

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Wyn Williams
CO/3457/2013**

Royal Courts of Justice
Strand, London, WC2A 2LL
9 July 2014

B e f o r e :

**LORD JUSTICE RIMER
LORD JUSTICE PATTEN
and
LORD JUSTICE KITCHIN**

Between:

NICHOLAS CHARLES EVANS

**Claimant/
Appellant**

- and -

**WIMBLEDON AND PUTNEY COMMONS
CONSERVATORS**

**Defendant/
Respondent**

- and -

LONDON BOROUGH OF WANDSWORTH

**Interested Party/
Respondent**

**Mr Robert McCracken QC and Mr Philip Petchey (instructed by Richard Buxton
Solicitor) for the Appellant
Mr Guy Fetherstonhaugh QC (instructed by Gregsons Solicitors) for the Respondent
Mr Ranjit Bhose QC (instructed by Sharpe Pritchard Solicitors) for the Interested
Party
Hearing date : 30 June 2014**

Lord Justice Patten :

1. The claimant is the co-founder of the Friends of Putney Common which he describes in his witness statement as a group of local residents whose aim is to protect such part of the site of

the former Putney Hospital (“the Site”) as is now in the ownership of London Borough of Wandsworth (“the Council”) from inappropriate development. The hospital was erected in 1911 on the site of two large semi-detached dwellinghouses and a row of cottages. The Site is landlocked and depends for access to the public highway on access roads across a small part of Putney Lower Common (“the Common”) which were created in 1911 with the consent of the Wimbledon and Putney Commons Conservators (“the Conservators”) to replace the road layout originally serving the dwellinghouses and the cottages.

2. The former hospital building is now derelict. There were plans to redevelop the Site so as to provide a primary care centre and a block of 24 flats. But the Site has now been sold by the Wandsworth Primary Care Trust (“the PCT”) to the Council who propose to develop the Site as a new primary school and housing for which planning permission was granted on 13 December 2013. The contract for the sale of the Site was conditional upon the Council entering into a deed of easement with the Conservators following the grant of planning permission for the development. Once executed, the deed of easement will provide for the grant to the Council as owner of the Site of rights of way by vehicle and on foot over a defined accessway and footpaths linking the Site and the development on it to the Lower Richmond Road together with a footpath access from the north-eastern end of the Site to a residential road called Commondale which runs along the side of the Common parallel to the eastern boundary of the Site. The deed also grants rights of access to the Council to enable it to construct the necessary accessway and footpaths and afterwards to maintain them. As part of the consideration for the grant of these new rights of way, the Council has agreed (as part of the Agreed Works as defined in the Schedule to the deed) to remove areas of hardstanding around the perimeter of the Site so as to create new grassed areas in keeping with the Common and to transfer to the Conservators such of these areas as remain in its ownership. As I shall explain in a little more detail later in this judgement, some of the areas of hardstanding lay within the land owned by the PCT and were transferred to the Conservators prior to the sale of the Site to the Council. But other areas have always remained in the ownership of the Conservators as part of the Common and their use in connection with the hospital has been by licence. The schedule of Agreed Works applies to both areas. As a consequence, the existing hospital car park and the access road on the western and southern sides of the Site will be erased together with the existing access road from the northern end of the Site leading to Commondale. The existing access road leading from Lower Richmond Road in the south along the eastern side of the Site will be refurbished as the sole vehicular means of access to the Site. The plans for the access road indicate that there will be some kind of barrier close to its junction with the Lower Richmond Road together with bollards and earth mounds approximately 1m in height along the edge of the road adjacent to the Common. The evidence of the Conservators is that the sole purpose of these measures is to prevent unlawful encampments on the Common by travellers and others and that similar measures (at least in respect of earth mounds) have been employed elsewhere. The access road will culminate in a new turning circle adjacent to the proposed point of entry to the flats which are to be built at the northern end of the Site. This will be constructed close to the former access road leading to Commondale which will be reduced to a footpath.
3. As mentioned earlier, the eastern access road was created in 1911 as part of a re-organisation of the access roads leading to the properties on the Site known as East Lodge and West Lodge. There were then two access roads leading from the Lower Richmond Road which crossed each other diagonally south of the two dwellinghouses and then proceeded northwards up both sides of the two properties. The 1911 re-arrangement eliminated the crossover I have described, substituting for it two new access roads leading straight from the existing access points on the Lower Richmond Road to the eastern and western sides respectively of the Site which were linked by an existing access road running east-west immediately in front of the two dwellinghouses. Subsequently, in 1935 and again in 1957, the eastern access road, with the consent of the Conservators, was extended further north along the eastern boundary of the Site so as to facilitate access to new hospital buildings on land formerly occupied by the row of cottages (Waller’s Cottages) to the north of East and West Lodge. The 1957 extension involved not only

