

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

08/11/2013

B e f o r e :

MR JUSTICE WYN WILLIAMS

Between:

NICHOLAS CHARLES EVANS

Claimant

- and -

**WIMBLEDON & PUTNEY COMMONS
CONSERVATORS**

- and -

**THE LONDON BOROUGH OF
WANDSWORTH**

Defendant

Interested Party

**Philip Petchey (instructed by Richard Buxton Solicitor) for the Claimant
Guy Fetherstonhaugh QC (instructed by Gregsons Solicitors) for the Defendant
Ranjit Bhose QC (instructed by Sharpe Pritchard Solicitors) for the Interested Party
Hearing date: 9 October 2013**

Mr Justice Wyn Williams:

Introduction

1. The Claimant owns and lives in the premises known as 29 Commondale, Putney. His house is in close proximity to Putney Lower Common (hereinafter referred to as "the common"). The

common is part of a much larger area of common land in Wimbledon and Putney (referred to hereinafter as “the commons”).

2. The Defendant is the registered owner of the commons. It is also responsible for their management. This state of affairs has prevailed since the coming into force of the Wimbledon and Putney Commons Act 1871 (hereinafter referred to as “the 1871 Act”).
3. The Interested Party owns an area of land which is bounded on all its sides by the common (hereinafter referred to as “the site”). Between about 1911 or thereabouts and 1999 a hospital existed on the site. It was owned and managed by successive hospital authorities until 2010 when it was sold to the Interested Party.
4. The Interested Party is anxious to develop the site. It has applied to itself (as local planning authority) to develop the land. In summary, the development consists of demolishing the buildings which exist upon the land and replacing them with a primary school and a number of flats. The Claimant and a number of local residents oppose the grant of planning permission for that proposed development. The planning process is ongoing.
5. The proposed development includes a means of access to and from the site which, in part, crosses a small area of the common. By an agreement in writing made on 14 February 2012 the Defendant agreed to execute a document described as a “Deed of Easement” in favour of the Interested Party upon receipt of written confirmation from the Interested Party that it had obtained a “satisfactory planning permission” in respect of its proposed development. The proposed “Deed of Easement” is an appendix to the agreement.
6. In these proceedings the Claimant asserts that the Defendant is not entitled to grant many of the rights which will be conferred upon the Interested Party if the Deed of Easement is executed. Before I consider the rights in question and the legal issues which arise in this case, it is as well to set out the relevant historical background.

Relevant history

7. The Defendant was created by the 1871 Act. It was created as a body corporate specifically to own and manage the commons. Schedule 3 of the 1871 Act defines the commons in considerable detail. Putney Lower Common (the common) is described in Schedule 3 Part B. Quite deliberately, the site and the means of access thereto was excluded from the common as defined. As of 1871 the site was served by accesses from the south and from the northeast.
8. By 1910, if not before, serious consideration was being given to building a hospital upon the site. It is common ground that before the hospital was built those who would become responsible for its management sought a “re-arrangement” of the access roads at the southern end of the site – see the letter dated 7 March 1910 from Mr P Birkett to the Defendant. The letter was accompanied by plans showing the existing means of access and the suggested re-arrangement. There were in evidence before me two large scale plans (plan A and plan B) which date from 1910 and which showed the access arrangements at the southern end of the site and the proposed re-arrangement. The plans were produced by architects so that the Defendant could give proper consideration to the proposed re-arrangement of the means of access. In a letter dated 18 July 1911 from a firm of surveyors known as Percy H Clarke & Son to the Defendant the surveyors referred specifically to the plans and also advised the Defendant that it could justifiably agree to the proposed re-arrangement because the land over which the new accesses would be formed was less extensive than the land which had been used as accesses hitherto. The very strong probability is that the Defendant approved the re-arrangement; I was shown a draft letter from the Defendants addressed to the Secretary of the Hospital Committee which, in terms, approved the re-arrangement and there is every reason to suppose that a letter in that or a similar form was sent by the Defendant to the Secretary of the Hospital Committee.

