
> (1) A right of common cannot at any time after the commencement of this section be created over land to which this Part applies by virtue of prescription.
>
> (2) A right of common cannot at any time after the commencement of this section be created in any other way over land to which this Part applies except–
>
> (a) as specified in subsection (3); or
>
> (b) pursuant to any other enactment.

> (3) A right of common may be created over land to which this Part applies by way of express grant if–
>
> (a) the land is not registered as a town or village green; and
>
> (b) the right is attached to land.
>
> (4) The creation of a right of common in accordance with subsection (3) only has effect if it complies with such requirements as to form and content as regulations may provide.
>
> (5) The creation of a right of common in accordance with subsection (3) does not operate at law until on an application under this section–
>
> (a) the right is registered in a register of common land; and
>
> (b) if the right is created over land not registered as common land, the land is registered in a register of common land.
>
> (6) An application under this section to register the creation of a right of common consisting of a right to graze any animal is to be refused if in the opinion of the commons registration authority the land over which it is created would be unable to sustain the exercise of–
>
> (a) that right; and
>
> (b) if the land is already registered as common land, any other rights of common registered as exercisable over the land."

31. Section 7 contains provisions for the variation of registered rights of common which comply with such requirements as to form and content as regulations may provide.

32. Section 23 provides that schedule 3, containing transitional provisions, shall have effect. Schedule 3 provides for a transitional period during which commons registration authorities can amend their registers of common land in consequence of "qualifying events" which were not registered under the 1965 Act. Paragraph 2(2)(a) specifies as one of the qualifying events:

> "the creation of a right of common (by any means, including prescription), where occurring in relation to land to which this Part applies at any time–
>
> (i) after 2 January 1970; and
>
> (ii) before the commencement of this paragraph;"

33. Paragraph 3 of schedule 3 provides that, at the end of the transitional period, any right of common which (a) is not registered in a register of common land but (b) was capable of being so registered under paragraph 2, is extinguished.

34. Paragraph 6 of schedule 3 provides as follows:

> "The repeal by this Act of section 1(2)(b) of the 1965 Act does not affect the extinguishment of rights of common occurring by virtue of that provision."

The claim for judicial review

35. By a claim form dated 28 July 2014 the Littlejohns commenced proceedings for judicial review of DCC's refusal of their application. They claimed an order quashing DCC's decision, a mandatory order requiring DCC to reconsider that decision, and a declaration that a right of common may be registered under para. 2(2)(a) of schedule 3 to the 2006 Act notwithstanding that it came into existence over land previously registered as common land under the 1965 Act.

36. The Duchy of Cornwall was identified in the claim form as an interested party. It is registered as the owner of all or the majority of the common land in the relevant register units. It has not participated in the proceedings in any way.

37. The claim for judicial review was heard by Lang J on 10 and 11 March 2015. She handed down a written judgment on 24 March 2015 dismissing the claim.

38. The reasoning in her clear and careful judgment was as follows. She noted (at para. [5]) that, for the purpose of the claim, DCC was content to assume that the facts were as stated by the Littlejohns but that, if the point of law was resolved in their favour, there would be outstanding factual issues to be determined.

39. Having referred to *Central Electricity Generating Board v Clwyd County Council* [1976] 1 WLR 151, *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674, at [18] and the Royal Commission report, she said (at para. [21]) that it was common ground before her that the rights of common acquired by Mr Littlejohns' father prior to 31 July 1970 were extinguished at that date. She said that the issue between the parties was whether or not rights of common were acquired by prescription by the continued use of the common land for grazing, without objection from the owner of the land, from 1970 onwards.

40. She said (at para. [26]) that the 1966 General Regulations did not assist the Littlejohns because they only authorised DCC to correct clerical errors or omissions in the register but not so as to increase the rights of common over any land.

41. She said (in para. [29]) that it is clear that regulation 3(2) of the New Land Regulations excluded any applications to register rights of common acquired after 2 January 1970 if the land was already registered under the 1965 Act prior to 2 January 1970, and that was confirmed by the prescribed forms in the schedule to the Regulations and the accompanying notes.

42. Lang J said (in para. [36]) that the legislative intention of the 1965 Act was that all common land and rights of common should be registered and that registration would be conclusive evidence of the matters registered, under section 10. In her view, the wording of section 1(2)(b) – "no rights of common shall be exercisable over any such land unless under they are registered" – was so widely expressed that it could not be

read as limited to rights which were in existence prior to 31 July 1970. She observed that the parallel existence of rights which were unregistered would be contrary to the purpose of the 1965 Act.

43. She said (in para. [37]) that the fact that section 13 only made provision for new rights of common in respect of new common land, not existing common land, could not be attributed to an oversight, particularly in the light of the express exclusion in the 1969 New Land Regulations made by the Minister with responsibility for promoting the 1965 Act in Parliament. In her view, the exclusion of new rights of common over existing common land was consistent with the aim of producing a conclusive register of common land, and the rights of common which existed over that land, as at 31 July 1970.

44. She observed (in para. [38]) that the 1965 Act also intended that any new rights of common would have to be registered since, by virtue of section 1(2)(b), a right of common which was not registered could not be exercised.

45. She said (in para. [39]) that a further argument against the Littlejohns' interpretation of the 1965 Act was that, under the statutory scheme, rights only came into existence once registered, and in that connection she quoted from the speech of Lord Hoffmann in the *Oxfordshire County Council* case at [43].

46. Her conclusions on the position under the 1965 Act were stated in paragraphs [42] and [43] of her judgment as follows:

> "42. In conclusion, in my judgment, it would have been inconsistent with the legislative purpose of the CRA 1965 to allow unregistered rights of common to co-exist alongside registered rights of common. Either the unregistered rights never had legal effect or their legal effect at common law was automatically extinguished by operation of section 1(2)(b).
>
> 43. On this analysis, A1P1 to the ECHR was either never engaged, because no propriety rights ever came into existence, or the rights came into existence in the early 1990's and were then extinguished, which was before the Human Rights Act 1998 came into force. The limitation periods for any challenge to the operation of the CRA 1965 have long since expired."

47. Lang J then turned to the 2006 Act. Having referred to the Explanatory Notes to the 2006 Act and the provisions in schedule 3, she concluded (in para. [49]) that the purpose of schedule 3 was to provide a brief window within which the commons register could be updated and corrected by incorporating any registrations which could have been, but were not, made under the 1965 Act; and that thereafter any unregistered rights would be extinguished under paragraph 3, repeating the legislative approach adopted by section 1(2)(b) of the 1965 Act.

