IN THE MATTER OF:

ROMALDKIRK VILLAGE GREEN

ADVICE

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1. I am asked to advise in relation to a parcel of land that lies within the parish of Romaldkirk and upon which a dispute has arisen in respect of its registration as a village green.

2. In summary, I am of the view that in following the statutory trail, that the deed no longer applies and therefore absent any other evidence to the contrary it is not adverse to the "as of right" argument to prevent registration.

BACKGROUND

3. The issue stems right back to 1967 when various parcels of land were registered as a village green under the Commons Registration Act 1965 where unfortunately a parcel of land was missed off due to the fact that the plan submitted had been a mis-drawn and therefore did not include it for registration.

4. I have seen various photographs and plans highlighting the location of this parcel and in addition undertaken examination using the Google Earth software.

5. In February 2016 Romaldkirk Parish Council (RPC) attempted to have this parcel of land registered as a village green but met with objections inter alia from the owners of the property known as Rose Style Cottage; of which this parcel of land adjoins.

6. A document had come to light being a deed of settlement made in 1930. In essence, this deed was made by the owner at the time, of various parcels of land in Romaldkirk. I can only assume the parcel of land in question is encompassed in this deed and therefore for present purposes I will assume the deed applies. Those requesting this advice have no doubt considered this point and I have received no instructions that it does not.

7. The deed itself gives permission to the public to have access over and on this and other parcels of land and to use as if it was a village green and such rights were enshrined in section 193 of the Law of Property Act 1925.

8. There is then further a letter dated 11 February 1997 whereby the then Lord of the Manor in effect handed over the management, maintenance and husbandry of the village greens to the local parish council.[1]

9. After the application was submitted, a letter was received from Durham County Council dated 11 May 2018, which was acting as the Commons Registration Authority in determining the said application.

10. In that letter they expressly state that they have some concerns about the application and in particular whether the land has been used, "as of right". This they define as use of the land without force, secrecy or permission.[2]

11. Their concern primarily relates to the aforementioned deed and thus the granting of the permission to use this and other parcel of land. As such, this would obviously negate the use of the land, "as of right" since there would be permission.

12. The question posed therefore is whether the deed has resulted in permission and therefore prevents registration of the village green by the

[1] I am not of the opinion this takes the matter any further since it provides no permission,
[2] And are correct.

local council in that the criteria set down in section 15(1) of the Commons Act 2006 namely the "as of right" aspect has not been so satisfied.

Town or village greens

13. Legislation has recognised the significance of these areas since 1845 but was considerably enhanced by registration requirements imposed by the Commons Registration Act 1965 ("CRA"). The act required the registration of land, which is a town or village green and provided three classes of greens.

    i) Class, A which had been allotted by under any act the exercise a recreation of the inhabitants of any locality.
    ii) Class B land on which the inhabitants of any locality have a customary rights to indulge in lawful sports and pastimes
    iii) Class C land on which the not less than 20 years a significant number of inhabitants of any locality or any neighbourhood or neighbourhoods within a locality have indulged in lawful sports and pastimes as of right and either continue to do so or have ceased to do so from not more than such period as may be prescribed determined in accordance with prescribed provisions.

14. Land capable of being registered as a town or village green had to be registered before August 1970 and applications for registration had to be made before 3 January 1970. Failure to register was conclusive and extinguished such rights and recreation as were registrable at that date. It appears that claims to Class A and B greens which were not registered ceased to become tenable after January 2 1970.[3]

15. However there remains the possibility that land may have become a town or village green after 2 January 1970 and that is where a claim is made for a new class C green based on 20 years user as of right.

[3] R v Oxfordshire CC ex p Sunningwell PC [2000] 1 AC 335 at 348

16. This was authoritatively stated by Lord Hoffmann giving the leading judgment in *Oxfordshire County Council v Oxford City Council*[4] that the 20 years' user was necessary to establish a modern green.

Registration of a New Village Green

17. The current application as referred to above was made under section 15 of the Commons Act 2006 which states:

(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
(2) This subsection applies where–
(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged ***as of right*** *in lawful sports and pastimes on the land for a period of at least 20 years; and*
(b) they continue to do so at the time of the application.
(3) This subsection applies where–
(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;
(b) they ceased to do so before the time of the application but after the commencement of this section; and
(c) the application is made within [the relevant period]

18. The application in this case is based upon subsection (2) and therefore must satisfy the relevant criteria.

19. As referred to above, the issue in this case is the phrase "as of right". I have not been asked to comment on any other of the criteria indeed this was seem otiose as the application has already been submitted.