9. There is no dispute but that shortly after this correspondence was concluded the access to the site at the southern end was changed so as to accord with that which was shown on plan B. The consequence was that accesses were created on the west and east side of the site which, in part at least, traversed land then within the common.
10. On 23 February 1935 the Defendant granted then hospital managers a licence to “make and maintain” an extension to the means of access which existed on the eastern side of the site. The licence authorised the use of a further area of the common for the extension. There is no evidence before me as to how or why the Defendant came to its decision. On any view, however, the licence related to a very small area of the common.
11. In 1956 a further agreement was reached between the Defendant and its then managers. This agreement authorised the hospital managers to construct a car park on part of the common to be used thereafter in conjunction with the hospital. The car park was constructed immediately to the south of the site. The next year (1957) an agreement was concluded between the Defendant and the managers which permitted them to extend and improve the existing accesses. This, too, involved the use of a small part of the common.
12. The site remained in use as a hospital until 1999. In that year the hospital closed. I assume that the accesses in being in 1957 remained unchanged (at least as to location) between 1957 and 1999.
13. Between 1999 and 2010 alternative uses of the site were considered but the site remained unused. On 8 July 2010 the Interested Party granted planning permission to the Wandsworth Primary Care Trust (by then the owners and managers of the site) which authorised the demolition of the buildings on site, the erection of a primary care centre, the erection of a block of flats and the creation of vehicular access and associated car parking. This proposed development generated little, if any, opposition although the proposed access to the site was very similar to the access that is the subject of the planning application currently under consideration by the Interested Party.
14. On the same date that the Interested Party granted planning permission for this development Wandsworth Primary Care Trust transferred to the Defendant an area of land at the northern end of the hospital site. In that same transfer document the Defendant granted various rights to the Trust over the area of land over which access to the site would be provided (see Trial Bundle page 355). These rights were subsequently registered.
15. Sometime after the planning permission had been granted the prospect of creating a primary care centre on the site receded. The Interested Party identified the site as suitable for a new primary school. Since that time it has sought to progress its aim of using a part of the site as a school and part as flats.
16. On 14 February 2012 Wandsworth Primary Care Trust transferred the site to the Interested Party. I have not seen the relevant documents of transfer of title but there is no dispute that the transfer took place. Further as I understand it the Transfer would have included any rights which the Trust had acquired from the Defendant on 8 July 2010.
17. On 29 October 2012 conditional planning permission was granted for the development of the site as a school and a block of flats. The access to the site authorised by this planning permission was very similar to that which had been approved by the planning permission of 8 July 2010 and which had generated little if any opposition. However, the planning permission granted on 29 October 2012 was challenged by way of judicial review by a group of residents known as “The Friends of Putney Common.” On 8 March 2013 the planning permission was quashed; the Interested Party consented to the quashing.

18. The site is currently unused; it has been unused since 1999. The buildings on site are described as derelict in the evidence adduced by the Defendant – a description about which there is no dispute.

The rights conferred by the Deed of Easement

19. Clause 2 of the Deed confers the following rights on the Interested Party:
- (i) The right to enter upon the common to construct an access to the site and footpaths; the access way is defined within the Deed as being “a particular accessway leading from the Lower Richmond Road to and along the boundary of the hospital site”. The location of the access way and the footpaths are shown on a plan attached to the Deed.
 - (ii) The right to enter upon the common for the purposes of repairing, maintaining, cleaning, lighting or renewing the access way and the footpaths.
 - (iii) Rights of way over the access way to serve the school and the residential development.
 - (iv) Rights of entry on to the common in order to comply with conditions of any planning permission granted and the right to carry out any work on the common required by the planning permission.
 - (v) Rights to install in the common and maintain surface water drainage to serve the site.
 - (vi) The right to install and maintain a lifting arm barrier or such other form of barrier as might be agreed with the Defendant at a position which is shown upon the plan attached to the Deed.
20. The Claimant asserts that the Defendant has no power to grant these rights. That, he submits, is the effect of the 1871 Act properly interpreted.

The 1871 Act

21. Section 8 of the Act is in the following terms:

“There shall be a body of Conservators for carrying this Act into execution, the full number of whom shall be eight, and who are hereby incorporated by the name of the Wimbledon and Putney Commons Conservators, and by that name shall be one body corporate, with perpetual succession and a common seal, and with power to take and hold and to dispose of (by grant, demise, or otherwise) land and other property (which body corporate is in this Act referred to as the Conservators).”