48. She reasoned and concluded as follows:

> "50. Although Parliament could have legislated so as to revive rights of common which were not capable of being registered

> under the CRA 1965, after 31 July 1970, there is nothing in the Act to suggest that it did so. The Minister and Parliament were aware of the possibility that no new rights of common could have arisen over existing common land under the CRA 1965 (see Hansard, HL, vol 674, col GC 284) but made no express provision for registration of this category of rights. Paragraph 2(2)(a) requires proof of "the creation of a right of common" between 1970 and 2008 which does not assist those in the position of the Claimants as they cannot establish that they had acquired rights of common over this period. It is significant that paragraph 6 of Schedule 3 expressly confirms the extinguishment of rights under section 1(2)(b) CRA 1965, signalling that it was not intended to revive such rights. I am not persuaded by the terms of the Act or the extracts from Hansard which I have been shown that Parliament intended to allow registrations of new rights of common over registered common land, which were not permitted under the CRA 1965.
>
> 51. Indeed, it appears from Hansard (*supra*) and section 6(6) CA 2006 that the way forward adopted by Parliament was to make express provision for applications to register new grazing rights of common over existing common land, but subject to the control of the commons registration authority which could refuse to register the rights if the land could not sustain any further grazing. By sections 6(1) and (2), a right of common can no longer be created by prescription; only by express grant or enactment. Unless the Duchy of Cornwall now grants grazing rights to the Claimants, they cannot acquire them.
>
> Whilst the CA 2006 should be interpreted so as to give effect to A1P1, so far as possible, I consider that the transitional provisions in Schedule 3 to the Act, enabling corrections to the register, did give sufficient protection to existing rights of common so as to avoid any breach of A1P1 to the ECHR. The reason the Claimants' application failed was that they could not establish that they had acquired rights of common when they applied to register them in March 2010.

The appeal

49. Lang J gave permission to appeal because the points in issue are of importance to farmers; they have been the subject of divergent expressions of opinion among textbook authors and DEFRA; and they are difficult to resolve.

50. There are five ground of appeal. The first ground is that the Judge should have held that section 1(2)(b) of the 1965 Act was limited to rights which were in existence before 31 July 1970. The second ground is that the Judge should have held that the absence of any facility to register rights coming into existence after 31 July 1970 over land previously registered under the 1965 Act did not evidence any legislative purpose that unregistered rights could not exist. The third ground is that the Judge should have held that the 1965 Act neither prevented new rights of common over land

registered under the 1965 Act coming into existence nor extinguished them. The fourth ground is that the Judge should not have held that paragraph 2(2)(a) of schedule 3 to the 2006 Act was confined to registrations which could have been but had not been made under the 1965 Act and should have held that the Littlejohns could invoke it. The fifth ground is that the Judge should have held that the 1965 Act did not prevent rights from coming into existence in favour of the Littlejohns and hence Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1") applied to them.

Discussion

Overview

51. The crucial statutory provision at the heart of the present dispute is section 1(2)(b) of the 1965 Act. It is important to place that provision in its historical and legal context.

52. The 1965 Act was enacted following the report of the Royal Commission, which was published in July 1958. The 1965 Act differed from the recommendations of the Royal Commission in many respects, and, so far as concerns the present proceedings, in one critical respect.

53. As I have said, the concerns and recommendations of the Royal Commission as regards common land (as distinct from town and village greens) centred on three matters: (1) the need to identify common land and those claiming rights over it; (2) the management of common land; and (3) public access to common land.

54. So far as concerns the first of those matters, the Royal Commission recommended that within one year of a day to be appointed by legislation each county or county borough council in England and Wales should open registers of claims that land was common land and of claims to rights of common exercisable over it as at the date of the passing of the legislation; and such registers should be kept open for 12 years, the first eight being for the registration of such claims and the last four years for recording objections to those claims.

55. The Royal Commission envisaged that, at the end of the 12 year period, the registers would be conclusive of all the land and rights registered: para. 291. It did not say anything about the creation or registration of new rights of common after that period. The assumption must be that it did not contemplate the proposed legislation permitting, after the end of the 12 year period, the creation of new common land by the creation of new rights of common (whether by express grant or by prescription).

56. On the other hand, the Royal Commission did expressly contemplate that registered rights of common could be varied, not only by apportionment, extinction, release or transfer but also by enlarging the registered right and so increasing the burden on the land where the common could support it, such as by increasing the number of animals which the rights owner could graze on the common: see para. 352.

57. The reason for that is clear. The Royal Commission was not only concerned about overgrazing. It was equally troubled by an historic trend in some places of underuse of common land since that could be shown in some cases to be a direct cause of its deterioration, allowing it to become overgrown. The Commission's overriding

concern was to maximise the use of common land by those who were interested in it and could benefit from it. It recommended that this would be achieved by local schemes of management, run by a committee of management, which would include commoners: para. 322 and following. In paragraph 176, for example, the Commission said:

> "The need is … to give the commoners who wish to assert their rights and to maintain and improve the land, the opportunity to associate together and adopt such arrangements for effective management as they believe to be in their own best interests having regard to the local conditions and the nature of the land. In short, we assume that, given the right circumstances, commoners who have pasture rights will generally endeavour by the better stocking of their common to attain the same level of economic production that has been achieved by the rest of the agricultural industry …"

58. As the Royal Commission had envisaged, Parliament addressed first the identification of common land. That was the purpose of the 1965 Act, as reflected in its long title. The 1965 Act was not intended to address either management or public access. That is apparent from its express terms, not least the provisions of section 15(3). Access was subsequently addressed in Part I of the Countryside and Rights of Way Act 2000 ("the 2000 Act"), which provided for a public right of access on foot to all registered common land, which was fully implemented across England and Wales by October 2005. The agricultural use and management of common land was addressed in the 2006 Act.

59. Identification and registration of common land necessarily involved identification and registration of rights of common since, as defined in section 22(1) of the 1965 Act, common land must be either land subject to rights of common or waste land of a manor.

60. The 1965 Act differed from the recommendations of the Royal Commission on registration in important respects. Instead of 12 years for the registration of claims that land was common land and of rights of common over it and for the making of objections to registration, the period for registration of such claims ended on 2 January 1970, a period of under 5 years. The period for objections under the 1965 Act scheme ended, initially, on 30 April 1972, subsequently extended to 31 July 1972, a period of some 2 years as compared with the 4 years envisaged by the Royal Commission.

61. Unlike the Royal Commission, which had envisaged that the date for identification of common land and rights of common over it would be the date on which the legislation was passed, under the 1965 Act common land and rights of common were those which existed at the date of, and were identified in, the applications for registration.

62. Like the Royal Commission, the 1965 Act made provision for the extinction of rights of common which could and should have been the subject of an application before the cut-off date of 2 January 1970 (by section 1(2)). Critically, however, the 1965 Act provided (as had the Royal Commission) for the future variation of registered rights of common otherwise than because of apportionment, extinction, release or transfer

(by section 13(c)) but also (unlike the Royal Commission) for the creation of new common land after the initial registration period ending on 2 January 1970. That necessarily extended to the creation of new rights of common because of the definition of common land in section 22(1) of the 1965 Act and the fact that no new manors could be created so that there could not be any new waste land of a manor.

63. The 1965 Act was subject to considerable criticism, much of which concerned the lack of provision and certainty around future common land and future rights of common. Section 13 did not, for example, say anything at all about the creation or registration of future rights of common even over new common land despite the express recognition that there could be new common land and the fact that there could not be any new common land unless new rights of common were created. Further, the 1965 Act did not make the registration of new common land and new rights of common over it compulsory, let alone impose any time limit on such registration, and it did not preclude the possibility of successive grants of rights of common over such land without any time limit. Nor was there any statutory compulsion as to the registration of changes to registered rights of common, whether arising from apportionment, extinction, release, variation or transfer.

