

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

Royal Courts of Justice
Strand, London, WC2A 2LL

08/05/2013

B e f o r e :

MR JUSTICE STADLEN

Between:

**Norbrook Laboratories Limited (1)
The Right Honourable The Lord Ballyedmond
(2)
Lady Ballyedmond (3)**

Claimant

- and -

Carlisle City Council

Defendant

**Iain Colville (instructed by Pinsent Masons LLP) for the 1st, 2nd & 3rd Claimants
Alan Evans (instructed by Carlisle City Council) for the Defendant**

Hearing dates: 3rd & 4th October 2012

Mr Justice Stadlen:

1. This is a claim brought under section 288(1) of the Town and Country Planning Act 1990 ("the 1990 Act"). The Claimants (strictly the applicants) seek an order quashing a Tree Preservation Order made under the 1990 Act by the Defendant (strictly the Respondent) ("the Council") on 26 November 2010. The central issue in the case turns on whether the land in question was "public open space" for the purposes of section 9 of the Forestry Act 1967, as the Council contends, so that any woodland management of the land was outwith the jurisdiction of the Forestry Commission or whether, as the Claimants contend, it was not. The answer to that question depends on whether, as the Claimants contend, the right of free access conferred on the

inhabitants of the district and neighbourhood by Article 5 of a Scheme made under the Commons Act 1899 by the Council on 13 September 1915 was extinguished and lapsed by reason of their non-registration and/or the non-registration of rights of common to which they were parasitic under the Commons Registration Act 1965 (“the 1965” Act”).

Factual Background

2. Corby Castle and its estate at Great Corby, Carlisle (‘the Estate’) is occupied by Lord and Lady Ballyedmond, the Second and Third Claimants. The Estate includes an area of land known as Corby Beck Wood which is adjacent to Clints Road, Great Corby (‘the Land’). The Land was used in the past for quarrying stones for both the Estate and the local village. Over time trees have been allowed to grow creating a woodland on the bed of the quarry. Norbrook Laboratories Limited, the First Claimant, is responsible for carrying out all works to and maintenance of the Land.
3. On 29 October 1915 an Order made by the Rural District Council of Carlisle on 13 September 1915 (‘the Order’) under the Commons Act 1899 (“the 1899 Act”) was approved by Order of the Board of Agriculture and Fisheries. The Order set out a scheme for regulation of ‘pieces of land’ by the Rural District Council of Carlisle (the Council’s predecessor). The pieces of land identified in the Order were referred to as ‘the commons’. The Land, identified as Great Corby Village Quarry, was included as part of the commons and a footpath is shown to run across it marked ‘FP’, which is now registered as Public Footpath 138030.
4. Article 1 of the Order provided that the Commons, being Commons within the meaning of the 1899 Act should henceforth be regulated by the scheme created by the Order (“the Scheme”) and that the management of them should be vested in the Council. Article 5 of the Order conferred on the inhabitants of the district and the neighbourhood a right of free access to every part of the commons and a privilege of playing games and enjoying other species of recreation thereon subject to any bye-laws made by the Council under the Scheme.
5. The Claimants contend that Article 5 also conferred on the inhabitants of the district and neighbourhood new rights of common in respect of the land. I set out relevant provisions of the Order below.
6. The Land was provisionally registered as common land on 8 August 1969 in the Register of Common Land (“the Register”) under the 1965 Act under Register Unit No. 180. That registration was finalised on 1 August 1972. The Register did not and does not set out any rights of common over or in respect of the land.
7. In an email dated 20 July 2010 the Registration Officer of Cumbria County Council informed the Third Claimant that the Common Land Register in respect of the Land comprised land and ownership sections only and that there was no rights section, indicating that no one had claimed rights over the Land at the time of registration under the 1965 Act. The issue as to the status of any rights over the Land first came to light after the Second Claimant decided in April 2010 to erect fencing adjacent to the public footpath that runs across the Land in order to prevent injury from falling rocks on members of the public straying into the quarry area. That fear had arisen as a result of evidence of people straying off the path into the quarry area and mountain biking, fire lighting, climbing and graffiti on and around the quarry faces. In a letter dated 24 May 2010 the Council had asked the Second Claimant to remove the fence as it was considered to have the potential to cause injury and also because the Land “is a registered common (CL180) and new fencing may not be erected except with a written consent of the Secretary of State”.
8. The Estate rejected the Council’s position that the Second Claimant was not permitted to erect the fence and also rejected the contention that the Land was subject to rights of common. The Council maintained their position that the fence must be removed, relying in part on the registration of the land as common land and the rights of the inhabitants of the district and the

neighbourhood to access it under the Order. The disputed entitlement to erect the fence is not an issue raised in this application.

9. On 8 June 2010 the Director of Estate Management on the Estate applied to the Forestry Commission for felling permission and a woodland regeneration grant. The application said that the proposal was “to fell existing woodland which is unmanaged and replant with native species to enhance the area”. The proposal was said to be to fell “all or selected trees and regenerate woodland and restock with broad-leaves to achieve at least 1100 trees per hectare”. Permission was sought to fell trees in 100% of the woodland.
10. In response to being consulted on the Estate’s application by the Forestry Commission the Council on 26 November 2010 made and served a provisional woodland tree preservation order (“the TPO”) covering all species of tree on the Land. The TPO prohibited the cutting down or lopping of any trees on the land except with the consent of the Council and, where such consent was given subject to conditions, in accordance with those conditions.
11. The accompanying Statement of Reasons included the following:

“...The guidance set out in the Department of the Environment Transport and Regions Document “Tree Preservation Orders, A Guide to the Law and Good Practice” states that tree preservation orders should be used to protect selected trees and woodlands if their removal would have a significant impact on the local environment and its enjoyment by the public.