Section 34 provides:

“The Conservators shall at all times keep the commons open, unenclosed, and unbuilt on, except as regards such parts thereof as are at the passing of this Act enclosed or built on, and except as otherwise in this Act expressed, and shall by all lawful means prevent, resist, and abate all encroachments and attempted encroachments on the commons, and protect the commons and preserve them as open spaces, and resist all proceedings tending to the enclosure or appropriation for any purpose of any part thereof.”

Sections 35 and 36 limit the Defendant’s powers. Section 35 provides:

“It shall not be lawful for the Conservators, except as in this Act expressed, to sell, lease, grant, or in any manner dispose of any part of the commons.”

Section 36 enjoins the Defendant “at all times [to] preserve, as far as may be, the natural aspect and state of the common”. Further it specifies that the Defendant shall “protect the turf, gorse, heather, timber and other trees, shrubs and brushwood thereon.”

22. Section 39 confers a number of express powers upon the Defendant. They are:

“To drain, level, and improve the common, as far only as may be in their judgement from time to time requisite for the use thereof for purposes of health and unrestricted exercise and recreation:

To make temporary enclosures for the protection of the turf or the better attainment of the object aforesaid:

To make and maintain such roads and ways as may be in their judgement necessary or proper:

To make and maintain ornamental ponds:

To plant trees and shrubs for purposes of shelter or ornament, and to make temporary enclosures for the protection thereof:

To build lodges, not exceeding 6 in number, to be used for residences of common-keepers and officers, and for no other purpose:

To repair from time to time the lodges and other buildings vested in them.”

23. There is recent authority, binding upon me, which explains the proper approach to the interpretation of the 1871 Act. In *Housden v Conservators of Wimbledon and Putney Commons* [2008] 1 WLR 1172 the Court of Appeal had to consider whether or not the Defendant had the power to grant a right of way over a small area of Wimbledon Common for the benefit of a dwelling-house situated in close proximity to that common. The court concluded that it did and as part of the reasoning leading to that conclusion it set out the approach to be adopted when interpreting the 1871 Act. The leading judgement was delivered by Mummery LJ; between paragraphs 19 and 26 of his judgement he explained the proper approach to be adopted when interpreting the 1871 Act thus:

“*Discussion and conclusion on vires issue*

19 The social value reflected in the 1871 Act was conservation of the natural environment in an urban locality for the benefit of an expanding local population. A scheme was established “with a view to the preservation” of the commons as “open spaces of large extent, unenclosed and unbuilt on” for “great local and public advantage” by vesting them in an incorporated body of appointed and elected conservators, on whom duties were imposed and powers conferred.

20 The environmental purpose can be protected and promoted without adopting a narrow, literal interpretation of the 1871 Act. The legislative text should be read sensibly in context. In this way full effect can be given, so far as a fair and reasonable reading of the statutory language allows, to the stated purpose and the scheme devised to attain it.

21 ...

22 I accept that section 35 is a very wide prohibition against alienation of the commons by the conservators. I also agree that there is a sense in which the grant of an easement over land is disposing of part of it. It is a disposal of a right over land which form the commons. There is a parcel of rights and interests in that land. However, on reading

section 35 in the wider context of the Act as a whole, its apparent aim and its general scheme, I do not construe it as preventing the conservators from lawfully granting an easement over the access way.

