Neutral Citation Number: [2015] EWHC 730 (Admin)

Case No: CO/3620/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 March 2015

Before:

THE HONOURABLE MRS JUSTICE LANG DBE

- -

Between:

THE QUEEN
on the application of

(1) MARTIN LITTLEJOHNS
(2) SARAH JEAN LITTLEJOHNS — **Claimants**

- and -

DEVON COUNTY COUNCIL — **Defendant**

DUCHY OF CORNWALL — **Interested Party**

- -
- -

Nicholas Le Poidevin QC (instructed by **SW Law Solicitors**) for the **Claimants**
Stephen Whale (instructed by **Devon County Council Legal Services**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing dates: 10 & 11 March 2015

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE LANG DBE

Mrs Justice Lang:

1. The Claimants have applied for judicial review of the decision dated 28 May 2014, made by the Defendant, in its capacity as commons registration authority ("the Authority"), refusing the Claimants' application to register rights of common under the Commons Act 2006 ("CA 2006").

2. The Claimants are farmers and landowners in Devon, who claim that they have rights of common over three parcels of registered common land on Dartmoor ("the common land"). The common land belongs to the Duchy of Cornwall which, though named as an interested party, has taken no active part in these proceedings. Devon is one of only 7 pilot areas in which the CA 2006 came into force on 1 October 2008, repealing the Commons Registration Act 1965 ("CRA 1965") in those areas.

3. The sole issue in this claim is whether or not the Authority was correct in deciding that the application ought to be refused because it fell outside the scope of paragraph 2(2)(a) of Schedule 3 to the CA 2006, which made transitional provision for the registration of unregistered rights of common created after the registers were originally drawn up under the CRA 1965. The Authority concluded, on legal advice, 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 CRA 1965, and therefore the Claimants had not established that a right of common had been created, for the purposes of paragraph 2(2)(a) of Schedule 3. The Claimants contend that the Authority adopted an unduly restrictive interpretation of the legislation, which interfered with their proprietary rights, contrary to Article 1 of the First Protocol ("A1P1") to the European Convention on Human Rights and the Human Rights Act 1998.

4. The Claimants' claim is supported by the National Farmers Union because it raises an issue of general importance to farmers.

5. For the purpose of this claim, the Authority is content to assume that the facts are as stated by the Claimants. If the point of law is resolved in the Claimants' favour, there are some outstanding factual issues which are still to be determined.

Facts

6. The Claimants, who are husband and wife, own two properties, known as Minehouse Farm and Estrayer Park, Okehampton, Devon. Minehouse Farm comprises 110 acres and Estrayer Park comprises 230 acres.

7. The Claimants, and their predecessors in title, have grazed sheep and cattle on common land adjacent to the farms for decades. The common land was registered under the scheme introduced by the CRA 1965. The land used for grazing (identified by its commons register unit number) was Okehampton Common (CL 155); Forest of Dartmoor (CL 164) and the Triangle (CL 135).

8. The farms were previously owned by the late Mr Arthur Littlejohns, the First Claimant's father. The First Claimant grew up at Estrayer Park, and as a boy, he

helped his father on the farm. Upon leaving school in 1979, he worked for his father. From his earliest recollections, his father grazed hundreds of cattle and sheep on the common land adjacent to his farms, as did other local farmers.

9. Following the introduction of commons registration by the CRA 1965, on 27 May 1968 the National Farmers Union sent to the Authority, on behalf of Mr Arthur Littlejohns, a formal notice of intention to register rights of common under the CRA 1965, over Okehampton Commons and Dartmoor Forest, in respect of Minehouse and Estrayer Park farms. The rights claimed were grazing, piscary, turbary and estovers. The Authority acknowledged receipt of the notice. This was an initial step under regulation 5 of the Commons Registration (General) Regulations 1966, but it had to be followed by a formal application under regulation 8. The Authority's records indicate that no formal application was made and so the rights were never registered.

10. After such a long period of time, it has not been possible to ascertain whether the non-registration was as a result of some failure on the part of Mr Arthur Littlejohns, or the National Farmers Union, or the Authority, or the postal service. The First Claimant says 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 Okehampton Commoners Association that the rights had never been registered.

11. Despite the non-registration of the rights of common, Mr Arthur Littlejohns and then the Claimants continued to use the common land 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 Claimants could elect either to graze their herds (subject to restrictions on areas designated as Sites of Special Scientific Interest) or receive payments.