the northerly extension of the access road but also the widening of an access road leading from that end of the hospital site to Comondale. This provided a link from that access point to the hospital car park which was constructed in 1956 by tarmacing the area to the south of the Site between the eastern and western access roads created under the 1911 re-arrangement.

4. Neither the Site itself nor the access roads as they stood before 1911 have ever been part of the Common. They were expressly excluded by the terms of Part B of the Third Schedule to the Wimbledon and Putney Commons Act 1871 (“the 1871 Act”) which created the Common and vested title to it in the Conservators. Mr Fetherstonhaugh QC for the Conservators says that there is no extant record of title to the pre-1871 access roads and it is not known whether they belonged to one or more of the owners of the two houses on the Site or to a third party. Nor is there any evidence of their being transferred to his clients either before 1911 or as a consequence of their replacement by the new eastern and western access roads. But whether or not they have been acquired as part of the Common under the powers contained in s.68 of the 1871 Act, he accepts that any purchase would have taken effect subject to a right of way in favour of the dwellinghouses and cottages on the Site so that the PCT and now the Council continues to enjoy rights of way over the site of the pre-1871 access roads. Mr McCracken QC for the claimant did not challenge this.
5. The new access roads created in 1911 and thereafter involved the use of part of the Common itself and by common consent have remained part of it. Their use involved the grant by the Conservators of what Mr Fetherstonhaugh concedes were licences over land in their ownership. The proposed deed of easement over the eastern access road and the footpaths will serve to confirm rights of way over the existing access road and the footpaths and will create additional rights of way over a turning circle which is to be constructed at the northern end of the new road in front of the school. With the exception of a few small areas, the rights of way will therefore be over the Common. Without them the Council, as owner of the Site, will be limited to relying on the rights of way over the pre-1871 access roads including the right of access from Comondale to the site of Waller’s Cottages.
6. The claimant sought judicial review of the decision of the Conservators to enter into the agreement to grant easements over parts of the Common by means of the deed of easement I have described. It was not argued that if the Conservators had the power to grant such easements then their decision to do so was *Wednesbury* unreasonable. Although it may be possible to take different views about the aesthetics of the scheme or the consequences of the new development for neighbouring occupiers, those are essentially matters for the planning authority. The Conservators are said by Mr McCracken to have erred in principle in rejecting the claimant’s evidence about the impact of the proposals on the openness of the Common. But this point is taken as part of a challenge to the *vires* of the proposed grant under the 1871 Act rather than as a separate allegation of administrative error or irrationality. In short, the sole question for the Administrative Court, and now for us, was whether the 1871 Act gives the Conservators the power to enter into the proposed deed of easement.
7. The 1871 Act was passed to preserve the open spaces comprised by Wimbledon and Putney Lower Common and by Putney Heath. Section 8 provided:

“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).”

8. Under s.32 the commons (as described in the Third Schedule to the 1871 Act) were vested in the Conservators subject to the powers and duties set out in the Act. So far as material, the Act provided:

“34. The Conservators shall at all times keep the commons open, uninclosed, and unbuilt on, except as regards such parts thereof as are at the passing of this Act inclosed 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 inclosure or appropriation for any purpose of any part thereof.

35. 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.

36. The Conservators shall at all times preserve, as far as may be, the natural aspect and state of the commons, and to that end shall protect the turf, gorse, heather, timber and other trees, shrubs and brushwood thereon.

...

39. The Conservators shall by virtue of this Act have the following powers: (namely,)

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 inclosures for the protection thereof:

To build lodges, not exceeding six 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.”

9. Wyn Williams J ([2013] EWHC 3411 (Admin)) dismissed the claimant’s application for judicial review. He held that, on the authority of the decision of this court in *Housden v Conservators of Wimbledon and Putney Commons* [2008] 1 WLR 1172, the prohibition in s.35 on disposing of “any part of the commons” either has no application to the grant of an easement over part of the common or that such a grant is not prohibited by s.35 if the effect of the grant is not to diminish the physical area of the common as open space. The power in s.39 to “make and maintain such roads and ways as may be in their judgement necessary or proper” ought, he held, to be construed in the same way. He therefore rejected the submission made on behalf of the claimant that these words restrict the power to create roads over the common to cases where their construction is necessary and proper for the performance of the Conservators’ duty under s.34 to maintain and preserve the commons as open spaces. He said:

- “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.”