- 23 First, looking at the aim of the 1871 Act broadly, the grant would not be incompatible with the conservators' overriding duty to conserve the commons as an unenclosed, unbuilt on, open space. The access way would not cease to be an open space if the claimants were granted an easement over it. The grant of an easement would not entitle them to enclose or build on the access way. The easement would not interfere with the ability of members of the public to continue to enjoy the part of the commons across which the access way runs.
 - 24 Secondly, looking at the detail of the matter, the wording of section 35 is, in my judgement, reasonably open to an interpretation enabling the conservators to grant easements in circumstances consistent with the conservation of the commons in their existing state as an open space.
 - 25 The question is whether the grant of the easement would be a disposal of part of the commons in breach of the prohibition in section 35. I begin by asking whether there is a possible reason for making it unlawful to grant the claimants a right of way over the access way. A grant would entitle the claimants to pass and re-pass over only a narrow strip of the commons running alongside the verge of the highway. It would not give them exclusive possession of any part of the surface of the commons or detract from the openness of the space of the access way.
 - 26 Section 35 makes it unlawful for the conservators to "dispose" of any part of "the commons" by sale, lease, grant and so on. A number of points arise on the language in which the prohibition is expressed. It is of some significance that the restriction relates to "the commons" rather than to "land" or to an "estate, interest or right in land". The latter are the expressions apt to include rights in or over land and incorporeal hereditaments, such as a right of way: see the Interpretation Act 1978, Schedule 2 paragraph 5(b). "The commons" refer not so much to the land itself or to the rights and interests in the land, as to the physical area of open space, which is to remain unenclosed and unbuilt on. The grant of a right of way to the claimants over the small defined access way would impose a legal burden on the land, but not one that would diminish the area of the commons as a physical area of open space or result in any physical enclosure of it or building on it. In these circumstances I do not think that the conservators would be unlawfully disposing of or alienating part of the commons contrary to section 35."
24. Carnwath LJ (as he then was) gave a short concurring judgement. Richards LJ agreed with the judgements of Mummery and Carnwath LJ. It is worth citing two of the paragraphs from the judgement of Carnwath LJ.
- "74. On the 1871 Act, I have come to the conclusion that the simplest approach is best: that is, to apply the operative provisions in accordance with their own terms. Section 8 permits the disposal of "land". "Land" includes "hereditaments...of any tenure" (Interpretation Act 1978, Schedule 2, paragraph 5(b)), and thus includes incorporeal hereditaments such as easements. Section 35 prohibits disposal of "part of the commons". In ordinary language words "part of the commons" denotes a physical concept, not a legal right. It is natural to talk of selling, leasing or granting a part of the commons. But an easement is not a *part* of the commons; it is a right granted *over* the commons. There is no corresponding definition of "commons" to stretch the meaning to include such rights. Nor does the purpose of the Act require such an extension. Any easements granted by the conservators would have to be consistent with their overall objectives, and they have

full control of the nature of any easements and the conditions under which they are granted.

75. In summary, section 8 permits the grant of easements, and section 35 does not prohibit it. On these short grounds, I would allow the appeal. I am encouraged to see that the same result follows from the more analytical approach adopted by Mummery LJ, with which I also agree.”

Discussion

25. *Housden* decides that the Defendant has power to grant an easement over the commons for the benefit of adjoining land provided the easement does not interfere with the ability of members of the public to continue to enjoy the part of the common over which the easement is granted and provided, too, that the easement granted is consistent with the duties of the Defendant as specified in the Act and the overall objectives of the Act – see the judgement of Mummery LJ at paragraphs 23 and 24 and the judgement of Carnwath LJ at paragraph 74. Further, it seems to me that it must follow from the reasoning in *Housden* that rights which are granted by the Defendant which have as their aim the maintaining and preserving of such an easement – for example the right to maintain any access over which an easement is granted – must be permissible, too, subject to the same qualifications.
26. I have reached the conclusion, too, that the powers expressly conferred by section 39 of the 1871 Act must be interpreted in the same way. Nothing in *Housden* suggests the contrary and I can think of no convincing reason why there should be a different interpretive approach to section 39 to that which has been thought to be appropriate by the Court of Appeal in respect of sections 8 and 35.
27. Of particular importance in the context of this case is the provision within section 39 which empowers the Defendant “to make and maintain such roads and ways as may be in their judgement necessary or proper”. Given the approach to interpretation spelled out above I am satisfied that it is open to the Defendant to create a means of access for the benefit of an area of land adjoining the common provided the means of access so created does not interfere with the ability of members of the public to continue to enjoy the part of the common across which the access is created and provided that the creation of the means of access is consistent with the duties of the Defendant and the overall objectives of the Act. It follows that I do not accept Mr Petchey’s submission that this provision within section 39 of the 1871 Act should be interpreted to mean that the construction of a means of access over the common is authorised only if the construction is necessary or proper in connection with the Defendant’s duty to maintain and/or preserve the common. To accept that submission would be to revert to a narrow, literal approach to the interpretation of the Act – an approach disavowed, specifically, in *Housden*.
28. The duties imposed upon the Defendant by the terms of the 1871 Act and its overall objectives are not absolute in their terms. Section 34 imposes a duty upon the Defendant to keep the commons open, unenclosed and unbuilt upon. The Defendant must use all lawful means to preserve the commons as open spaces; it must resist encroachments, attempted encroachments and any enclosure or appropriation. It is to be noted, however, that the duty to keep the commons “unenclosed and unbuilt on” is qualified by the phrase “except as otherwise in this Act expressed.” Section 36 imposes a duty upon the Defendant to preserve the natural aspect and state of the commons and, “to that end”, protect the turf etc. This duty, however, is qualified by the phrase “as far as may be”. The overall objectives of the Act are expressed in its preamble which expressly recognises that “it would be of great local and public advantage if the commons were always kept unenclosed and unbuilt on, their natural aspect and state being, *as far as may be, preserved*” (my emphasis in italics).