12. In an application received by the Authority on 25 March 2010, the Claimants applied to the Authority to amend the commons register to record their rights of common, pursuant to paragraph 2(2)(a) of Schedule 3 to the CA 2006. The basis of their application was that, after 2 January 1970 and before 1 October 2008 (the relevant dates in paragraph 2(2)(a)), they had grazed sheep and cattle for more than 20 years on the specified common land, and had acquired a prescriptive right to graze 224 livestock units over that land.

13. On 28 May 2014, the Authority refused the application. The reasons were that, although the Claimants had provided evidence that rights of common had been used on CL 135, CL 155 and CL 164 for a period of more than thirty years, according to leading counsel, 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 CRA 1965.

Rights of common

14. Rights of common were originally part of a feudal landholding system, under which rights were held communally by the "commoners" and the lord of the manor over

manorial land. In its modern form, a right of common is a profit à prendre (a right to remove the product of natural growth from another person's land), shared with the owner of the land over which it is exercisable. A profit à prendre is a proprietary interest, which can be acquired by custom, prescription, grant or statute. Prescription at common law requires user since time immemorial, but in practice, proof of user for a period in excess of twenty years will normally suffice. Acquisition by prescription has been abolished by the Commons Act 2006 (which is only in force in some areas).

Commons Registration Act 1965

15. The CRA 1965 introduced a scheme for the registration of common land and rights of common. The registration authority was required to register (i) common land; (ii) ownership of common land; and (iii) rights of common. Registration was made in response to applications, though the authority could register land as common land on its own initiative. Registrations were initially made on a provisional basis, and then made final, once established. There was a procedure for resolving disputed registrations.

16. Section 4(6) provided:

> "*An application for registration under this section shall not be entertained if made after such date, not less than three years from the commencement of this Act, as the Minister may by order specify…*"

17. Section 1(2) provided:

> "*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.*"

18. The Commons Registration (Time Limits) Order 1966 provided (1) that the final date for applications under section 4 would be 2 January 1970, and (2) the period referred to in section 1(2) would begin on 2 January 1967 and end on 31 March 1970. In the Commons Registration (Time Limits) Amendment Order 1970, the deadline of 31 March 1970 for registration was extended to 31 July 1970. Despite the reference to section 4 (which I think was a drafting error), the period for applications was not extended.

19. The effect of section 1(2)(b) on existing rights of common was considered in *Central Electricity Generating Board v Clwyd County Council* [1976] 1 WLR 151, in which Goff J. held that an existing right of common was extinguished if not registered by

the prescribed date. The contrary interpretation that the rights of common remained in existence, albeit that they could not be exercised, was rejected. In *Oxfordshire County Council v Oxfordshire City Council* [2006] 2 AC 674, at [18], Lord Hoffman reached the same conclusion in relation to town or village greens under section 1(2)(a):

> "*the effect of non-registration was to extinguish such rights of recreation as may have existed by custom or statutory allotment and were registrable on the appointed day.*"

20. This interpretation of section 1(2) was in accordance with the recommendations of the *Royal Commission Report on Common Land* (Cmnd 462 1958), which led to the CRA 1965:

> "*281. We recommend that at the end of the eight years … no further claims should be admitted for the registration in respect of the land, of 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…*"

21. In the light of these authorities, it is common ground before me that the rights of common acquired by Mr Arthur Littlejohns prior to 31 July 1970 were extinguished as at that date, because of the failure to register those rights, for whatever reason. Even if the non-registration was the result of an innocent mistake, section 14(a) only provided for rectification of the original register in cases of fraud.

22. The issue between the parties is 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.

23. The Claimants relied upon the fact that, unlike the CA 2006, the CRA 1965 did not bar the creation of new rights of common by prescription. Mr Whale referred to the purpose of the Act as, *inter alia*, "to amend the law as to prescriptive claims to rights of common" but in my view, this was a reference to section 16 (disregard of certain interruptions in prescriptive claims to rights of common) which has no bearing on this case.

24. It is also apparent that Parliament did not intend, when passing the CRA 1965, to prevent any new rights of common coming into existence, as it provided for the creation of new common land in section 13. Common land, as defined in section 22, meant "land subject to rights of common …" However, this was limited to new rights of common arising over new common land, not land which was already registered as common land.