The woodland is prominent in the landscape, and clearly visible from footpaths that pass through it and Clints Road. It is considered to be of significant visual amenity and landscape value to the locality and its loss would be detrimental to the area and its enjoyment by the public.

The woodland is situated in registered Common Land. A felling licence application has recently been submitted in respect of the woodland to the Forestry Commission to clear fell and replant. However **trees on Common land are exempt from the Felling Licence regime**. The woodlands therefore have no protection from felling, and there is no mechanism to ensure replanting.

It is considered a Tree Preservation Order is appropriate as the loss of the woodland would be detrimental to the character of the area and its enjoyment by the public.” (Emphasis added).

12. It was accepted by Mr Evans on behalf of the Council that the mere fact that trees are on common land would not in itself exempt them from the Felling Licence regime. However it was accepted by Mr Colville on behalf of the Claimants that that error was corrected (subject to the legal issues in dispute in this case) by the following extract of the officers’ report to the Development Control Committee (“The Committee”) for its meeting 11 March 2011 recommending that the provisional Tree Preservation Order made on 26 November 2010 should be confirmed:
 - “(iv) The Statement of Reasons accurately reflects the situation at the time the Tree Preservation Order was made. The English Woodland Grant Scheme was for the clear felling and re-planting of the woodland, it was considered that the proposed Scheme was exempt from the Felling Licence regime, and, as such the woodlands had no protection from felling.
 - (v) The Forestry Commission have taken the view, based on advice from DEFRA solicitors that the **Common is public access land and therefore the trees are exempt from the Felling Licence regime**. As such there is no mechanism other than the Tree Preservation Order controlling the management of this woodland in accordance with the Scheme of Regulation for the benefits of the inhabitants of the district and the neighbourhood. (Emphasis added).
 - (vi) The Tree Preservation Order is the only mechanism controlling the woodland management, and is not an additional control.”

13. These concessions reflect the terms of section 9(6) of the Forestry Act 1967 (“the 1967 Act”). Section 9(1) of the 1967 Act provides that a felling licence granted by the Forestry Commissioners is required for the felling of growing trees except in a case where by or under the provisions of that part of the Act that subsection is expressed not to apply. Section 19(2) provides that subsection (1) does not apply to the felling of trees growing on “public open spaces”. Section 19(6) provides:

““Public open space” means land laid out as a public garden or used (otherwise than in pursuance of section 193 of the Law of Property Act 1925 or of Part V of the National Parks and Access to the Countryside Act 1949 or Part I of the Countryside and Rights of Way Act 2000) for the purpose of public recreation...”
14. It was common ground that in order to fall within the definition of “public open space” it is not sufficient that the land in question is common land. In the context of this case it must be land used for the purpose of public recreation. I return to this in more detail below.
15. Detailed objections to the TPO were submitted on behalf of the Second and Third Claimants to the Council on 23 December 2010. In summary it was submitted that the Council were wrong to contend that the Forestry Commission did not have jurisdiction to grant a felling licence under the 1967 Act because the Council were wrong to contend that the rights over the Land under the 1915 Scheme still applied and the Land was registered common land. That being so it followed that the Council must revoke the provisional TPO and permit the Forestry Commission to process and determine the application for a felling licence. It was submitted that the rights of access as set out in the 1915 Scheme had been extinguished and/or were no longer exercisable as those rights were not registered as rights of common under the 1965 Act. Implicit in that submission was the proposition that the rights of access set out in the 1915 Scheme were rights of common.
16. It was submitted that, because the Forestry Commission had jurisdiction over the land so that before any felling could take place a licence from the Commission had to be obtained, there was protection from felling. Since the Second and Third Claimants were seeking the consent of the Forestry Commission for proposed management works to the woodland in accordance with the government guidance – Tree Preservation Orders: Guide to the Law and Good Practice – it was contended that the making of the TPO was not expedient in the interest of amenity for the purposes of section 198(1) of the 1990 Act given the proposed management scheme.
17. The officers’ report recommended that the Committee should confirm the TPO. It referred to the fact that the application to the Forestry Commission for a felling licence and regeneration grant had subsequently been amended to selectively thinning the woodland by 50 – 60% and replanting. The report included the following:

“2.0 The Trees Amenity Value

- 2.1 In accordance with good practice an objective assessment of the woodland based on expediency and amenity was undertaken. A score is awarded which indicates whether or not the woodlands are worthy of the statutory protection afforded by a Tree Preservation Order.
- 2.2 The assessment found the woodland achieved a score that indicated the woodland warranted the statutory protection afforded by a Tree Preservation Order...
- 3.2(i) The Common is not owned by the Council and it is not within their authority to manage or maintain it, other than to ensure the rights of the inhabitants of the neighbourhood under the Scheme of Regulation ...