10. Mr McCracken relies on four grounds of appeal:

- (i) that the judge misconstrued the fundamental duties of the Conservators under ss. 34 and 36 of the 1871 Act in particular by reading the words in the pre-amble “as far as may be” as giving the Conservators a general discretion when, on their proper construction, those words should be read as meaning “as far as possible”. For the same reason, he was wrong to construe s.39 as he did;
- (ii) that the proposed access road will, on the evidence, cease in any real sense to be part of the Common and will become the road system for the school and the development of flats in breach of the Conservators’ duty under s.34;
- (iii) that the proposal to construct bollards and mounds (of 6m by 1m) along the Common side of the access road and at the entrance to the footpath at the northern end of the Site will constitute an alteration to the “natural aspect and state of the commons” in breach of s.36 and the judge was wrong to hold that the words “as far as may be” in s.36 allowed the Conservators to justify the effective loss of part of the natural landscape by the gains in the form of additional open space which would accrue from the grassing over and transfer of the former car park and western access road; and
- (iv) that the judge misunderstood the decision in *Housden*. All that the Court of Appeal decided was that the Conservators have the power to grant easements of access to

adjoining properties. It did not hold that they have the power to create or authorise the creation of tarmacadamed roads surrounded by substantial mounds and bollards in order to facilitate the redevelopment of land adjoining the Common. The creation of the mounds will in any case amount to the physical enclosure of part of the Common and be inconsistent with the environmental purpose of the 1871 Act. What, he submits, the Court of Appeal emphasised in *Housden* was that the grant of an easement was lawful provided that it did not conflict with the duty to preserve the Commons as open space. The Court was not concerned to decide (and did not decide) what might create such a conflict or in particular whether (as in this case) the creation of a tarmacadamed road with a barrier and the other roadside features I have described would be a breach of the Conservators' duties under ss. 34 and 36 of the 1871 Act to keep the Common open and uninclosed and to preserve its natural aspect and state.

11. Since the decision in *Housden* is binding on us and is a decision on the construction of the 1871 Act, that is the obvious place to start. The case concerned a claim by the owners of a property adjoining Wimbledon Common that the property (which was built between 1883 and 1893) had acquired the benefit of a right of way by prescription across a strip of land forming part of the common which lay between the property and the public highway.
12. Because the creation of a right of way under the Prescription Act 1832 proceeds on the basis of a presumed grant, the Court was faced with the issue of whether the Conservators had power to grant an easement over part of the Common in order to provide access from an adjoining property to the public highway.
13. The judge had held that there was no such power because the exercise by the Conservators of their core powers under s.8 of the 1871 Act was excluded by the provisions of s.35. Absent any other express power to grant an easement, they could not do so. But the Court of Appeal took a different view of the proper construction of the 1871 Act. Mummery LJ held that the environmental purpose of the Act in the preservation of the commons as public open space could be promoted and protected without adopting the narrow, literal construction favoured by the judge. He said:

“[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 appellants 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 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.”

14. He went on to say that the grant of the easement would not give the owners of the property exclusive possession of any part of the surface of the area of the Common over which it existed:

“[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 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 appellants 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.”

15. Carnwath LJ dealt with the matter more shortly:

“[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 Sch 2 para 5(b)), and thus includes incorporeal hereditaments such as easements. Section 35 prohibits disposal of “parts of the commons”. In ordinary language the words “part of the commons” denote 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 ordinary 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.”

16. Stephen Richards LJ agreed with both judgements.

17. It is therefore clear that this Court has construed s.8 as conferring on the Conservators power to grant an easement over a common in their ownership. Carnwath LJ considered that any limitations on that power are to be found in the need for them to act consistently with their overall objectives (which I take to mean their duties under ss. 34 and 36) rather than in s.35 which in his view had no application to the grant of easements. Mummery LJ took the same view about s.35 in [26] of his judgement. Neither of them was persuaded that the grant of an easement in that case would diminish the area of the common as open space.