64. Unlike the scheme envisaged by the Royal Commission, therefore, the register of common land under the 1965 Act was never going to be comprehensive or conclusive as at any date. That is underscored by the fact that there was no fixed point of time as to when the common land or the claimed right of common came into existence, even for the initial period of registration, save the date of each registration under section 4 which became final because there was no objection to it or any objection was withdrawn or the objection was held to be invalid following determination by a Commons Commissioner or on appeal from the Commons Commissioner. That is the extent of section 10 of the 1965 Act.

65. On the motion on 20 July 2005 for the second reading of the Bill that became the 2006 Act Lord Bach, the Parliamentary Under-Secretary of State for DEFRA, described the 1965 Act as "well meant but somewhat flawed and designed only as a short-term measure to identify and register common land and town or village greens".

66. This is the context for DCC's assertion that Parliament intended that the 1965 Act would abolish the ability of the owner of common land to grant and another land owner to acquire, even expressly, a right of common over land which was registered pursuant to an application made on or before 2 January 1970 – even if it was waste land of a manor not then subject to any rights of common or there were registered rights of common but the land could efficiently sustain greater agricultural use.

67. The context does not stop there since, as I have said, the 2006 Act was the statutory vehicle by which Parliament tackled the issues of commons management which had been raised in the report of the Royal Commission. The 2006 Act addressed the issue of future rights of common over previously registered common land in a way that was entirely consistent with the approach of the Royal Commission as to efficient agricultural management and entirely inconsistent with a policy of blanket prohibition on the creation of new rights of common over previously registered common land.

68. The reasons for the enactment of the 2006 Act are to be found in the speech of Lord Bach, to which I have referred, and in the Explanatory Notes to the 2006 Act. They

included putting right various deficiencies in the 1965 Act regarding the proper registration of common land and rights of common (described in paragraph 17 of the Notes) and, importantly so far as the present case is concerned, giving effect to the desire of the Royal Commission for better management of commons. Lord Bach described the third of the recommendations of the Royal Commission, namely improved management, as remaining unfulfilled. He stated that the Bill would deliver, in addition to long term improvements to the registers of common land and town or village greens, new mechanisms for the management of commons, and much needed reforms to the controls of work and fencing on common land.

69. Part 2 of the 2006 Act, for example, was intended to achieve better management of commons by enabling commoners, landowners and others to form statutory commons councils or associations to manage agricultural activity, vegetation and rights of common over the land for which they were established.

70. As part of the legislative intent that common land should be better managed, section 6 of the 2006 Act set out the circumstances in which it would be possible in the future to create rights of common. It abolished prescription as a means of creating a right of common (save in the three areas of land excluded from the operation of Part I of the Act by section 5, namely the New Forest, Epping Forest and the Forest of Dean). It provided for the future creation of rights of common by express grant over registered common land but circumscribed the circumstances in which such a grant could be made; notably, the grant of a new right to graze animals is only permissible if the commons registration authority is of the opinion that the land would be able to sustain the exercise of the right and any other rights of common registered as exercisable over the land.

71. Section 7(1) provides for variation of registered rights of common. A variation is described as being, among other things, "any … alteration in what can be done by virtue of the right", which would presumably include (consistently with the approach of the Royal Commission) enlargement of the right.

72. The 2006 Act, therefore, expressly contemplates, consistently with the approach of the Royal Commission, the enlargement of existing registered rights of common and the express grant of new rights of common, including increasing the number of animals that are permitted to graze where the land can sustain it, over existing registered common land.

Detailed interpretation analysis of the 1965 Act

73. Resolution of the issue in dispute depends on the answer to two questions: in relation to common land registered under the 1965 Act on or prior 31 July 1970, (1) did the 1965 Act abolish the right of the owner of the common land after that date to grant and another to acquire, whether by express grant or by prescription, a right of common over the land; if not, (2) was any such right immediately extinguished upon its creation?

74. The only provision which it is suggested had either consequence is section 1(2) of the 1965 Act.

75. That section does not contain an express prohibition on the creation of new rights of common over registered common land. The contrast with the clear wording of section 6(1) of the 2006 Act, which abolished the creation of rights of common by prescription and specified conditions for the creation of rights of common by express grant, is conspicuous.

76. Abolition of the right of an owner of land to dispose of it or of interests in it as he or she thinks fit, and abolition of another person's right to acquire an interest in land by the centuries' old doctrine of prescription, are unlikely to have been intended by Parliament in the absence of words in the statute clearly demonstrating that intention. In *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560 at page 574 Sellers LJ said of section 9 of the Factors Act 1889: "one must remember that it is taking away the right which would have existed at common law, and for myself I should not be prepared to enlarge it more than the words clearly permitted and required." The same approach is equally applicable in the present case.

77. The wording of section 1(2) is inconsistent with the abolition of a right to create rights of common over registered common land. The critical words were – "After the end of such period … no rights of common shall be exercisable over any such land …". Those are words of limitation on an existing right of common that, but for the statutory prohibition, was legally exercisable. Authority indicates that they have the effect of extinguishing an existing right in the light of section 22(1) of the 1965 Act and sections 193 and 194 of the Law of Property Act 1925: see *Central Electricity Generating Board v Clwyd County Council* [1976] 1 WLR 151, esp. at 155-156, *Corpus Christi College v Gloucestershire County Council* [1983] 1 QB 360, 370F; and comp. *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 (a case on registration of a town or village green under the 1965 Act) at 688. That is entirely consistent with the Littlejohns' case that the purpose of section 1(2) was to require the registration of common land and rights of common as existed at (in the event) 2 January 1970 if they were to be valid and exercisable. The extinction of the previously valid rights of common was the sanction for non-registration.

78. There is no contemporaneous Parliamentary or other admissible material stating that the intention of the Government or Parliament in 1965 was to abolish the right by express grant, or ability by prescription, to create rights of common in the future over land registered or registrable as common land pursuant to an application under section 4 of the 1965 Act made on or before 2 January 1970.

79. The 1969 New Land Regulations provided in regulation 3(2) that, where any land was registered under section 4 of the 1965 Act, no application should be entertained for the registration of rights common over it. There is no statement to be found, however, either in those regulations or the annexed forms and the notes to them that this was because the ability to create rights of common over such land was abolished by the 1965 Act. The only explanation is to be found in the notes to Form 31 (Application for the registration of a right of common over land, where both the right and the land became registrable after 2 January 1970), where it is said in Note 9 that: "If either the right or the land was registrable before 1970 it is now too late to apply for the registration of either". The expression "too late" pre-supposes that there could have been registration but, plainly, that was not the case in respect of common land or a right of common created after 2 January 1970. There is in fact no coherent explanation anywhere in the statutory material, or admissible evidence as to its

interpretation, which states that, let alone explains why, the ability to create rights of common over land registered or registrable before 3 January 1970 or, insofar as it is relevant, on or before 31 July 1970, was abolished.

80. I turn, then, to the second limb of the issue, namely, if a right of common was capable of being created after 31 July 1970 (by express grant or prescription) over land registered under the 1965 Act on or before that date, was the effect of section 1(2)(b) to extinguish it immediately? This turns on whether section 1(2)(b) was intended to apply only to rights of common already in existence and registrable on or prior to that date or, alternatively, it was intended to apply to rights of common created both before and after that date.