- (iii) Whilst an English Woodland Grant Scheme has been submitted to the Forestry Commission they have declined to determine this as it falls outside the scope of the Forestry Act 1967 as the Common is Public Open Space.

I have already set out (iv) (v) and (vi).

4.0 Summary of Representations in favour of Tree Preservation Order 256

- (i) The City Council has by virtue of the Scheme of Regulation authority to ensure the preservation of the trees on the common for the benefit of the neighbourhood.

5.0 Conclusion

- 5.1 The Forestry Commission cannot determine the English Woodland Grant Scheme as the woodland is exempt from the Felling Licence regime.
- 5.2 The only control preventing the felling of trees on this area of common land is the Tree Preservation Order, and this is the only available mechanism to ensure good woodland management.
- 5.3 Carlisle City Council's Green Spaces Officers are opposed to selling off the woodland which is under a Scheme of Regulation granting authority to the Council to preserve the trees on the Common for the benefit of the inhabitants of the district and the neighbourhood.
- 5.4 The Tree Preservation Order will not prevent the owners from carrying out good woodland management, albeit an application will have to be made to and approved by the Local Planning Authority.
- 5.5 Having duly considered the representations and having weighed the objections against the present and future value of the woodland it is considered that the woodland will provide a significant level of public amenity for a reasonable period of time and therefore merits the protection afforded by Tree Preservation Orders.
- 6.1 It is recommended that the Committee resolve to confirm Tree Preservation Order 256 without modification."

Issues on the Application

- 18. In his opening written submissions Mr Colville identified the following four issues:
 - 1) Did the Council err in concluding that the Land was "public open space" for the purpose of section 9 of the Forestry Act 1967 because it was common land and the public had rights of access to it and therefore any woodland management of the land was outwith the jurisdiction of the Forestry Commission?
 - 2) Did the Council err in finding that the Land was "waste land of the manor" which gave the public rights of access to the Land?
 - 3) Did the Council's Development Control Committee fail to consider, properly or at all, whether it was expedient in the interest of amenity to confirm the Tree Preservation Order?
 - 4) Did the Council act with procedural unfairness by not affording the applicants the opportunity to fully address their objections in oral submissions?

19. Mr Colville described questions one and two as substantive challenges and three and four as procedural challenges.

Relevant Legislation and The Scheme

20. I have already referred to the relevant provisions of the 1990 Act and the 1967 Act.
21. The Scheme was contained in and constituted by an order made by the Rural District Council of Carlisle on 13 September 1915 which was approved by the Order of the Board of Agriculture and Fisheries on 29 October 1915. The Order was made under the 1899 Act.
22. Article 1 of the Scheme provided that the Pieces of Land, with the ponds, paths and roads thereon, [including the Land]:
- “hereinafter referred to as “the Commons”, as the same are delineated in Plans deposited at the Office of the Rural District Council of Carlisle, hereinafter called “the Council,” and thereon coloured Green, being Commons within the meaning of the Commons Act 1899, shall henceforth be regulated by this Scheme and the Management thereof shall be vested in the Council.”
23. The Scheme contained the following additional relevant Articles:
3. The Council may execute any work of drainage, raising, levelling, or fencing or other works, for the protection and improvement of the Commons and shall preserve the turf, shrubs, trees, plants and grass thereon, and for this purpose may for short periods enclose by fences such portions as may require rest to revive the same and may plant trees and shrubs for shelter or ornament, and may place seats upon and light the Commons and **otherwise improve the Commons as places for exercise or recreation**, but the Council shall do nothing that may otherwise vary or alter the natural features or aspect of the Commons, or interfere with free access to every part thereof, and shall not erect upon the Commons any shelter, pavilion or other building without the previous consent of the persons entitled to the soil of the Commons. (emphasis added).
 4. The Council shall maintain the Commons free from all encroachments, and shall not permit any trespass on or partial or other enclosure of any part thereof.
 5. **The inhabitants of the district and the neighbourhood shall have a right of free access to every part of the commons, and a privilege of playing games and of enjoying other species of recreation thereon, subject to any bye-laws made by the Council under this Scheme** [The rubric to the left of Article 5 was: “Public Right of Access and Recreation”]. (Emphasis added).
 6. The Council shall have power to repair and maintain the existing paths and roads on the commons, and to set out, make and maintain such new paths and roads on the commons as appear to the Council to be necessary or expedient, and to take any proceedings necessary for the stopping or diversion of any highway over the commons....
 8. The Council may set apart for games any portion or portions of the commons as they may consider expedient and may form cricket grounds, and may allow the same to be temporarily enclosed with an open fence so as to prevent cattle and horses straying thereon, but such grounds shall not be laid out so near to any dwelling house as to create a nuisance or be an annoyance to the inhabitants thereof.
 9. **The Council may, for the prevention of nuisances and the preservation of order on the commons, and subject to the provisions of section 10 of the Commons Act, 1899, make, revoke, and alter bye-laws for any of the following purposes, viz:—**