18. On the basis that s.8 gives the Conservators power to grant easements as part of their express powers to dispose of land, it is difficult to see why Parliament should have intended to cancel out those powers by the provisions of s.35. The qualification to s.35 (“except as in this Act expressed”) has to be given some meaning and obviously refers to s.8 as well as to s.38 which confers an express power to let existing buildings on the commons. For that reason, I would not regard s.35 as negating the effect of s.8 even if, on its true construction, it did extend to the grant of easements. The key issue therefore, as identified in *Housden*, is not whether the power

is excluded by s.35 but whether it can be exercised consistently with the obligations of the Conservators under ss. 34 and 36 of the 1871 Act.

19. This is the point in the argument where Mr McCracken submits that *Housden* is either of no or very limited assistance. The court in that case was not concerned with a proposal to tarmac the access strip or otherwise to enclose it. The physical state of the strip was to remain unaltered. All that the adjoining occupiers sought was confirmation that they had a right of way over it. In this case, by contrast says Mr McCracken, the Conservators intend not only to grant rights of way over the access road and footpaths including the new turning circle, but also to tarmac the road and put in place the barrier and other deterrents against unauthorised parking. This will effectively exclude the public from the part of the Common occupied by the road and make it *de facto* a private access road for the use of the school and the block of flats which is confirmed, he says, by clause 3.1.2 of the deed of easement which contains a covenant by the Conservators:

“Not without the prior consent of the Grantee to enter into any agreement with any third party that permits any third party to link up with or use the Accessway other than for the purpose of maintenance of the commons.”

20. Mr McCracken’s argument extends, I think, to saying that any grant of an easement which involves the creation of some kind of artificial surface over the relevant part of the Common will necessarily fall foul of s.36 which contains an unqualified obligation on the part of the Conservators to preserve “as far as may be” the natural aspect and state of the Common. “As far as may be” means, he says, as far as possible and is not to be read as qualified by the powers of the Conservators to carry out works to the Common which will change its existing state and appearance.
21. The judge did not accept this construction of the Act and neither do I. Section 36 is specifically concerned with the preservation of the natural state of the commons and in particular with the grassland, gorse, heath and trees which grow there. To confirm this, s.37 prevents the Conservators from cutting and selling these items for profit. But s.36 is essentially ancillary to s.34 in that any encroachment or building on the Common will necessarily interfere with the existing landscape. It would be odd if any powers which the Conservators may have under the Act to build on or inclose parts of the Common which remain exercisable under s.34 are nonetheless absolutely excluded by the provisions of s.36. One would expect the legislative scheme to be that the Conservators should be under a duty to preserve the natural state of whatever parts of the Common they are obliged to maintain as open space under s.34. It seems to me that the natural construction of the words “as far as may be” in s.36 is “as far as required under the Act”. I do not accept Mr McCracken’s argument that s.36 provides an independent, absolute and unrelated duty which would have the effect of making the scheme under s.34 largely irrelevant.
22. Section 34 requires the Conservators to keep the Common “open, uninclosed, and unbuilt on, ... except as otherwise in this Act expressed”. The principal express provision which now permits inclosures, the making of roads and buildings is s.39. Mr Fetherstonhaugh submitted that on one view the construction of a road with a metalled surface was not the building on or inclosure of the Common but I prefer Mr McCracken’s submission that those words are wide enough to include what is proposed in this case.
23. The Conservators’ principal argument, however, is that there is an obvious and intended correlation between the qualification to s.34 (“except as otherwise in this Act expressed”) and the provisions of s.39 and any other provisions in the Act which authorise inclosure and building on the Common. Section 39 therefore operates as an express and recognised exception to s.34 according to its own terms. The words of qualification contained in s.34 refer simply to what the other relevant provisions of the Act permit and do not add any further inhibition on

how they may be exercised. The limits of those powers, and therefore of the exception to s.34, are to be found in s.39 itself.