[4] *[2006] UKHL 25* at para 18 and 43

The Deed

20. It is worth at this juncture setting out section 193 of the Law of Property Act 1925.

(1) Members of the public shall, subject as hereinafter provided, have rights of access for air and exercise to any land which is a metropolitan common within the meaning of the Metropolitan Commons Acts, 1866 to 1898, ***or manorial waste****, or a common, which is wholly or partly situated within [an area which immediately before 1st April 1974 was] a borough or urban district, and to any land which at the commencement of this Act is subject to rights of common and to which this section may from time to time be applied in manner hereinafter provided:*

Provided that—

(a) such rights of access shall be subject to any Act, scheme, or provisional order for the regulation of the land, and to any byelaw, regulation or order made thereunder or under any other statutory authority; and

(b) the Minister shall, on the application of any person entitled as lord of the manor or otherwise to the soil of the land, or entitled to any commonable rights affecting the land, impose such limitations on and conditions as to the exercise of the rights of access or as to the extent of the land to be affected as, in the opinion of the Minister, are necessary or desirable for preventing any estate, right or interest of a profitable or beneficial nature in, over, or affecting the land from being injuriously affected, [for conserving flora, fauna or geological or physiographical features of the land,] or for protecting any object of historical interest and, where any such limitations or conditions are so imposed, the rights of access shall be subject thereto; and

(c) such rights of access shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle, or to camp or light any fire thereon; and

(d) the rights of access shall cease to apply—

(i) to any land over which the commonable rights are extinguished under any statutory provision;

(ii) to any land over which the commonable rights are otherwise extinguished if the council of the county [, county borough][or metropolitan district][…] in which the land is situated by resolution assent to its exclusion from the operation of this section, and the resolution is approved by the Minister.

(2) The lord of the manor or other person entitled to the soil of any land subject to rights of common may by deed, revocable or irrevocable, declare that this section shall apply to the land, and upon such deed being deposited with the Minister the land shall, so long as the deed remains operative, be land to which this section applies.

21. The deed in this case quite clearly has been undertaken under subsection 2 above and I see no reason as to why it does not satisfy the requirement to be deposited with the Minister. There is however a number of definitions within s.193 that need to be briefly looked at in my view.

22. Manorial waste in subsection 2 has been examined in the case of *Hampshire CC v Milburn*[5] and as a small history lesson stated:

"The manorial system which the Normans partly inherited and partly established displayed a variety of local laws and customs but in general there were three categories of land comprised in a manor. The demesne land belonged to the lord of the manor. The copyhold land was divided between the tenants of the lord of the manor. The remainder of the land

[5] [1991] 1 AC 325

*consisted of uncultivated land, referred to as the **waste of the manor**. The waste land was the natural source of grazing, fodder and fuel for all the inhabitants of the manor. The waste land belonged to the lord of the manor subject to the rights of the tenants to enjoy in common the fruits or some of the fruits of the soil in the manner of a 'profit à prendre.' The rights of the commoners varied from manor to manor. The extent of the right of any particular commoner depended on the origin of the right and might depend on the size and situation of land held by the commoner."*

23. There appears to be no dispute the land in question is waste of the manor.

24. Returning to section 193 subsection (d)(i) states:

    (d) the rights of access shall cease to apply—

    (i) to any land over which the commonable rights are extinguished under any statutory provision

25. "Commonable rights" are rights of common, which have their origin in local custom. These rights are exercisable together with, or "in common", with others. I am not of the view that for the purpose of this advice there is a dispute as to what this means.

26. Thus did the rights conferred by the deed in 1930 cease under the 1965 act?

27. In my view they did and it is simply a means of statutory interpretation.

28. Section 193 states towards the end of the first subparagraph, "*Provided that –"* and then lists four subparagraphs the latter one being divided into two.

29. As referred to above subsection d(i) states

    the right of access shall cease to apply –

(i) to any land over which the commonable rights are extinguished under any statutory provision.

30. First of all it states, *"any land"* over which commonable rights are extinguished and would therefore include manorial waste land.

31. Secondly the ability to grant such rights is an express statutory right under subsection 2 where the Lord of the Manor was able by deed to declare such rights were available. In addition, that subsection gives the Lord of the Manor the ability to declare that section 193 applies by stating "…***declare that this section shall apply to the land…"***. In the deed this occurs in the second clause 1. That must mean all of the section including (d)(i) and thus acknowledge, in my view, that there was a possibility that a statute may remove such granted rights.