- (a) For prohibiting the deposit on the commons, or in any pond thereon, of road-sand, materials for repair of roads, dung, rubbish, wood or any other matter.
 - (b) For prohibiting any person without lawful authority from digging, cutting, or taking turf, sods, gravel, sand, clay or other substance on or from the commons and from cutting, felling or injuring any gorse, heather, timber or other tree, shrubwood, or other under plant growing on the Commons.
 - (c) **For regulating the place and mode of digging and taking turf, sods, gravel, sand, clay, or other substance, and cutting, felling, and taking trees or underwood on or from the commons in exercise of any right of common or other right over the Commons. ...** (emphasis added).
 - (f) For prohibiting any person without lawful authority from bird-catching, setting traps or nets or liming trees or laying snares for birds or other animals, taking birds' eggs or nests, and shooting or chasing game or other animals on the commons. ...
 - (g) For prohibiting or regulating the drawing without lawful authority upon the Commons of any carriage, cart, caravan, truck or other vehicle, and the erecting or permitting to remain on the commons without the consent of the Council or other lawful authority any building, shed, tent, fence, post, railing, or other structure, whether used in connection with the playing of games or not, and for authorising an officer of the Council to remove from the commons any vehicle drawn upon the commons, and any structure erected thereon in contravention of any such bye-law ...
 - (i) For prohibiting or regulating the lighting of any fire on the commons ...
 - (l) For regulating games to be played and other means of recreation to be exercised on the Commons, and assemblages of persons thereon. ...
 - (m) For regulating the use of any portion of the Commons temporarily enclosed or set apart under this Scheme for any purpose.
 - (n) For prohibiting or regulating horses being exercised or broken in without lawful authority by grooms or others on the commons.
 - (o) For prohibiting any person without lawful authority from turning out or permitting to remain on the Commons any cattle, sheep or other animals, and for authorising an officer of the Council to remove from the Commons any cattle, sheep, or other animal being upon the commons in contravention of any such bye-law....
11. **“Nothing in this Scheme or any bye-law made thereunder shall** prejudice or affect any right of the persons entitled as Lord of the Manor or otherwise to the soil of the commons, or of any person claiming under him, which is lawfully exercisable in, over, under, or on the soil or surface of the commons, in connection with game or with mines, minerals or other substrata, or otherwise; or prejudice or affect any rights of the commoners in or over the Commons or the lawful use of any highway or thoroughfare on the Commons, or **affect any power or obligation to repairing such highway or thoroughfare.**” (emphasis added).
24. As mentioned already the Order was made pursuant to the powers conferred on the Council by the 1899 Act. That Act was described as “an Act to amend the Inclosure Acts, 1845 to 1882, and the Law relating to Commons and Open Spaces. Part I of the Act was headed: “Regulation of Commons”

The Act provided so far as relevant as follows:

“ 1.(1) The Council of an urban or rural district may make a Scheme for the regulation and management of any common within their district with a view to the expenditure of money on the drainage, levelling and improvement of the Common, and to the making of bye-laws and regulations for the prevention of nuisances and the preservation of order on the Commons. [The rubric to the right of section one was in these terms: “Power for District Council to make Scheme for Regulation of Common”].

(2) The Scheme may contain any of the statutory provisions for the benefit of the neighbourhood mentioned in section seven of the Commons Act 1876. ...

15. In this part of this Act, unless the context otherwise requires, –

The expression “common” shall include any land subject to be inclosed under the Inclosure Acts 1845 to 1882, and any town or village green...”

25. Section 7 of the Commons Act 1876 (“the 1876 Act”) was in these terms:

“In any provisional order in relation to a Common, the inclosure Commissioners shall, in considering the expediency of the application, take into consideration the question whether such application will be for the benefit of the neighbourhood, and shall, with a view to such benefit, insert in any such order such of the following terms and conditions (in this Act referred to as statutory provisions for the benefit of the neighbourhood) as are applicable to the case; that is to say

(1) That free access is to be secured to any particular points of view; and

(2) That particular trees or objects of historical interest are to be preserved; and

(3) That there is to be reserved, where a recreation ground is not set out, a privilege of playing games or of enjoying other species of recreation at such times and in such manner and on such parts of the Common as maybe thought suitable, care being taken to cause the least possible injury to the person interested in the Commons; and

(4) That carriage roads, bridle paths, and footpaths, over such common are to be set out in such directions as may appear most commodious; and

(5) That any other specified thing is to be done which may be thought equitable and expedient, regard being had to the benefit of the neighbourhood.”

26. The rubric to the left of section seven was in these terms:

“Provisions for the benefit of a neighbourhood applicable alike to orders for regulation and orders for inclosure.”

27. Section 193 of the Law of Property Act 1925 (“the 1925 Act”) provided as follows:

(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 1 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 –

- (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.”

28. The 1965 Act provided so far as relevant:

- 1. “(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...
- (2) After the end of such period, not being less than three years, from the commencement of this Act as the Minister made by order determine –
 - (a) no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered; and
 - (b) no rights of common shall be exercisable over any such land unless they are registered either under this act or under the Land Registration Acts 1925 and 1936....
- (10) 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... (emphasis added).
- (11)(1) The foregoing provisions of this Act shall not apply to...any land exempted from those provisions by order of the Minister...
- (3) The Minister shall not make an order under this section with respect to any land unless it appears to him–
 - (a) that the land is regulated by a scheme under the Commons Act 1899 or the Metropolitan Commons Act 1866 to 1898 or is regulated under a local Act or under an Act confirming a provisional order made under the Commons Act 1876; and
 - (b) that no rights of common have been exercised over the land for at least 30 years and that the owner of the land is known.