29. In my judgement the existence of the qualifying words in sections 34 and 36 and in the preamble demonstrate that Parliament was conferring a degree of flexibility upon the Defendant in relation to the manner in which it complied with its duties. While I accept, without hesitation, that the duties imposed upon the Defendant and the overall objectives of the Act have as their central aim the concept of preserving the natural environment of the commons it is clear, in my judgement, that the Defendant's duties do not require them to defend every blade of grass come what may in the event that it is called upon to consider the exercise of its powers in respect of a proposal which affects the natural environment of the commons. The Defendant is entitled to make a judgement about the exercise of its powers which takes account of the likely impact of a proposal upon the commons as a whole if that is appropriate as well as considering the impact upon the particular part of the commons in which the proposal is located. In the instant case, therefore, it seems to me that the Defendant must consider not just the impact of the grant of the rights contained within the Deed of Easement upon the part of the common directly affected i.e. the parts over which physical alteration will take place and the immediate environment of those places. It is also entitled to consider whether the grant of such rights will result in beneficial or negative effects on the commons as a whole either directly, or indirectly.
30. Some of the express powers conferred upon the Defendant by that section are phrased quite deliberately so as to make it clear that it is for the Defendant, exercising its judgement, to determine whether the criteria which justify the exercise of the power have or have not been met. So, for example, it is for the Defendant to judge whether the making or maintenance of a road is "necessary or proper". Mr Bhose QC submits that a challenge to the exercise of that power on the ground that the making of the road in question was neither necessary nor proper could succeed only if the Defendant's decision upon the need for or propriety of making the road was unreasonable or irrational. I am inclined to think he is correct in that submission, at least to the extent of agreeing that a challenge could succeed only upon well established judicial review principles. However, as will become apparent, I have reached the clear conclusion that the judgements made by the Defendant are wholly justified. In those circumstances no useful purpose would be served in a minute analysis of the scope of the challenges available to the Claimant.
31. Having set out the approach to interpretation of the 1871 Act which I believe to be correct, I turn, next, to consider whether the grant of any of the rights specified in the Deed of Easement should be impugned.
32. I deal first with the creation of the proposed means of access to the site. The Deed of Easement confers upon the Interested Party the right to enter the common to construct the access the location of which is defined by the plan attached to the Deed and the terms of the Deed itself. It is intended to construct a road with a tarmac surface and the access arrangements submitted for planning approval include a turning circle at what is said to be a suitable location.
33. The access authorised by the Deed would impact upon a very small area of the common. The road would be built, in part, upon land which was never part of the common and in part upon areas of the common which are currently under tarmac. A small area of the common which is currently undisturbed would be used to accommodate the turning circle thought to be necessary for car borne users of the school. Essentially, there has been a defined access in the location of the proposed access over much of its length and width since 1911, or thereabouts, and over nearly all its length and width since 1935. An access in the same location (save for that part of the common to be used for the turning circle) was proposed without objection as recently as 2010 and rights in respect of such an access are registered and are now owned by the Interested Party.
34. It seems to me to be impossible to conclude that the creation of this access would have the effect of interfering with the ability of members of the public to continue to enjoy the very

small part of the common across which it would be built. As Mr Fetherstonhaugh QC submits members of the public would be able to walk upon the access as they wished (subject only to avoiding the traffic). It is fanciful to think that this small area would or could ever be used other than as a means of walking further into the common.