32. In my opinion, the fact that the proviso in respect of extinguishment by statutory provision is a forward looking clause, means that quite clearly Parliament had intended that such rights could be extinguish in the future should such a statute come into force. If rights created by a deed were not to be so extinguished I would have expected a draftsman to have included a clause clearly stating those rights formed out of the deed would not be so affected by any future statutory provision – they did not. Indeed the circle completes itself by the subparagraph (d) and reference to "*any land*".[6]

33. Moving on; the statute that extinguished such rights is the Commons Registration Act 1965.

34. The CRA 1965 introduced a new regime for identifying common land, town and village greens and rights of common. The CRA 1965 followed the report of the Royal Commission on Common Land (1955-58), which emphasised the importance of open spaces.

[6] I will return to the saving provision in the Commons Registration Act 1965 later

35. The main purpose of the CRA 1965 was to preserve and improve common land and town and village greens, some of which were in danger of being encroached upon by developers because of legal and factual uncertainties as to their status or ownership. There was also an issue that because ownership was often unclear, it was difficult to establish whose consent was needed for improvements to, or maintenance of, the land.

36. The CRA 1965 imposed a duty on county councils to maintain registers of common land and town and village greens, together with details of any rights claimed over such land and the ownership of them.

37. Registrations were required to be made under the CRA 1965 by 31 July 1970 and any objections to a registration had to be made within a further two years. A registration became final if either there was no objection or any objection was determined.

38. If land was eligible for registration, either as common land or as a town or village green, but was not registered by 31 July 1970, it ceased to be common land or a green. Rights of common that were not registered by 31 July 1970 were no longer exercisable.

39. Section 1 of the Act stated:

(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]

40. The Court of Appeal commented on the legislation in respect of such registration [7]and held that:

"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."[8]

41. The court continued;

"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*

[7] R. (on the application of Littlejohns) v Devon CC [2016] EWCA Civ 446
[8] Ibid at 101

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."

42. The court had previously commented that:

"Authority indicates that they [section 1(2)] 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."[9]

43. The House of Lords in the case of *Oxfordshire County Council v Oxford City Council and another*[10] held that*:*

"On the other hand, by section 10 [11]*, the registration of land as common land or as a town or village green was to be "conclusive evidence of the matters registered, as at the date of registration". So the register was to be definitive, both positively and negatively: registration was*

[9] Para 77
[10] [2006] UKHL 25
[11] 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.

conclusive evidence that on that date it was a town or village green and non-registration was conclusive evidence that it was not."[12]

44. In other words, the Act was meant to be an all-encompassing statute in respect of registration of common land and those rights over it. To have exceptions such as those rights created by deed would not have produced such a definitive register as envisaged by Parliament. As such, the rights contained in the deed over this parcel of land must have been extinguished due to the fact they were not registered by the appropriate time.

Saving Provision

45. As if there was any more complication needed, section 21 of the CRA states this:

Section 1(2) of this Act shall not affect the application ***to any land registered*** *under this Act of section 193 or section 194 of the Law of Property Act 1925 (rights of access to, and restriction on inclosure of, land over which rights of common are exercisable).*

46. The court in *Central Electric* above held that the saving provision:[13]

Now section 193 (1) (d) of the Law of Property Act 1925 is a proviso that "the rights of access shall cease to apply — (i) to any land over which the commonable rights are extinguished under any statutory provision." And section 194 (3) has a proviso that the section "shall cease to apply (a *) to any land over which the rights of common are extinguished under any statutory provision." It is to those two provisions that the saving in section 21 of the Act of 1965 is clearly directed, and the significance is that whilst section 1 (2) (b) of the Act of 1965 refers only to the rights not being*

[12] Ibid at para 19
[13] [1976] 1 WLR 151 at 155/156

exercisable, it is saved from operating under the provisions in sections 193 and 194 of the Law of Property Act 1925 which refer to the rights being extinguished; and therefore clearly the legislature was contemplating section 1 (2) (b) of the Act of 1965 as working an extinguishment. That is emphasised by the parenthesis in section 21 (1) which reads as a definition of the relevant parts of sections 193 and 194 of the Act of 1925 as follows: "rights of access to, and restriction on inclosure of, land over which rights of common are exercisable."

47. Thus the legislation recognised that when registering land under the CRA there is somewhat of a distinction between the land itself and rights over the land. [14]

48. What the saving provisions does therefore, is that if the land is registered this section preserves those rights under s.193 that accompanied it but of course the land itself has to be registered under the CRA. In this case it has not been.

49. The definition of manorial waste in the CRA is that:

1) In this Act, unless the context otherwise requires, "common land" means—
(a) …
(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;

50. The section still requires that land to be registered. In this case it was not and therefore in my view it is not so saved and remains extinguished.

[14] Although not manorial waste land – see below.

James Kemp
Trinity Chambers
18th June 2018