22(1) In this Act unless the context otherwise requires,

“common land” means –

- (a) land subject to rights of common (as defined in this Act) whether those rights are exercisable or at all times or only during limited periods;
- (b) waste land of a manor not subject to rights of common;

but does not include a town or village green or any land which forms part of a highway....

“rights of common” includes cattlegates or beastgates (by whatever name known) and rights of sole or several vesture or herbage or of sole or several pasture, but does not include rights held for a term of years or from year to year...”

Issue 1: Did the Council err in concluding that the Land was “public open space” for the purpose of section 9 of the Forestry Act 1967 because it was common land and the public had rights of access to it, and therefore any woodland management of the land was outwith the jurisdiction of the Forestry Commission?

29. It is not in dispute that the only entries in the Common Land Register in respect of the Land were in the Land and Ownership Sections. There was no Rights section which, as stated by Ms Wallace, the Commons Registration Officer in her email to Norbrook dated 20 July 2010, indicated that no-one had claimed rights over the land at the time of registration under the 1965 Act. Mr Colville submitted that the combined effect of sections 1(2)(b) and 10 of the 1965 Act was that as from 31 July 1970, the relevant date under the Act, no rights of common were exercisable over the Land.
30. At the heart of Mr Colville’s case is the submission that the rights of access conferred on the inhabitants of the district and the neighbourhood by Article 5 of the Scheme were extinguished by reason of the non-registration of those rights and/or the existing rights of common over the Land and/or of new rights of common conferred on the residents by the Scheme.
31. His principal submission was that as a matter of statutory construction the Scheme conferred on the inhabitants of the district and the neighbourhood not only a free right of access to the Land but also rights of common over it. If that is right he submitted that the rights of access were parasitic on the rights of common and were extinguished together with them by virtue of their non-registration. If that is not right they were parasitic on the rights of common over the land which existed before the Scheme and were extinguished together with those rights by reason of **their** non-registration.
32. Mr Colville identified as the principal issue the question whether the right of free access conferred on the inhabitants by the Scheme also gave them a right of common. In his submission it did. It gave the inhabitants the full rights that could be enjoyed as commoners on the Land subject to regulation through bye-laws.
33. In support of this submission Mr Colville advanced a number of construction arguments. He submitted that on its face there was no limit prescribed by Article 5 to what could be done by the inhabitants in the exercise of the right conferred on them of free access to every part of the commons. The ambit of what could be done pursuant to the right has to be construed in the light of what, by implication, Article 9 reveals is permitted or prohibited. The starting point he submitted is that anything could be done unless explicitly prohibited. Article 9(a) and (b) empowered the Council to make bye-laws for prohibiting certain conduct. By reason of (b) in particular a bye-law could be passed for prohibiting any person without lawful authority from doing various things such as taking turf which would be included in rights of common. The implication from the power to make bye-laws to prohibit such conduct he submitted is that without such bye-laws such conduct, not having been prohibited, would be permissible. Thus in that way by implication Article 5 seen through the prism of Article 9 conferred on inhabitants new rights of common or rights akin to rights of common enjoyed by existing commoners.

34. Further or alternatively Mr Colville relied on that part of Article 11 which provided that nothing in the Scheme or any bye-law made under it “shall...prejudice or affect any rights of the commoners in or over the commons...”. Any bye-law made pursuant to Article 9 for the purposes set out in paragraph (c) for regulating the place and mode of digging and taking turf and so on from the commons in exercise of any right of common or other right over the commons would not, by virtue of Article 11, affect any rights of the existing commoners to dig and take turf and so on. The power to make such bye-laws Mr Colville argued would thus be otiose unless it was contemplated by the Scheme that such bye-laws could regulate the digging of turf and so on in the exercise of any right of common or other right over the commons other than those enjoyed by existing commoners. From that he argued it must necessarily be implied that Article 5, at the same time as conferring on the inhabitants a right of free access was also conferring on them rights of common. Otherwise there would be no right of common or other right over the commons capable of being regulated by a bye-law made pursuant to the power conferred on the Council by Article 9(c). Unlike the existing rights of common those new rights of common would be capable of being affected by bye-laws regulating the kind of conduct identified in Article 9(c).
35. Mr Colville submitted that the right of free access conferred by Article 5 should not be construed as a mere right to go onto the common land but for no other purpose. If it was intended to be so narrowly confined it would have said so. Article 9(c) for example showed that what was envisaged was that those accessing the Land pursuant to the right of free access under Article 5 should have the right to take turf and so on. If the right conferred by Article 5 was not a right of common then it was an “other right over the commons” such as is referred to in Article 9(c) which he submitted is akin to a right of common. There is no other way he submitted of reconciling the prohibition in Article 11 against bye laws affecting rights of the existing commoners with Article 9(c). As to the construction of Article 5 the fact that it conferred a privilege of playing games and enjoying other species of recreation in addition to a right of free access showed that the purpose of the former was not confined to exercising the latter and must therefore have been intended to include all rights which were not expressly prohibited or capable of being prohibited by bye-laws which were capable of lawfully being made pursuant to Article 9.
36. I am unable to accept these submissions. In my judgement it is very clear that Article 5 did not and was not intended to confer on residents of the district and neighbourhood rights of common or any rights akin to rights of common. Had it purported to do so it would have been *ultra vires* since the power conferred on the Council by section 1(1) and 1(2) of the 1899 Act did not extend to making a scheme which conferred rights of common or rights akin to rights of common.
37. The Order which constituted the Scheme was made pursuant to the powers conferred on the Council by section 1(1) of the 1899 Act. The power conferred on the Council by section 1(1) was limited to making schemes “for the regulation and management of any common within their district with a view to the expenditure of money on the drainage, levelling and improvement of the common, and to the making of bye-laws and regulations for the prevention of nuisances and the preservation of order on the commons”. A scheme which purported to confer new rights of common on the inhabitants of the district and neighbourhood would not be a scheme falling within that definition. In my judgement when construing Article 5 of the Scheme regard must be had to the purpose for which the Council was authorised by section 1(1) of the 1899 Act to make a scheme.
38. Further section 1(2) of the 1899 Act provided that a Scheme made pursuant to the power conferred by section 1(1) “may contain any of the statutory provisions for the benefit of the neighbourhood mentioned in section seven of the Commons Act, 1876”. When regard is had to the statutory provisions for the benefit of the neighbourhood mentioned in section 7 of the 1876 Act it is again clear in my judgement that a provision conferring new rights of common on the residents of the district and neighbourhood would not constitute such a statutory provision. In *Lewis v Mid Glamorgan County Council* [1995] 1 W.L.R. 3131 at 318E Lord Jauncey of Tullichettle stated that section 7 has been interpreted by Parliament as entitling the Inclosure