81. A number of matters lead to the conclusion that Parliament did not intend section 1(2) to apply to anything other than common land and rights of common over such land registrable pursuant to an application under section 4 of the 1965 Act (i.e. in the event, by application on or before 2 January 1970).

82. As a general point, the effect of a contrary interpretation is in substance to prohibit the creation of such future rights of common but without saying so simply and expressly. The same considerations arise, therefore, as are mentioned in paragraph 75 above.

83. The interpretation for which DCC contends, and the Judge found, makes the relevance of the section 1(2) cut-off date of (in the event) 31 July 1970 difficult to understand. The period between the final date for applications for registration in the initial period, namely 2 January 1970, and the cut-off date of 31 July 1970 was presumably to allow for the processing of provisional registrations under section 4: see the introductory note to the 1966 General Regulations in Harris & Ryan on The Law Relating to Common Land (1967) at page 164. If it had been intended that section 1(2) was to prohibit the creation of new rights of common over land registered or capable of registration pursuant to an application for registration under section 4, the cut-off date would have been 2 January 1970 because that was the defining date for applications under the 1965 Act. Indeed, consistently with that point, regulation 3(1) of the 1969 New Land Regulations provided that land which became common land after 2 January 1970 (not 31 March 1970, the then cut-off date under section 1(2)) was registrable, together with the rights of common over it, under section 13 of the 1965 Act.

84. Section 13 of the 1965 Act was the provision expressly addressing future events. It expressly catered for the creation and registration of new common land after the initial registration period. It is impossible to reconcile section 1(2) with section 13 if section 1(2) was intended to apply to rights of common created in the future. As I have already said, by virtue of the definition of common land in section 22(1) of the 1965 Act new common land could only have come into existence after 31 July 1970 if it was land which had become subject to new rights of common. Section 1(2)(b), however, provided that no rights of common were exercisable "over any such land" (that is to say, on DCC's approach, common land which had been registered on or before 31 July 1970). This produces an impossible circularity. Prior to registration of the new common land, there could never be rights of common legally exercisable over such land, but the only basis for registering the land as new common land would be that rights of common were legally exercisable over it. That conundrum does not exist if section 1(2) was confined to common land and rights over it which could have

been registered pursuant to an application under section 4 of the 1965 Act on or before 2 January 1970.

85. It follows that section 1(2) can only have the meaning for which DCC contends, and the Judge found, if sub-section 1(2)(a) was confined to common land which could have been registered pursuant to an application under section 4 of the 1965 Act on or before 2 January 1970 but sub-section 1(2)(b) was not so confined and applied to rights of common created after that date. That is not an argument which has been advanced by DCC in these proceedings or on which the Judge relied. In any event, there is no sound basis for it. Leaving aside the consequential conundrum that such an argument makes the cut-off date of 31 July 1970 incomprehensible, there is absolutely nothing in section 1(2) to suggest that any such distinction between sub-section 1(2)(a) and sub-section 1(2)(b) was intended. In particular, the assumption must be that, if sub-section 1(2)(a) was confined to common land which could and should have been registered on or before 31 July 1970, sub-section 1(2)(b) was similarly referring to the rights of common which also could and should have been so registered. Further, such a distinction, which is nowhere explicitly stated in the legislation, would simply highlight the tortuousness of the way Parliament is said to have intended to prohibit expressly or in substance the creation of future rights of common over such common land.

86. A natural reading of section 1(2)(b) is that that the rights to which it referred were actually capable of registration prior to the cut-off date at some point and ceased to be exercisable for non-registration. Rights expressly granted, or acquired by user, after 2 January 1970 were never registrable on or prior to the cut-off date. It seems perverse for Parliament to have intended that the very fact that such rights could never have been registered on or before the cut-off date is the reason why, although they could be legally created, they would be immediately extinguished.

87. The context, and the identifiable statutory purposes of the 1965 Act, support that detailed interpretative analysis of section 1(2)(b). The only suggested policy rationale for the interpretation of section 1(2)(b) for which DCC contends, and the Judge found, is the establishment of a definitive record of common land. That, however, could never have been a policy objective since a conclusive and comprehensive register of common land and common rights was manifestly never going to be achieved under the terms of the 1965 Act for all the reasons I have given in paragraphs 61, 62 and 63 above.

88. Far from giving effect to the recommendations of the Royal Commission, and meeting the management concerns expressed by the Royal Commission, a blanket prohibition on the creation or exercise of future rights of common over registered common land would not enable the best use to be made of common land for all those interested in it and who could benefit from it. Such a blanket ban in respect of common land which could support new or greater rights of common than those registered, and where such new or greater rights would benefit the land, the land owner and the person granted a right of common would be wholly inconsistent with the reasoning and concerns of the Royal Commission. That is why the 2006 Act imposed a management regime which enabled decisions to be made locally by those interested in the common land as to whether the land could or could not sustain further grazing rights.

89. The purpose of the 1965 Act was registration of common land and common rights. More particularly, it was the registration of such common land and rights of common as existed at the date of applications for registration under section 4 of the 1965 Act prior to the date fixed under section 4(5) but with express provision for (1) variation of registered common rights, including (consistently with the recommendations of the Royal Commission) increasing grazing rights in accordance with regulations to be made under section 13 and (2) provision for future rights of common over new common land. There is quite simply no discernible reason why Parliament should have intended that one category of common land alone, namely that which could have been or was registered prior to 31 July 1970, should have been subject to a complete bar on the creation or exercise of future rights of common, while permitting enlargement of the registered rights on such a common and the grant of new rights of common over new common land without limit of time, type or extent.

90. True it is that there is no express provision in the 1965 Act for the registration of rights of common created after the cut-off date in section 1(2) over registered common land. It is equally true, however, that section 13 contains no express provision for registration of rights of common over new common land registrable under section 13. One explanation may be that, consistently, with the long title to the 1965 Act, the primary focus was on ascertaining the extent and location of common land. What is clear, and all agree, is that the 1965 Act was poorly drafted in several respects. In such circumstances, the 1965 Act should be interpreted so far as possible to give effect to a coherent policy, consistent with the objectives of the Royal Commission, and in a way which assumes that Parliament would have made it clear (and the Government would have made it clear in the passage of the legislation through Parliament) if it had intended that the rights of a landowner to create rights over his or her land was to be circumscribed and that a long established legal doctrine by which property rights could be acquired was to be abrogated.

91. Lewison LJ considers that the Littlejohns' interpretation would mean that "the system of registration was all but pointless" and would make "the register … virtually useless". Similarly, Tomlinson LJ considers that, unless DCC is correct, "the registration exercise introduced by the Act … was of dubious utility". I respectfully disagree. As I have said, the purpose of the 1965 Act, as specified in its long title, was to identify common land. That was a necessary prerequisite of providing for public access. The register of common land under the 1965 Act was, for that reason, at the heart of the provision of public access under the 2000 Act: see the definition of "access land" in section 1(1). The register of common land under the 1965 Act performed, therefore, a vital role in achieving one of the aims of the Royal Commission irrespective of any conclusiveness of registration of rights of common. This is consistent with the three pronged legislative history, to which I have referred, namely identification of common land by the 1965 Act, the grant of access by the 2000 Act, and regulation of agricultural use and management by the 2006 Act. In truth, the register can only be described as pointless or virtually useless or of dubious utility if the assumption is made that it was intended to achieve some kind of conclusiveness as to rights of common but (1) it is clear that it was never going to achieve complete conclusiveness for the reasons I have already given, and (2) whether and (if so) to what extent it was intended to achieve partial conclusiveness turns on the very issue of interpretation which is in dispute.