35. I am equally sure that the creation of the access would be consistent with the Defendant's duties and the overall objectives of the 1871 Act. I reach that conclusion for a number of reasons. First, it is worth remembering that the access will be created only if the Interested Party obtains planning permission for its proposed development. The access has the specific purpose of providing an appropriate means of access to the development proposed upon the site. As Mr Devons points out in his witness statement dated 16 August 2013 (paragraphs 29 and 39) the provision of access to the site has the effect of enabling the development thereby ensuring the removal of derelict (and therefore unsightly) buildings adjacent to the common. He asserts on behalf of the Defendant that the removal of unsightly derelict buildings from the site and their replacement with appropriately designed new buildings which are not incompatible with their setting and location and which are approved by the local planning authority must be beneficial to the common as a whole. It seems to me that must be right. Second, nearly all of the land upon which the access will be constructed is already a means of access and has been for many decades; the necessary additional land is a very small area in comparative terms. Third, a consequence of the creation of the new access is that every other area which has, in the past, been used as a means of access to the site together with the former hospital car park will be returned to grass and will, in time, become indistinguishable from the common. The plan at page 675 of the Trial Bundle shows the extent of those areas – see the areas shaded green. The witness statement of Mr Clark on behalf of the Interested Party gives precise details of the areas of land to be used for the access and the areas which will be returned to their natural state – see paragraph 9 page 599 of the Trial Bundle. Overall, less land will be subject to hard surfaces than is currently the case. Fourth, the Defendant and the Interested Party have concluded an agreement whereby an area of land at Stag Lane SW15 will be transferred to the Defendant. This area of land will become part of the commons. Currently the Defendant is maintaining this area of land at its own expense notwithstanding it is owned by the Interested Party. It does that because a lack of maintenance would be deleterious to the commons in that location. It is clearly beneficial that this area should become part of the commons.
36. During the course of oral submissions there was a debate about whether the Defendant had acted lawfully when it had permitted the hospital managers to rearrange the means of access to the south of the site in 1911. Mr Petchey argues that the Defendant had no power to grant that permission and it had acted unlawfully. He submits that if this is the true position the fact that an access in this location has been in place for decades is not a material consideration in determining the acceptability of the creation of the access.
37. I cannot accept Mr Petchey's submission that the Defendant acted unlawfully in 1911 when it permitted a re-arrangement of the access arrangements at the southern end of the site. Such evidence as exists as to what occurred in 1910 and 1911 shows that the Defendant permitted the re-arrangement because its effect was that an area of land would be returned to its natural state and become part of the common which was greater (albeit by a small amount) than the area of the common over which the new means of access would be constructed. In my judgement there is no reason to suppose that what was permitted in 1911 was other than consistent with the Defendant's duties and the overall objectives of the 1871 Act. The Defendant did not dispose of land which was part of the common. Rather, it permitted an area of the common to be used as a means of access to the site and there is nothing to suggest that this use had the effect of interfering with the ability of members of the public to enjoy access to that part of the common or that the sanctioning of the re-arrangement was incompatible with the Defendant's duties or the overall objectives of the Act.