Commissioners to insert wide provisions for public access to commons. Again it follows in my judgement that a provision in a scheme made pursuant to section 1(1) of the 1899 Act which purported to confer new rights of common on the residents of the district and neighbourhood would be *ultra vires*.

39. By the same token and for the same reason when construing Article 5 of the Scheme and indeed the Scheme as a whole regard must be had to the fact that the enabling legislation which gave the Council the power to make the Scheme did not authorise it to make a scheme which contained a provision which had the effect of conferring rights of common on the residents of the district and neighbourhood.
40. The first statutory provision mentioned in section 7 of the 1876 Act was to secure free access to any particular points of view and the third was to reserve, where a recreation ground was not set out, a privilege of playing games or of enjoying other species of recreation at such times and in such manner and on such parts of the common as might be thought suitable. It is in my judgement abundantly clear that Article 5 was and was intended by the makers of the Scheme to be such a statutory provision as was referred to in the first and third statutory provisions in section 7 of the 1876 Act. It is no less clear in my judgement that a provision purporting to confer new rights of common or rights akin to rights of common would not fall within the definition of those two statutory provisions.
41. The same applies *a fortiori* in relation to the second and fourth statutory provisions set out in section 7 of the 1876 Act, namely that particular trees or objects of historical interest were to be preserved and that carriage roads, bridle paths and footpaths over the common were to be set out in such directions as might appear most commodious. In those circumstances it is equally clear in my judgement that a provision purporting to confer new rights of common or rights akin to rights of common would not fall within the sweep-up statutory provision set out as number 5 in section 7 of the 1876 Act, namely that “any other specified thing to be done which may be thought equitable and expedient, regard being had to the benefit of the neighbourhood”.
42. I observe that section 7 of the 1876 Act was in Part I which was described as being “Law as to the Regulation and Inclosure of Commons” and that the rubric next to section 7 was: “Provisions for the benefit of the neighbourhood applicable alike to orders for regulation and orders for inclosure.” Similarly section 1 of the 1899 Act was in Part I of that Act which had the title: “Regulation of Commons” and the rubric next to section 1(1) was: “Power for District Council to make Scheme for regulation of commons.” This serves to reinforce what is in my judgement self evident from the language of section 7 of the 1876 Act and section 1(1) and 1(2) of the 1899 Act, namely that neither was concerned with or intended to authorise the conferring of new rights of common.
43. This again in my judgement argues strongly against the construction of Article 5 of the Scheme and/or of the Scheme as a whole for which Mr Colville contended.
44. The language of Article 5 is in my judgement unambiguous and clear. It provides that the inhabitants of the district and neighbourhood shall have a right of free access to every part of the commons and a privilege of playing games and of enjoying other species of recreation thereon, subject to any bye-laws made by the Council under the Scheme. In my judgement the purpose of the right conferred was to entitle inhabitants of the district and neighbourhood to walk over every part of the common and to play games and enjoy other kinds of recreation on the commons and that was also the nature and effect of the right conferred. That is again supported by the rubric “public right of access and recreation” which appeared next to Article 5. If the intention had been to create a new right of common or a right akin to a new right of common it is in my judgement inconceivable that it would have been left by the maker of the Scheme to be conferred as a matter of implication on the coat-tails of the new right of access.

45. A right of free access over land is conceptually very different from a right of common. Rights of common are defined under section 22 of the 1965 Act as including

“cattlegates or beastgates (by whatever name known) and rights of sole or several vesture or herbage or of sole or several pasture ...”