92. The interpretation of the 1965 Act for which the Littlejohns contend is consistent with the policy and terms of the 2006 Act and what is stated in the Explanatory Notes to the 2006 Act. Paragraph 16 of the Explanatory Notes describes the effect of section 1(2) of the 1965 Act as being that, where common land was eligible for registration under the 1965 Act, a failure to register it resulted in the land being deemed not to be common land and, similarly, a failure to register rights of common which were eligible for registration caused the rights to cease to be exercisable. The Explanatory Notes say nothing about the effect being to preclude the grant of rights of common in the future.

93. Paragraph 6 of schedule 3 to the 2006 Act states that the repeal of section 1(2)(b) of the 1965 Act does not affect the extinguishment of rights of common occurring by virtue of that provision. Paragraph 145 of the Explanatory Notes states, consistently with the Littlejohns' argument, that paragraph 6 "preserves the effect of section 1(2)(b) of the 1965 Act, which extinguished right of common which could have been, but were not, registered at the conclusion of the initial registration period".

94. Although the 2006 Act was intended in part to rectify some of the deficiencies of the 1965 Act and it repealed the 1965 Act, it is legitimate to refer to the 2006 Act as an aid to interpretation of the 1965 Act for two reasons. Firstly, they may both be regarded as part of a one legal system for the regulation of common land and rights of common: see the commentary in Bennion on Statutory Interpretation (6th ed.) at pages 553-4. Secondly, even if that is not correct, what is clear is that there is nothing in the 2006 Act itself or the Explanatory Notes relating to it or Hansard or any other admissible evidence which indicates that, so far as concerns the creation of future rights over previously registered land, there was any change of policy save as expressly evident from the terms of section 6 of the 2006 Act and the transitional provisions of the schedule 3 to the 2006 Act.

95. I do not accept that regulation 3(2) of the 1969 New Land Regulations provides any reliable guide to the proper interpretation of the 1965 Act. Those Regulations were made four years after the 1965 Act was passed. As I have said in paragraph 79 above, there is no coherent explanation anywhere in those Regulations or in any admissible evidence as to their interpretation as to why regulation 3(2) provided that no application could be made for the registration of rights of common over common land already registered under the 1965 Act.

96. During the course of the hearing of the appeal it was suggested that an interpretation of section 1(2)(b) of the 1965 Act which limited it to rights of common which could and should have been the subject of an application on or before 2 January 1970 would produce an anomaly. This was said to arise because, on such an interpretation, a right of common created by express grant before 1970 would have been extinguished unless registered pursuant to an application made on or before 2 January 1970 whereas a period of 20 years' user beginning before that date and ending after it could have been relied upon to establish a prescriptive right under the doctrine of lost modern grant, even though the doctrine proceeds on the fiction that the right was granted by a lawful (but lost) grant: see *Bakewell Management Ltd v Brandwood* [2004] AC 519. I do not agree that there is an anomaly because it seems to me plain that, whether as a matter of common law or statutory interpretation, the fiction of a lawful (and still valid) grant, in the context of the 1965 Act, precludes reliance on any

user prior to 3 January 1970 for the purposes of lost modern grant. That seems to me to be equally true of any other way of acquiring a prescriptive right.

97. In view of my decision on the meaning of the relevant provisions of the 1965 Act and the 2006 Act, no point under A1P1 arises.

Lord Justice Tomlinson :

98. I have read in draft the judgments prepared by the Chancellor and by Lewison LJ. It falls to me to resolve their disagreement.

99. At the conclusion of the argument I was inclined to the view that the judge, Lang J, had reached the correct conclusion on this difficult and recondite point. I remain of that view.

100. Eight points have throughout weighed with me, and ultimately have proved decisive. I recognise that they overlap.

101. First, there can be no doubt that the 1965 Act was intended to establish a register which was definitive – see paragraph [283] of the Report of the Royal Commission and the Explanatory Notes to the Commons Act 2006, cited by Lewison LJ at paragraphs [114] and [115] respectively below. Because section 13 of the 1965 Act expressly contemplated that land could subsequent to the registration exercise envisaged by the Act become common land, whereas hitherto it had not been common land, the register could plainly not be definitive of the extent of common land. But a more modest ambition would have been to produce a register definitive of land which, as at the conclusion of the registration exercise, was at that time both capable of being registered as common land and had been registered as such, and definitive of the rights exercisable over such land as had been so registered. It seems reasonable to ascribe this ambition to Parliament, for unless the registration exercise introduced by the Act had this effect, that exercise was of dubious utility.

102. Second, the natural meaning of both sub-sections of section 1 of the 1965 Act seems to me entirely in accord with this clear objective. All land which was at the operative date common land, and all rights of common over such land then existing, were to be registered – sub-section (1). After the operative date, land which was common land but which had not been registered as such would no longer be regarded as common land – or deemed to be such – and no rights of common which had not been registered could thenceforth be exercised over land registered as common land.

103. Third, the "any such land" referred to in section 1(2)(b) must surely be land of the character just described in the immediately preceding sub-section, i.e. land deemed to be common land because registered as such.

104. Fourth, there is a clear distinction drawn in sub-sections 1(2)(a) and (b) between land "capable of being registered" as common land and rights of common, not similarly so qualified. There is thus no linguistic warrant for regarding sub-section 1(2)(b) as being concerned only with rights of common which were, at the operative date, capable of being registered as such. On the contrary, the contrast is suggestive of an intention to exclude the possibility of there thenceforth being exercised any rights of

common over registered common land other than those registered at the operative date.

105. Fifth, in the light of the foregoing, there is no difficulty in reconciling section 1(2) with section 13. Section 13, so far as relevant, is concerned with land which becomes common land after the operative period, which by reason of section 1(2) cannot be land which was common land at the operative date and registrable as such.

106. Sixth, Regulation 3(2) of the Commons Registration (New Land) Regulations 1969, made pursuant to section 13 of the 1965 Act and cited by Lewison LJ at paragraph [122] below, seems to me to carry forward this clear scheme. I would not for my part allow the notes to Form 31, referred to by the Chancellor at paragraph [79] above, to derogate from the clear meaning of the Regulations which can be taken to have been intended to implement the legislative intent behind the 1965 Act.

107. Seventh, I accept that the 1965 Act on this showing effected the partial and prospective abolition of the acquisition of rights of common by prescription, i.e. the future acquisition of rights of common over land registered in the 1970 Register as common land. The Royal Commission at paragraph [258] of their Report, cited by Lewison LJ at paragraph [112] below, provided sound policy reasons for so doing. I do not consider that it tells against the adoption of this interpretation of the 1965 Act that the complete abolition of the acquisition of rights of common by prescription was, in the 2006 Act, achieved by more apparently explicit language. I also do not consider that this interpretation of the 1965 Act involves any real interference with the rights of a landowner to create rights over his or her land. As Lewison LJ demonstrates, rights analogous to a right of common may be granted. There is no fetter on the grant of grazing licences. As Lewison LJ also points out, the 1965 Act in any event and on any showing does involve an interference with some property rights – viz unregistered rights of common existing at the operative date over registered common land.