25. Section 13 stated:

> "***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;*
>
> *…*"

26. The Commons Registration (General) Regulations 1966 made provision in Part V for the amendment of registers in respect of rights of common under section 13(c). The Claimants could not bring their claim within the scope of those provisions. Regulation 36 empowered the Authority to correct clerical errors or omissions in the register, but not so as to increase the rights of common over any land.

27. The Commons Registration (New Land) Regulations 1969 ("the 1969 Regulations") were made pursuant to section 13 and came into operation on 3 January 1970.

28. Regulation 3 provided:

> "***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.*
>
> *…*
>
> *(5) An application for the registration of a right of common over land which is registered, or which is capable of being registered, under these Regulations, may be made by the owner of the right …*
>
> *(7) An application must be—*
>
> *(a) in Form 29, 30, 31 or 32 as appropriate;*
>
> *…*"

29. It is clear that regulation 3(2) excluded any applications to register rights of common acquired after 2 January 1970 if the land was already registered under the CRA 1965 prior to 2 January 1970. This was confirmed by the prescribed forms, contained in the Schedule to the Regulations, and the accompanying notes.

30. In relation to Form 29 ("application for the registration of land which became common land after 2nd January 1970"), the notes stated:

> **"*4. Meaning of "common land"***
>
> *For the purpose of an application … common land may be taken to mean either –*
>
> *a) land which, after 2nd January 1970, became subject to rights of common …; or*
>
> *b) land which, after 2nd January 1970, became "substituted land", whether or not subject to rights of common… "*
>
> *"**5. How land can become common land***
>
> *Land can become common land after 2nd January 1970 in any of the following ways: -*
>
> *1. By or under an Act of Parliament ...*
>
> *2. By a grant by the owner of the land of rights of common over it.*
>
> *3. By rights of common being acquired over it by prescription.*
>
> *4. By substitution or exchange for other land which has ceased to be common land …"*
>
> *"**8. Grounds of application: evidence***
>
> *In part 5 should be set out ... a statement of the facts relied on to show that the land became common land on the date stated in part 4; this date must be after 2nd January 1970, otherwise the application cannot be entertained…*"

31. The only prescribed form for the registration of rights of common was Form 31. Its heading expressly stated that it was an "*Application for the registration of a right of common over land, where both the right and the land became registrable after 2nd January 1970*". Paragraph 9 of the notes to Form 31 explained:

> "***9. Date for part 6***
>
> *The date to be entered in part 6 is the date on which the right of common first came into existence and became registrable as exercisable over the land described in part 3. If this date is before 3rd January 1970 the application cannot be entertained*

> *by the registration Authority. Moreover, the land over which the right is exercisable must have become registrable under the Act after 2nd January 1970, whether it has in fact been registered or not. If either the right or the land was registrable under the Act before 3rd January 1970 it is now too late to apply for the registration of either*,"

32. The Authority submitted that, since it was not possible for the Claimants to register their rights of common under the CRA 1965, no such rights ever came into existence. Alternatively, if they did come into existence, they were extinguished because of non-registration, by virtue of section 1(2)(b).

33. The Claimants submitted that, even if there was no provision for registration of their rights of common, those rights could still be acquired at common law by prescription. Section 1(2)(b) was a sanction imposed in respect of non-registration of rights in existence as at 1970; it had no application to future rights. The power in section 13 to register new rights of common was limited to 'new' common land, i.e. land which became common land after the CRA 1965 came into force, and that was why the 1969 Regulations were similarly restricted in scope. Moreover registration was not determinative of the existence of rights of common under the CRA 1965 because registration under section 13 was not mandatory. Regulation 3(1) made it clear that applications to register "may" be made, not "shall" be made.

34. The academic commentators confirm that the CRA 1965 did not provide for registration of new rights of common over land already registered as common land but are inconclusive as to the reason for this omission or its consequences (*Law of Commons and of Town and Village Greens: Ubhi & Denyer-Green*, 2nd ed. at 6.3 and *Gadsen on Commons and Greens: Cousins & Honey* 2nd ed. at 3-101).

35. I have given careful consideration to DEFRA's guidance, issued after the CA 2006, which expresses the view that rights of common could be acquired by prescription over existing common land and would not be extinguished by section 1(2)(b) CRA 1965.

36. In my judgment, the legislative intention of the CRA 1965 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. Common land which was not registered would no longer be deemed to be common land. Rights of common which were not registered would not be exercisable thereafter; the legal effect was that they were extinguished. In my view, the wording of section 1(2)(b) – "no rights of commons shall be exercisable over any such land unless they are registered" – is so broadly expressed that it cannot be read as limited to rights which were in existence prior to 31 July 1970. Moreover, the parallel existence of rights which were unregistered would be contrary to the purpose of the CRA 1965.