38. I should also record that Mr Petchey suggested that the relevant provisions for the exchange of common land available in 1911 were contained in the Inclosure Act 1845, but these powers, which were not invoked, would not have been effective to remove land from the protection of the 1871 Act. I was not shown those provisions (although I understand that the provisions have been re-enacted in modern legislation). The provisions in question relate to the sanctioning of an exchange of common land. In my judgement it was unnecessary to resort to those powers; upon a proper interpretation of the powers contained within the 1871 Act the Defendant was entitled to authorise arrangements which did not conflict with its duties or the overall objectives of the Act.
39. At one point I thought that Mr Petchey was proposing to argue that even if the 1911 arrangements had been sanctioned lawfully the fact of an access since that time was irrelevant to whether it was now lawful for the Defendant to sanction the creation of the proposed access. That may have been a misunderstanding on my part since it became clear as he developed his oral submissions that Mr Petchey accepted that if the access created in 1911 had been sanctioned lawfully its existence since that time was bound to have a bearing upon whether the sanctioning of the new access conflicted with the Defendant's duties or the overall objectives of the Act.
40. I turn next to consider a constellation of points of detail taken by the Claimant as they relate to the construction of the access. The first point taken is that the 1871 Act confers no power upon the Defendant to permit the Interested Party to construct an access over the common which benefits no one other than the owner and users of the site. In effect it is said that the 1871 Act does not allow the Defendant to authorise a third party to enter the common for the purpose of constructing an access to serve property owned by the third party.
41. I cannot accept that the Act should be interpreted so narrowly. If, as I have found, the Defendant has the power to permit an access to be created for the benefit of adjoining land and, as *Housden* establishes, it also has power to grant an easement over such an access it would be a very strange state of affairs if the Act did not empower the Defendant to authorise the third party to carry out the necessary construction work if the Defendant thought that to be appropriate. I can think of no cogent reason why the statute should be interpreted in such a way. I acknowledge, of course, that there are no express words contained within the statute which specify, in terms, that the Defendant may authorise a third party to construct an access which is intended for the benefit of his property; equally there are no express words which prohibit such authorisation.
42. As it happens it is far from clear to me why it is necessary that the 1871 Act need confer such a power. Why cannot the Defendant simply decide to carry into effect a lawful decision to permit construction work to be done on the common by authorising any person which it considers competent to do the work and by authorising the carrying out of the work in whatever manner it decides is appropriate in the circumstances? Assuming, however, that there is a need for statutory underpinning for the decision to permit the construction work to be done by the Interested Party I consider section 39 of the 1871 Act is sufficiently broad in its terms. That section should be interpreted so as to permit the Defendant to authorise a third party to construct an access when it is that party which will derive the benefit from the access. I remind myself that in any particular case the Defendant will have to satisfy itself that the authorisation granted to a third party will not put it in conflict with its duties under the Act or the overall objectives of the Act.
43. When this point was first raised on the Claimant's behalf the Defendant and the Interested Party sought to meet it by entering into a supplementary agreement dated 24 September 2013. In summary that agreement expressly stipulates that the work undertaken by the Interested Party in relation to the construction of the access shall be carried out as agent for the Defendant. The

evidence (which I accept) is that this agreement was concluded as a genuine attempt to resolve one of the issues in this litigation.

44. The attempt to accommodate the Claimant's argument has been met with further opposition. Mr Petchey complains that the supplementary agreement is a "sham" and is, therefore, void or unenforceable. He also submits that the supplementary agreement does not constitute an enforceable contract since it is not supported by consideration.
45. I do not propose to lengthen this judgement by considering the issue of consideration. I say that because the parties could, at any stage, constitute the supplementary agreement in a deed at which point the need for consideration would cease to exist.
46. In my judgement the supplementary agreement is not a sham. It is common ground that this issue is to be tested by reference to a passage in the judgement of Diplock LJ (as he then was) in *Snook v London & West Riding Investments Ltd* [1967] 2QB 786. At page 802C Diplock LJ said:

"As regards the contention of the plaintiff that the transactions between himself, Auto Finance and defendants were a "sham" it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v McClure* and *Stoneleigh Finance Ltd v Philips*), that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating..."

I agree with Mr Fetherstonhaugh QC and Mr Bhose QC that the supplementary agreement cannot be regarded as a "sham" within the principles formulated by Diplock LJ. The Defendant and the Interested Party intend that their legal relationship shall be that which is described in the supplementary agreement.

47. To repeat, however, I am satisfied that the 1871 Act, properly interpreted, authorises the Defendant to permit the Interested Party to construct the access if statutory authority is necessary so as to enable the Defendant to act in that way.
48. The Claimant next complains that the Defendant has no power to permit the access to be constructed to a specification which is suitable for a modern road. In my judgement that submission is untenable. I accept the submissions made on behalf of the Defendant and Interested Party that the power conferred upon the Defendant by section 39 relates to all aspects of road construction and that provided the finished surface of the road is not such as to put the Defendant in conflict with its duties or prejudices the overall objectives of the Act the Defendant can permit the same. I cannot conclude that the provision of a tarmac surface upon proper foundations is in any sense objectionable given that I have concluded, already, that the construction of an access is unobjectionable and tarmac has existed in this general location for decades quite lawfully as it seems to me.
49. The remaining issue in relation to the access is whether or not the Defendant is entitled to grant the rights of way over it which are contained in the Deed of Easement. The rights are carefully drafted so as to ensure that the use of the site (the dominant tenement) can never be significantly different from that for which planning permission is sought (see clauses 2.2 and 2.3 Trial Bundle page 372).