108. Eighth, like Lewison LJ, I do not think that we should attribute to Parliament the anomalous and discrepant treatment of express grant and lost modern grant inherent in interpreting section 1(2)(b) of the 1965 Act as referring only to rights of common which could have been registered in 1970. The anomaly is spelled out by the Chancellor and by Lewison LJ at paragraphs [96] above and [140] below respectively. Nor with respect do I consider that the Chancellor, at paragraph [96] above, has provided an explanation which removes the anomaly. I do not understand what process of interpretation of section 1(2)(b) can lead to the result that reliance upon user prior to 1970 is impermissible for the purpose of establishing a prescriptive right which had not by then accrued, particularly as the sub-section is concerned only with the future exercise of rights after the end of the operative period, not with the inability to rely upon events which have occurred prior to that period.

109. For all these reasons therefore I consider that the judge was correct to uphold the decision of the Commons Registration Authority, and I would dismiss the appeal.

Lord Justice Lewison :

110. I am grateful to the Chancellor for having set out the facts and the progress of this case with such clarity. It is with great regret that I find myself unable to share his conclusion. Let me explain why.

111. The background to the Commons Registration Act 1965 ("the 1965 Act") is helpfully and concisely set out in the explanatory notes to the Commons Act 2006 ("the 2006 Act"). In the nineteenth century pressure grew for public access to common land because of their value for leisure and recreation. Reforms in property law in the early part of the twentieth century abolished the manorial system which was the origin of rights of common. The notes continue:

> "The remainder of the twentieth century saw the pressure for access to common land grow but, following the Second World War, there was concern about a more insidious loss of common land and town or village greens through encroachment and abandonment of rights of common. Many commons had been ploughed up to increase agricultural production during the war, while others had fallen into disuse. The recreational needs of the public were also increasing. Growing motor traffic and demand for housing and other development were bringing different pressures to bear upon commons and greens. In 1955 a Royal Commission was established to enquire into whether any changes were needed in the law to promote and balance the needs of owners of land, commoners and the enjoyment of the public. The Royal Commission reported in 1958, and recommended legislation to promote:
>
> · registration of common land and town and village greens,
>
> · public access, and
>
> · improved management."

112. The Royal Commission explained the policy reasons for the creation of a register of common land and rights of common in paragraph [258] of their report:

> "In the preceding chapters, we have shown that as a general rule if anyone is to be persuaded to embark on a scheme for managing and improving common land, he will need to know with much greater certainty than hitherto who are the other holders of rights in the land, the nature of their rights and over exactly what land they are exercisable. The knowledge would be of advantage to all interests … All alike would be rid of the frustration of not knowing with whom they have to deal or where to find them and the fear that at any moment their proposals might be wrecked by the intervention of an unsuspected claimant. The knowledge would also be a surer protection than existing legislation against illicit encroachment. All this points to the necessity for a public record of the land and its boundaries, of the ownership of the soil, and of the common rights."

113. In paragraph [281] they recommended that at the end of a stipulated period:

> "… no further claims should be admitted for registration in respect of the land, or the ownership of the soil or of rights of common. Any claims which had not been lodged within the period would be held to have lapsed."

114. Paragraph [283] pointed to the creation of "a final, definitive record of the registered rights of common to include those deemed to be valid because uncontested and those which having been contested had been judged to be valid by a Commons Commissioner."

115. The explanatory notes to the Commons Act 2006 thus say at [16]:

> "The 1965 Act was intended to establish definitive registers of common land and town and village greens in England and Wales and to record details of rights of common."

116. This background explanation is echoed in Gadsden on Commons and Greens (2nd ed):

> "The Royal Commission recommended a definitive once and for all statutory register. (Para 1-14)
>
> The Government decided to implement the Report in two stages. First, as a matter of policy the 1965 Act was to provide the legislative basis for what was intended to be a conclusive nationwide inquiry into commons, common rights and town and village greens. There was intended to be a definitive statutory registration scheme. This was to be followed in relation to common land by a second stage of legislation to provide for public access and management scheme… (Para 1-15)"

117. It is true that, as the Chancellor has said, the Act did not precisely implement all the Commission's recommendations. The principal omission was any provision for the management of or public access to common land, which has now been dealt with by subsequent legislation. The detailed timetable may also have differed, but in my judgment the overall policy of definitive identification of common land and common rights remained.

118. The first of the key provisions of the 1965 Act is section 1 which provides, so far as relevant:

> "(1) There shall be registered, in accordance with the provisions of this Act and subject to the exceptions mentioned therein,—
>
> (a) land in England or Wales which is common land or a town or village green;
>
> (b) rights of common over such land; and

> (c) persons claiming to be or found to be owners of such land or becoming the owners thereof by virtue of this Act;
>
> and no rights of common over land which is capable of being registered under this Act shall be registered in the register of title.
>
> (2) After the end of such period, not being less than three years from the commencement of this Act, as the Minister may by order determine—
>
> (a) no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered; and
>
> (b) no rights of common shall be exercisable over any such land unless they are registered either under this Act or in the register of title."

119. (I have quoted the text as amended by the Land Registration Act 2002). The Minister specified the end of the period referred to in section 1 (2) as 31 July 1970: The Commons Registration (Time Limits) (Amendment) Order 1970 art 2.

120. The effect of registration is dealt with by section 10 which provides:

> "The registration under this Act of any land as common land or as a town or village green, or of any rights of common over any such land, shall be conclusive evidence of the matters registered, as at the date of registration, except where the registration is provisional only."

121. Section 13 allows certain amendments of the register to be made. It provides:

> "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…"

122. The relevant regulations are the Commons Registration (New Land) Regulations 1969. Regulation 3 (2) provides:

> "Where any land is for the time being registered under the Act, no application shall be entertained for its registration under these Regulations and, where any land is for the time being

> registered under section 4 of the Act (whether or not the registration has become final) no application shall be entertained for the registration of rights of common over it."

123. Finally I should refer to some of the definitions in section 22 (1):

> ""common land" means—
>
> (a) land subject to rights of common (as defined in this Act) whether those rights are exercisable at all times or only during limited periods;
>
> (b) waste land of a manor not subject to rights of common…
>
> "rights of common" includes cattlegates or beastgates (by whatever name known) and rights of sole or several vesture or herbage or of sole or several pasture, but does not include rights held for a term of years or from year to year"

124. It has been recognised, almost as soon as the 1965 Act came to be implemented, that it had deficiencies. Mr Le Poidevin QC described it as "half-baked", but I would be very reluctant to conclude that it was pointless. One thing that, to my mind, is absolutely clear is that by virtue of the combination of section 13 and the regulations made under it, it was not possible to register new rights of common over land already registered under the 1965 Act as common land. Where there are potential obscurities in the 1965 Act I consider that this clear beacon is the surest guide. Although parts of the decision of this court in *Oxfordshire County Council v Oxford City Council* [2005] EWCA Civ 175, [2006] Ch 43 were subsequently reversed by the House of Lords, I do not think that any real doubt was cast on the approach to interpretation that Carnwath LJ adopted at [24]:

> "We can and should look again at the 1965 Act in its historical context. We should be guided by the assumption, so far as possible within ordinary judicial constraints, that the Act was intended to achieve its stated purpose of providing a definitive register of common land and town and village greens, and to have practical effects, within a scheme which was coherent, workable and fair. We are entitled also to have regard to the Royal Commission report, whose recommendations provided the basis for the legislative scheme: see Halsbury's Laws (4th ed reissue), vol 44(1), para 1423. At the same time, in accordance with established principles, we must adopt a restrictive approach to the interpretation of legislation which imposes or extends penal obligations, or detrimentally affects property rights: see Halsbury's Laws, vol 44(1), paras 1456, 1464. Finally, section 3 of Human Rights Act 1998 requires us, so far as possible, to interpret all legislation (old and new) in a manner compatible with the rights guaranteed by the European Convention of Human Rights, including the protection of property rights: First Protocol, article 1."