37. The CRA 1965 did not prevent the creation of new rights of common after 31 July 1970, whether by prescription or grant. Indeed, it expressly envisaged, in section 13 and the 1969 Regulations, that new rights of common could arise. But it only made provision for new rights in respect of new common land, not existing common land. I do not think that can be attributed to an oversight, particularly in the light of the express exclusion in the 1969 Regulations, made by the Minister with responsibility

for promoting the CRA 1965 in Parliament. In my 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. Parliament did not expect or intend new rights to be registered over existing common land.

38. The CRA 1965 also intended that any new right of common would have to be registered. Although it did not make registration mandatory, a right of common which was not registered could not be exercised, by virtue of section 1(2)(b).

39. A further argument against the Claimants' interpretation of the CRA 1965 is, that, under the statutory scheme, rights only came into existence once registered. In *Oxfordshire County Council v Oxfordshire City Council* the House of Lords decided that the effect of the CRA 1965 was that a town or village green only came into existence upon registration. Lord Hoffman said, at [43]:

> *"43. In my opinion it is unnecessary to decide when the 20 year period under the old law would have expired because the argument that it would have "become a village green" is a misreading of sections 13 and 22 of the 1965 Act. 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 by reason of events which have happened after 1970, the land now satisfies the definition. That makes it registrable. But, because the new 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 together 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. I agree with Carnwath LJ's analysis [2006] Ch 43, 72 – 73, para 100:*
>
> > *"The 1965 Act created no new legal status, and no new rights of liabilities other than those resulting from the proper interpretation of section 10. Since that section only takes effect in relation to any particular land on registration, there is no legal basis for treating that land as having acquired village green status by virtue of an earlier period of qualifying use. The mere fact that it would at some earlier time have come within the statutory definition is irrelevant if it was not registered as such.*""

40. I acknowledge that there may be a legal distinction to be drawn between town or village greens, which were newly defined by section 22 CRA 1965, and rights of common which, though described in section 22, were not exhaustively defined.

41. I have considered the position if, contrary to my primary conclusion, new rights of common could arise at common law by grant or prescription over existing common land, as well as over land which was not previously common land. In my view, as they could not be registered, they would be extinguished as soon as they came into existence, applying section 1(2)(b). So in the case of the Littlejohns, if new prescriptive rights did come into existence in the 1990's, after 20 years, they would then have been extinguished by virtue of non-registration.

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.

The Commons Act 2006

44. Part 1 of the Act provides for commons registration authorities to continue to keep registers of common land and to permit amendments to be made to the registers, in accordance with the terms of the Act. According to the Explanatory Notes, at paragraph 27, it replaces and improves the registration system under the CRA 1965, using the same registers.

45. The Explanatory Notes to the Act, at paragraphs 17 & 18 state:

> *"17. In practice the task of establishing registers was complex and the 1965 Act proved to have deficiencies. For example, some land provisionally registered under the Act was wrongly struck out, and other common land was overlooked and never registered. Many greens became registered as common land. Some grazing rights were registered far in excess of the carrying capacity of the common. The scope for correcting errors was limited. Furthermore, regulations made under the Act did not provide for sufficient notification of applications made for provisional registration of common land and rights of common, so that many provisional registrations became final without any objections and thus without independent appraisal of the claim made in the application. The Court of Appeal held that even where land had clearly been wrongly registered as common land, the Act provided no mechanism to enable such*

> *land to be removed from the register once the registration had become final.*
>
> *18. Moreover, although the 1965 Act made provision for amendments to be made to the registers consequent on events which occurred after 1970, there was no obligation on persons interested in any entry in the register to seek such an amendment. Many events which in principle affected entries in the registers have not been registered, and the registers have become significantly out-of-date since 1970."*

46. The Claimants submit that the purpose of the transitional provisions in Schedule 3 was to address the deficiencies of the previous registration scheme, and to give a final opportunity to register rights of common acquired by prescription.