24. In terms of *vires* therefore, the Conservators submit that there is power in s.8 (unqualified as it is by s.35) to grant the easements in this case and that the tarmacing of the road and the construction of the barrier, mounds and bollards which is what is said to distinguish this case from the facts in *Housden* do not fall foul of the provisions of either s.34 or s.36 if they are otherwise authorised by the express provisions of the 1871 Act. In the case of s.39, this means that the Conservators must consider them to be either necessary or proper.
25. In my judgement this construction of the 1871 Act is to be preferred to the one advanced on behalf of the appellant. The Act was intended to lay down a scheme of arrangement for the commons as open space for the foreseeable future. It is clear from the provisions of s.39 and the other exceptions contained in the now repealed ss. 40-67 that the Conservators were not intended to be placed under an unqualified duty to maintain the Common as open space in its existing state. The exceptions were limited in nature and were expressly provided for in the Act. But, consistently with that scheme of legislation, it is to the excepted provisions that one must look in order to discover the scope of the powers in question.
26. Mr McCracken submitted that, even on this construction of the Act, there was no express power to carry out the works in connection with the access road and footpaths which I have described. I do not accept that. Contrary to his submission, the inclusion in s.39 of the power to “make” roads must include the creation of a metalled or other surface. That is the natural meaning of the words and it is hard to understand why the Conservators should be empowered to make a road (so far as this would be possible) but not to provide it with a proper, usable surface. In relation to the barrier, bollards and mounds, he says that there is no power to construct or install such features in s.39 and Mr Fetherstonhaugh was inclined to agree with him. But these measures are intended for the protection of the Common from unauthorised camping and other trespassers which seems to me to come squarely within the duty under s.34 to use all lawful means to protect the commons and preserve them as open spaces. This is confirmed by the provisions of s.84 of the 1871 Act which empower the Conservators to make byelaws for the “exclusion and removal [from the Common] of gipsies, hawkers, beggars, rogues and vagabonds” and for preventing unauthorised persons from passing over the Common with vehicles.
27. In order to justify the construction of the access road and to grant the rights of way, I accept that the Conservators have to exercise a judgement as to what is necessary or proper. As Carnwath LJ observed in *Housden*, this is likely to require a consideration of the proposal against the background of the overall objectives of the 1871 Act. But I reject Mr McCracken’s submission that this is a narrowly focused exercise in which the only relevant criteria are what is strictly necessary for the maintenance of the Common as open space or, as I have said, in which any interference with the existing state of the Common has to be treated as impermissible.
28. It seems to me that in making a judgement as to what is proper, the Conservators are entitled to take into account (as they have done in this case) the overall impact of the proposal including the net effect on the Common of the scheme as a whole. As Mr Fetherstonhaugh reminded us, the present scheme of development is the latest phase in a long-running history of development of this part of the Common which began more than a century ago. The Conservators inherited, as it were, a network of existing roads to the south of the Site which they did not own and over which they had no control. They thought it appropriate in 1911 to agree to their replacement by a simplified access arrangement which had the benefit of eliminating much of the existing roadways and replacing them with two southern access roads. The hospital continued to enjoy these means of access which were extended to accommodate future development on the Site as I have described and the creation of the southern car park over a significant area of the

Common. No-one has hitherto objected to the use of parts of the Common for purposes of access to the hospital site and I am left with the strong impression both from what was said at the hearing and from the appellant's own evidence that the points now taken about the legitimacy of the grant of the proposed rights of way are largely directed to frustrating what local residents consider to be the over-intensive development of the Site but have not succeeded in challenging through the planning process.

29. The ultimate effect of the current proposals will be to restore as open grassland significant areas such as the car park and the western access road. The fact that this has been a two-stage process involving transfers first by the PCT and now by the Council does not in my view prevent the Conservators from looking at the overall result which will be achieved. This represents a net gain in terms of the area of the Common which will be returned to grass and will preclude any reliance by the owners of the Site on the rights of way which the land enjoyed as of 1871. This would include a right of vehicular access to Commondale as against the footpath under the present scheme and would give the owner of the Site as dominant owner the right to enter the Common and to construct a way or ways suitable for the rights it enjoys: see *Newcomen v Coulson* (1887) 5 ChD 133 at 143; *Carter v Cole* [2006] EWCA Civ 398 at [8]. The Conservators would have no ability to prevent the construction of a metalled surface for that purpose.
30. All these factors are relevant circumstances against the background of which the s.8 power falls to be exercised. But, as I emphasised earlier in this judgement, this is not one of the issues on the appeal. The grounds of appeal do not challenge the reasonableness of the decision which the Conservators have made but only the existence of the power to make it. For the reasons given above, particularly in relation to the construction of ss. 34, 36 and 39 of the 1871 Act, I do not regard the execution of the proposed deed of easement as lying outside the scope of their powers. I would therefore dismiss the appeal.

Lord Justice Kitchen :

31. I agree.

Lord Justice Rimer :

32. I also agree.