125. No Human Rights argument was advanced in relation to the 1965 Act. The real debate concerns the meaning and effect of section 1 (2). Mr Le Poidevin QC argued that it applied only to the situation on the ground in 1970. It had no future application. Mr Whale on the other hand argued that the section (and in particular section 1 (2) (b)) had continuing application.

126. Substituting the date specified by the Minister for the formula in the text as enacted, section 1 (2) reads:

> "After 31 July 1970—
>
> (a) no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered; and
>
> (b) no rights of common shall be exercisable over any such land unless they are registered either under this Act or in the register of title."

127. Taking section 1 (2) (a) first, it is now settled that if land was capable of being registered under the 1965 Act but was not, then after 31 July 1970 it ceased to be common land, or a town or village green as the case may be. It was no longer possible to assert that even though it was not "deemed" to be common land, in fact it was. Registration was conclusive evidence that the land was common land, and non-registration was conclusive evidence that it was not: *Oxford County Council v Oxford City Council* [2006] UKHL 25, [2006] 2 AC 674 ("the Trap Grounds case"), at [18] and [19]. This is part of the concept of a definitive once for all register.

128. Moving on to section 1 (2) (b) the first question is what is meant by "such land"? Mr Le Poidevin submitted that it meant either land actually registered under the Act or land capable of being registered under the Act. I do not accept this interpretation. The natural grammatical meaning, in my view, is that "such" refers to the last antecedent which in this case is land registered under the Act. In my judgment it also conforms with the policy of the Act which was to establish a definitive record of common land; and also with the recognition in section 13: (a) that land could become common land and (b) that no new rights of common could be registered over land which was already registered as a common. Accordingly, in my judgment section 1 (2) (b) provides that unregistered rights of common are not exercisable over land registered under the 1965 Act as common land. The next question under section 1 (2) (b) is the meaning of "no rights … shall be exercisable." Goff J considered this question in *Central Electricity Generating Board v Clwyd CC* [1976] 1 WLR 151. The owner of a farm made an out of time application for the registration of a right of common over land which was provisionally registered as common land. After an inquiry the Commons Commissioner confirmed the registration of the land as common land. He took the view, after hearing the evidence as to grazing and other uses, that the land was subject to rights of common within the meaning of the definition in section 22, although none had been registered at the date of the provisional registration of the land as common land, and none were exercisable at the date of the hearing. He held that any rights of common which might have existed when the provisional registration was made had not been extinguished for want of registration. Goff J held that the Commissioner had erred in law. He said at 155:

> "[Counsel] relies first on the words in section 22 (1) "… whether those rights are exercisable at all times or only during limited periods …" Those words are all-embracing, and when one finds that description of the words "subject to rights of common," and then finds under section 1 (2) (*b*) that no rights of common in the circumstances in the events which have happened are exercisable, it seems clearly to follow that the rights must have been extinguished and the land no longer be subject to rights of common."

129. At 156 he said:

> "In my judgment it is plain that in the Commons Registration Act 1965 the legislature was using the expression "cease to be exercisable" as synonymous with "extinguished.""

130. He added at 157:

> "In my judgment, therefore, at the time when the commissioner heard the matter the land was not subject to rights of common, and on that short ground he ought to have refused to confirm the registration."

131. This interpretation has not been doubted, and neither party to this appeal sought to challenge it. However, while it is in my judgment a correct interpretation where the court is faced with a situation involving rights which pre-dated the final date for registration, I do not regard it as being an exhaustive interpretation. First, in the first of the quoted passages Goff J was careful to limit his observations to "the events which have happened", namely that a pre-existing right was not registered. Second, in the second of the quoted passages Goff J was not quoting the words of the Act ("no rights of common shall be exercisable"), but was substituting his own paraphrase ("cease to be exercisable"). The Act does not in fact use the word "cease", which is apposite in the case of a pre-existing right.

132. In my judgment the straightforward reading of section 1 (2) (b) leads to the conclusion that after 31 July 1970 no unregistered rights of common can be exercised over land which is registered as a common. If they cannot be exercised, then a person who claims to have acquired a prescriptive right of grazing over registered common land is attempting to establish a right in reliance on activity that is precluded by section 1 (2) (b). The general principle that an easement or profit a prendre cannot be acquired by doing something that is prohibited by a public general statute is well established. In *Neaverson v Peterborough RDC* [1902] 1 Ch 557 an inclosure award made under a private Act of Parliament awarded herbage on certain roads for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever. The surveyors of highways had for more than fifty years made a practice of letting the herbage on the roads for the depasturing of a certain number of horses and cattle as well as sheep. The Court of Appeal held that no profit could have been created in reliance on acts prohibited by the award which had the force of an Act of Parliament. The headnote summarised the decision in the proposition that:

> "A lost grant cannot be presumed where such a grant would have been in contravention of a statute."

133. That proposition was approved by the House of Lords in *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519 at [32] where Lord Scott said of that case and others that:

> "What they establish is a rather different rule, namely, that an easement cannot be acquired to do something the doing of which is prohibited by a public statute."

134. The Supreme Court applied an analogous principle to the question whether a beach in a working port was a village green in *R (Newhaven Port & Properties Ltd) v East Sussex CC* [2015] UKSC 7, [2015] AC 1547.

135. The essential question is whether the land owner could lawfully have granted the right to do that which is said to give rise to the easement or profit. But in the case of a registered common I consider that he could not, because section 1 (2) (b) precluded the grant, after 1970, of an exercisable (i.e. an effective) right of common.

136. In short, that means that no right of common over land registered as common land can now be acquired by prescription. I note that this was the view of Dr Gadsden in the first edition of his pioneering work on Commons at 4.59:

> "It has been demonstrated that it is not possible to register new rights over land which achieved registration in the initial registration period. It follows that it is also not possible to claim rights by prescription over that land if for no other reason than that they may not be registered and are consequently unexercisable."