Mr Colville in his Skeleton Argument pointed out that that is not a finite definition of the term “rights of common”. He submitted that traditionally the classification of rights of common by subject matter falls into six categories: pasturage (the right to graze), pannage (the right to graze pigs in woodlands and forests), estovers (the right to fell and take timber), turbary (the right to take turf or peat for fuel), piscary (the right to take fish from a pond) and common in the soil (right to take part of the soil or minerals from the land). There is also another right, the right to take animals *ferae naturae* (the right to take away animals). In *Hampshire County Council v Milburn* [1991] 1A.C. 325 at 338/E–F Lord Templeman, in a review of the history of rights of common, common land and waste land of a manor, said that there were four main categories of common rights, namely the common of pasture, common of estovers, the common of piscary and the common of turbary. Historically rights of common were created through statute, grant, prescription, privilege of law or by custom. As he submitted the 1899 Act provided a method of regulating a common through a district council.

46. There is in my judgement an obvious and material difference between providing a method of regulating a common through a district council and authorising a district council to confer new rights of common. A right of access over land plainly does not fall within any of the examples identified either in section 22 of the 1965 Act or by Lord Templeman in *Hampshire County Council v Milburn* or in the traditional classification of rights helpfully set out by Mr Colville.
47. In *Lewis v Mid Glamorgan* Lord Jauncey of Tullichettle held that there were material differences between the rights of the commoners over the commons and the rights of the lords of the manor in the soil on the one hand and the public rights of access and recreation with which the Court was concerned on the other:

“The nature of the three classes of rights which existed at the time of the passage of the Act of 1968 was materially different. Whereas the rights of the lords of the manor and the commoners were vested in ascertainable individuals, the public rights were not. The first class of rights could be acquired or extinguished by agreement with those interested. Public rights in general are exercisable by the public at large. They are neither transmissible nor extinguishable with consent and, accordingly, provisions applicable to acquisition and extinction of private rights can have no application thereto.” (At page 320C-D).

48. As already mentioned, Lord Jauncey also said that section 7 of the 1876 Act:

“has been interpreted by Parliament as entitling the Commissioners to insert wide provisions for public access to commons.” (At page 318E).

That is in my judgement a far cry from the proposition that section 7 of the 1876 Act was used by the 1899 Act as a model to authorise schemes to confer rights of common.

49. In *Lewis v Mid Glamorgan* Lord Browne-Wilkinson also distinguished between rights of common and public rights of access, which he described as two separate types of rights.

“There is no dispute that down to the passing of the Act of 1968 the land was subject to two separate types of rights: first, common rights enjoyed by commoners to depasture and otherwise use the land; second, public rights of access created by the Commons Regulation (Coity Wallia) Provisional Order Confirmation Act 1919 and the award made thereunder dated 13 August 1936.” (327H).

Lord Jauncey said that section 7 of the 1876 Act was undoubtedly one of the warrants for the reservation of the right of free access in Part II of the 1919 Provisional Order. (Page 318E).

50. Indeed the distinction between a right of common and a public right of access to a common was fundamental to the decision of the House of Lords in *Lewis v Mid Glamorgan*. In that case rights of common had been bought out by a water board intending to construct a reservoir on certain commons but “a right of free access at all times to the commons...and a privilege of recreation by walking and enjoying air and exercise thereon” provided in a local Act of Parliament had not been. The latter right was “for the benefit of the neighbourhood” and was rooted in a Provisional Order which had first been made under the 1876 Act.
51. Lord Jauncey explained that because public rights were in general exercisable by the public at large and were neither transmissible nor extinguishable with consent, provisions applicable to the acquisition and extinction of private rights could have no application to them. (at 320/D).
52. As to Mr Colville’s argument based on Article 9 of the Scheme, the bye-law which was authorised to be made by Article 9(b) was limited to prohibiting any person from cutting turf and so on “without lawful authority”. On the assumption that neither Article 5 nor any other part of the Scheme nor all the provisions of the Scheme taken together conferred on residents of the district and neighbourhood any right of common or other right over the commons, any resident exercising the right of free access conferred by Article 5 would not have lawful authority to cut turf and so on. Accordingly the power to make bye-laws prohibiting residents in the exercise of their newly conferred right of free access from cutting turf and so on would make perfect sense. It would also fall within the purpose for which bye-laws were authorised to be made under Article 9, namely the prevention of nuisance and the preservation of order on the commons as well as the purpose for which section 1(1) of the 1899 Act authorised schemes to be made, namely for the regulation and management of any common and the making of bye-laws and regulations for the prevention of nuisance and the preservation of order on the common.
53. To my mind Mr Colville’s most persuasive argument was that based on the proposition that the power conferred by Article 9(c) on the Council to make bye-laws regulating conduct in the exercise of any right of common or other right over the commons would be otiose unless there were persons other than the existing commoners who could exercise a right of common or other right over the commons. If there were no such persons, there would be no need for a power to make bye-laws regulating the conduct of such persons in the exercise of their rights of common or other rights over the commons. Since no bye-law made pursuant to Article 9(c) could affect any rights of the existing commoners in or over the commons by reason of Article 11, the only purpose of Article 9(c) must have been to enable the Council to make bye-laws to regulate the exercise by residents of the district and neighbourhood of new rights of free access to the common conferred by Article 5 and/or by implication by Article 9(c) and/or by Article 11 and/or by this Scheme as a whole.
54. There is in my judgement a tension between Article 9(c) and Article 11 and the drafting of the Scheme leaves something to be desired. However the tension is not such in my judgement as to compel the conclusion that Article 5 or any other Article(s) of the Scheme conferred on the inhabitants of the district and neighbourhood a right of common over the commons. Such a conclusion would fly in the face of what is in my view the clear and unambiguous wording of Article 5, which defines the right conferred on the residents as being a right of free access and a privilege of playing games and enjoying other species of recreation thereon. It would also fly in the face of the limited power for which section 1(1) and 1(2) of the 1899 Act empowered the Council to make the Scheme. If there were an irreconcilable conflict between Article 9(c) and the clear and unambiguous meaning which in my view Article 5 bears such conflict would in my view have to be resolved in favour of the clear and unambiguous construction of Article 5.
55. Mr Evans on behalf of the Council submitted that there is no such irreconcilable conflict. First he submitted that the framers of the Scheme may have contemplated some future grant of an “other