47. Schedule 3 provides, so far as is material:

> "***2. Transitional period for updating registers***
>
> *(1) Regulations may make provision for commons registration authorities, during a period specified in the regulations ("the transitional period"), to amend their registers of common land and town or village greens in consequence of qualifying events which were not registered under the 1965 Act.*
>
> *(2) The following are qualifying events for the purposes of this Schedule—*
>
> *(a) 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;*
>
> *(b) any relevant disposition in relation to a right of common registered under the 1965 Act, or any extinguishment of such a right, where occurring at any time —*
>
> *(i) after the date of the registration of the right under that Act; and*
>
> *(ii) before the commencement of this paragraph;*
>
> *(c) a disposition occurring before the commencement of this paragraph by virtue of any relevant instrument in relation to land which at the time of the disposition was registered as common land or a town or village green under the 1965 Act;*
>
> *(d) the giving of land in exchange for any land subject to a disposition referred to in paragraph (c).*

(3) In sub-paragraph (2)(b) "relevant disposition" means —

(a) the surrender of a right of common;

(b) the variation of a right of common;

(c) in the case of a right of common attached to land, the apportionment or severance of the right;

(d) in the case of a right not attached to land, the transfer of the right.

(4) In sub-paragraph (2)(c) "relevant instrument" means —

(a) any order, deed or other instrument made under or pursuant to the Acquisition of Land Act 1981 (c. 67);

(b) a conveyance made for the purposes of section 13 of the New Parishes Measure 1943 (No. 1);

(c) any other instrument made under or pursuant to any enactment.

(5) Regulations under this paragraph may include provision for commons registration authorities to amend their registers as specified in sub-paragraph (1) —

(a) on the application of a person specified in the regulations; or

(b) on their own initiative.

(6) Regulations under sub-paragraph (5)(b) may include provision requiring a commons registration Authority to take steps to discover information relating to qualifying events, including in particular requiring an Authority to —

(a) carry out a review of information already contained in a register of common land or town or village greens;

(b) publicise the review;

(c) invite persons to supply information for, or to apply for amendment of, the register.

…

3. At the end of the transitional period, any right of common which—

(a) is not registered in a register of common land or town or village greens, but

(b) was capable of being so registered under paragraph 2,

is by virtue of this paragraph at that time extinguished.

…

6. Effect of repeals

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."

48. The Explanatory Notes state:

"***Section 23 and Schedule 3 Transitional***

135. Section 23 enables the appropriate national Authority to make transitional provisions and savings in connection with the coming into force of Part 1, and introduces Schedule 3, which makes transitional provision for updating the commons registers.

136. The 1965 Act did not require the commons registers prepared under that Act to be kept up-to-date. Provision was made (in section 13) to register certain events, but compliance was optional. Many instruments, and other events affecting entries in the registers (or calling for new entries in the registers), have had effect since the registers were compiled under section 4 of the 1965 Act, but many of these have not been captured in consequential amendments to the registers.

137. Schedule 3 makes provision for updating the registers during a transitional period to capture these events. Section 59(1) enables the transitional period to be commenced in relation to different commons registration authorities at different times.

138. Paragraph 2 enables the appropriate national Authority to make regulations regarding the updating of registers by commons registration authorities during the transitional period in consequence of 'qualifying events'. 'Qualifying events' are defined in sub-paragraph (2).

139. Sub-paragraph (2) provides that qualifying events comprise:

- *the creation by any means of rights of common after 2 January 1970 (the latest date on which rights of common eligible for registration under section 4 of the 1965 Act could be registered, failing which they were extinguished under section 1(2)(b) of that Act41) but before the commencement of paragraph 2;*

> - *any relevant disposition (as defined in sub-paragraph (3)) of a right of common occurring after the date of registration of the right but before the commencement of paragraph 2;*
>
> - *an extinguishment of a right of common occurring after the date of registration of the right but before the commencement of paragraph 2;*
>
> - *the deregistration of registered land under a relevant instrument (as defined in sub-paragraph (4)), and the giving of other land in exchange.*
>
> *140. Regulations may provide for the amendment of the register both on application and on the initiative of the commons registration Authority (sub-paragraph (5)). Sub-paragraph (6) states that regulations may require commons registration authorities to take steps to discover information concerning qualifying events. This may include undertaking and publicising a formal review of their registers.*"

49. In my judgment, 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 CRA 1965. Thereafter, any unregistered rights would be extinguished under paragraph 3, repeating the legislative approach adopted by section 1(2)(b) CRA 1965.

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.

52. 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.

Conclusion

53. Despite Mr Le Poidevin's impressive submissions, I have concluded that the Authority's decision was correct in law and so the Claimants' claim has to be dismissed.