137. In my judgment this interpretation is supported by a number of different considerations. First, it is clear from section 13 and the regulations made under it that there is no means of registering a newly created right of common over registered commons. The interpretation for which Mr Le Poidevin argued would allow the existence of unregistered (and unregistrable) rights of common. Since one of the purposes of the 1965 Act was to create a definitive register of common rights that would mean that the system of registration was all but pointless. As Lord Hoffman said in the Trap Grounds case (of town and village greens) at [43]:

> "Section 22 defines a village green for the purposes of the Act. When section 13 speaks of amendment of the register when land "becomes" a village green, it means that by reason of events which have happened after 1970, the land now satisfies the definition. That makes it registrable. But, because the register is conclusive, it does not become a village green until it has been registered. The Act was a Commons *Registration* Act, not an act to change the substantive law of commons and village greens, although, as Carnwath LJ pointed out, the effect of the conclusive presumption in section 10, read with section 22, may be to create rights in respect of land to which they

> would not have attached without registration. But one purpose of the Act was to enable buyers of land and other members of the public to ascertain from the register whether land was common land or a village green. It would defeat that purpose if unregistered greens could come into existence after the appointed day."

138. The same is, in my judgment, true of rights of common. Because a right of common is not exercisable over a registered common unless it is registered; and because it cannot be registered under the 1965 Act it must follow that it cannot be acquired. The point that Lord Hoffmann made about the purpose of the public register is also apposite. One of the problems that the Royal Commission wished to avoid by the scheme of registration was that management and improvement plans "might be wrecked by the intervention of an unsuspected claimant". Mr Le Poidevin's interpretation runs counter to that policy.

139. Mr Le Poidevin pointed to the unsatisfactory nature of the process for amending the register under section 13. As he rightly said, there was no compulsion to register changes in registered common rights. A right of common might have been extinguished or released, but the register might still reflect its continuing existence. I accept that that is so. However, if the interpretation which I prefer is the correct one, then at least the register will reflect the maximum burden to which the registered common is subjected, and the owner or manager of the common may plan accordingly.

140. The interpretation which I favour also avoids a number of startling anomalies. Suppose that a farmer was expressly granted a right of common in 1955, failed to register it but continued to graze his cattle until 1975. It is common ground that the express right would have been extinguished, and that the period from 1970 to 1975 would have been too short to support a prescriptive right. Now suppose that instead of having an express right, the farmer had simply started to graze his cattle on the land in 1955. Absent section 1 (2) (b) he would have acquired a prescriptive right to graze under the doctrine of lost modern grant in 1975. But according to the theory underpinning that doctrine, what is presumed is a grant at the *start* of the prescriptive period (i.e. in 1955): see *Bakewell Management Ltd v Brandwood*. Thus on Mr Le Poidevin's interpretation the farmer with the express grant is worse off than the farmer with the prescriptive right, although both had done exactly the same thing. On the interpretation which I prefer this anomaly is avoided. The Chancellor has avoided this anomaly by holding that any use before 1970 cannot be relied on (although this was not a point that Mr Le Poidevin made). In other words section 1 (2) wipes the slate clean whether or not a right of common has been acquired. I cannot see that in the words of section 1 (2). It only deals with the exercise of "rights"; and the fact of, say, 10 years' grazing is not a right in any sense of the word. So in my judgment the anomaly still remains.

141. It is then said that to interpret section 1 (2) (b) in the way that I prefer is an interference with property rights, which requires clear words. There is a contrast between section 1 (2) (b) and the clarity of section 6 of the 2006 Act which says in terms that a right of common cannot be created by prescription after the commencement of the section. I acknowledge the difference in wording between the two, and I also acknowledge, as Carnwath LJ did in the Trap Grounds case, that we

must adopt a restrictive approach to the interpretation of legislation which detrimentally affects property rights. However, in my judgment this argument does not carry much weight in this context. First, the 1965 Act clearly did interfere with property rights because rights of common would be lost unless registered under the 1965 Act. Second, the acquisition of a right by prescription imposes a fetter on the property rights of the owner of the common (necessarily, in the case of a prescriptive right, without his consent and without compensation) rather than interfering with his right to do as he pleases with his own land, so that there is a balance to be struck between the putative commoner and the owner of the soil. Third, the express grant of a right of common (other than by an inclosure award) is the exception rather than the rule. But if the land owner chooses to he may grant a right analogous to a right of common for a leasehold term (because such a right falls outside the statutory definition of right of common). Since such a right falls outside the statutory definition it need not be registered under the 1965 Act in order to be exercisable. However, if the common itself is registered under the Land Registration Act 2002 then the grant of the profit must also be completed by registration, unless it is granted for a term of less than seven years: Land Registration Act 2002 s 27 (2) (d). If the common itself is not registered under the Land Registration Act 2002 and the profit is a profit in gross then the profit may be independently registered under that Act, although in such a case registration is voluntary rather than compulsory: Land Registration Act 2002 s 3 (1) (d). A leasehold right that the owner chooses to grant could be a very long one: say 999 years. So the interference with his right to do as he pleases with his property is minimal. Fourth, the owner of the common is not precluded from granting other easements over the common (e.g. rights of way) provided that the rights of the registered commoners are not unduly interfered with; so the actual interference with the rights of the owner of the common is limited to the grant of freehold rights of common. Fifth, in steering what became the 2006 Act through Parliament Lord Bach made it clear that there was controversy over whether prescriptive rights over registered common land could still be created. So Parliament was, in my judgment, doing no more than leaving open the possibility without making any assumption one way or another. Finally in this connection it must not be forgotten that the Royal Commission's recommendation was that after the cut-off date no further claims should be admitted for registration in respect of the land, or the ownership of the soil or of rights of common. In my judgment "no further claims" means what it says: no further claims.

142. The last argument that I need to address is based upon the proposition that land can become common land. This is clearly contemplated by section 13 (b), which allows the register to be amended where land becomes common land or a village green. Since land cannot become common land unless it is subject to rights of common it must follow, according to the argument, that a right of common can be created by all means available under the general law; and that includes prescription. Although section 13 does not say so expressly it must also be inferred that the register can be amended to record the newly created rights of common which caused the land in question to become common land. This is borne out by regulation 3 (1) of the New Land Regulations which says in terms that the register may be amended "for the registration of rights of common thereover" (i.e. over the land which has become common land). Building on this, the argument proceeds by asserting that this shows that Parliament did not completely abolish the acquisition of rights of common by prescription. Thus far I agree. However, I do not consider that this argument carries

Mr Le Poidevin home. First, as Lord Hoffmann pointed out in the Trap Grounds case at [43] land does not become a village green unless and until it is registered. Since section 13 (b) deals with both common land and village greens in the same paragraph the same must be true of common land. Likewise it must follow that an asserted right of common does not actually become a right of common until it is registered. But a right of common over land registered as common land under the 1965 Act itself during the initial registration period cannot be registered; so by parity of reasoning it must follow that it cannot come into existence. Second, although Parliament did not abolish the acquisition of rights of common completely (as it did in the 2006 Act) does not lead to the conclusion that it did not do so in relation to land registered as common land under the 1965 Act during the initial registration period.

143. If Mr Le Poidevin is right then the register is virtually useless. Far from being a definitive register of rights of common it is a trap for the unwary. As Lord Hoffman put it in the Trap Grounds case at [49] one must assume that Parliament legislated for some practical purpose and was not sending commons commissioners round the countryside on a useless exercise. I do not think that Mr Le Poidevin had a satisfactory answer to the fundamental question: why did Parliament prohibit registration of new rights of common over common land registered under the 1965 Act, if it did not intend that they should no longer be capable of acquisition?

144. For these reasons (which are substantially the same as those of the judge), and in respectful disagreement with the Chancellor, I would dismiss the appeal.