50. As a matter of logic the lawfulness of the grant of the rights of way set out within the Deed is separate from the lawfulness of the creation of the access. In this case, however, it would be an extraordinary state of affairs to conclude that the creation of the access was lawful but the grant of the proposed rights of way in relation to the access was unlawful. *Housden* establishes that a grant of a right of way over the common may be lawful. In this case I am satisfied that there is no legal impediment to the grant of the rights in question. The grant would not be inconsistent or conflict with the Defendant's duties; nor would it be inconsistent with the overall objectives of the Act. The grant of the rights of way would not impede the use of the common by members of the public. All those reasons which justify the creation of the access apply with equal force to the grant of the rights of way. In my judgement, the two are inextricably linked in the context of this case.
51. I turn to other points of objection to rights which the Defendant is proposing to grant. Clause 2.4 permits the Interested Party to construct footpaths in locations specified in the Deed of Easement and plan attached thereto. Mr Petchey submits that the 1871 Act does not authorise the creation of the footpaths which are proposed.
52. Mr Devons deals with the issue of the footpaths at paragraph 36 of his witness statement. That reads as follows:
- “Turning now to the question of footpaths which it is proposed should be constructed around the Hospital Site, I would first of all confirm that footpaths are necessary for the upkeep and preservation of the Commons, as users of the Commons, and in particular parents with young families, dog walkers and the like, prefer to use and stick to the footpaths. In this way the usage of the Commons is concentrated upon the footpaths, and the open areas are allowed to remain comparatively untouched. Furthermore, it has not been agreed, as has been suggested by the Claimant, that all footpaths in or around the Hospital Site are to be tarmaced, albeit a small number of footpaths which are subject to a great deal of pedestrian traffic have had to be tarmaced, and in respect of which there has been no objection it will be clear from the agreement with LBW that the conservators have gone out of their way to ensure that all of the proposed works to the Commons which are to be affected as a result of the development of the Hospital Site are to be carried out as sympathetically and harmoniously in line with the rest of the Commons so as to maintain the Commons in their existing state so far as is at all possible or practicable.”
53. In my judgement this evidence justifies the Defendant's decision to permit the creation of the footpaths. Section 39 clearly empowers the Defendant to create footpaths. I have found that the Defendant is entitled to permit the Interested Party to create an access and by the same reasoning I conclude that it can permit the Interested Party to create footpaths. Given the evidence of Mr Devons, I am satisfied that the exercise of that power in this case would not put the Defendant in conflict with its duties under the Act nor would it be inconsistent with the overall objectives of the Act. The creation of the footpaths would certainly not impede access to the common for members of the public and, in many ways, it could facilitate such access.
54. The drawings submitted with the planning application show mounds at points on the common. The Deed of Easement does not, in terms, authorise the creation of mounds but does grant to the Interested Party the right to carry out works on the common which are required by the planning permission. The purpose of the mounds is to prevent unauthorised vehicle access onto the common.
55. I do not know what form any planning permission might take or whether the environmental advantages or disadvantages of mounds will be considered in the planning process. If mounds are considered appropriate in that context and there is some provision within the planning permission which requires them to be constructed I would be loathe to conclude that the

Defendant was acting unlawfully by granting a right to the Interested Party which facilitated compliance with the terms of the planning permission.

56. The practical advantages of mounds are attested to in the evidence of Mr Devons at paragraph 34 of his witness statement. If express statutory authority is necessary for the creation of mounds on the common I would conclude that the Defendant was exercising the power to “improve the common....for the use thereof for purposes of health and unrestricted exercise and recreation.” On the basis of the evidence of Mr Devons the creation of mounds in suitable locations on the common has the beneficial purpose of preventing unauthorised access by vehicles thereby enhancing the aim of providing unrestricted exercise and recreation on the common.
57. The same statutory provision can be invoked, in my judgement, in relation to the erection of bollards and the use of a lifting arm barrier. Those measures, obviously, serve the same purpose as do the mounds. I accept the evidence adduced on behalf of the Defendant which justifies their use.

Conclusion

58. The Defendant is entitled to grant to the Interested Party the various rights which are contained within the Deed of Easement provided the Interested Party obtains a “satisfactory planning permission”. It follows that this claim must fail.