right over the commons” which would carry with it a right of taking turf and so on. A bye-law to regulate such conduct in pursuit of such other right over the commons as might in the future be conferred would not be otiose even though, consistently with Article 11, such a bye-law could not affect the existing rights of the commoners. Alternatively Mr Evans submitted that even if any bye-law made pursuant to Article 9(c) could never be effective since the only conduct it could affect would be conduct by the commoners in exercise of their rights over the commons, which by Article 11 the bye-law was not allowed to affect, so be it. It may be that Article 9(c) conferred a power on the Council to make bye-laws which could never be exercised. If the choice is between such a construction of Article 9(c) on the one hand and a construction of Article 5 which does damage to the clear and unambiguous meaning of the wording of that Article the former is to be preferred. I accept those submissions.

56. Mr Evans submitted that the separation between schemes under the 1899 Act and rights of common is seen in the 1965 Act itself. Section 11(3) of the 1965 Act provides that the minister shall not make an order under section 11(1) exempting land from the registration provisions of the Act unless the land is regulated by *inter alia* a scheme under the 1989 Act and no rights of common have been exercised over the land for at least 30 years.
57. I see some force in this submission, albeit the contention in support of which it was advanced, namely that there is a distinction between a right of common and a public right of access to a common, is one which, as I have indicated, was established by the House of Lords in *Lewis v Mid Glamorgan* and for which thus no further support is required.
58. Mr Evans further submitted as being inconsistent with Mr Colville’s contention that the public right of access and recreation provided by the Scheme was a right of common, that the Scheme itself distinguishes between its provisions, and in particular by implication the right to free access conferred by Article 5 on the one hand and rights of common on the other. Thus by Article 11 it is made clear that nothing in the Scheme shall “prejudice or affect any rights of the commoners in or over the commons”. I see some force in that submission to the extent that it is entirely consistent with a construction of the Scheme as conferring on the residents no rights beyond a right of free access, but it would not in itself in my judgement provide a complete answer to Mr Colville’s construction submission based on Article 9(c). However as I have held it does not need to.
59. Mr Colville submitted that the new rights of common which he contended had been conferred on the residents by the Scheme had to be registered under the 1965 Act by reason of section 1(1)(b) and that the effect of section 1(2)(b) of the 1965 Act is that because they were not registered within the prescribed period they were no longer exercisable. It is common ground that no such purported rights of common were registered. It follows that if such rights of common had been conferred on the residents by the Scheme they would no longer have been exercisable by the time the TPO was being considered by the Council. However since I have held that no such rights of common were conferred on the residents by the Scheme nothing turns on that fact.
60. Mr Colville’s next submission was that the loss of the rights of common which he contended had been conferred on the residents by the Scheme resulted also in the loss of all the rights of the residents of the district and the neighbourhood including in particular the rights of free access which were conferred on them by Article 5 of the Scheme. It is unnecessary for me adjudicate upon that submission since the premise on which it is based, namely that the Scheme had also conferred on the residents rights of common, does not, as I have held, arise. In fact if it had arisen, in my judgement, for the reasons which I set out below for rejecting Mr Colville’s alternative submission, even if, contrary to what I have held, the Scheme had conferred rights of common on the residents it would not follow that the rights of free access conferred on them by Article 5 of the Scheme lapsed at the same time as and by the reason of the lapse by non-registration of those rights of common.

61. Mr Colville's alternative submission was that on any view the rights of common which existed prior to the making of the Scheme were not registered within the prescribed period as they should have been by reason of section 1(b) of the 1965 Act and as a result, by reason of section 1(2)(b) of the 1965 Act, the effect of the failure to register them within the prescribed period was that thereafter they were no longer exercisable and thus had lapsed by the time the TPO was being considered by the Council. That proposition was not disputed by Mr Evans and is plainly right.
62. Mr Colville's alternative submission was that the Article 5 right of free access conferred on the residents by Article 5 of the Scheme was what he described as parasitic on the existing rights of common which were enjoyed by the commoners at the time the Scheme was made and that it followed that it must have lapsed by reason of and at the same time as the lapse of the rights of common on which they were parasitic by reason of the failure to register those rights of common within the prescribed period. For the reasons set out below I do not accept that submission.
63. Mr Colville's submission that the right of free access conferred by Article 5 was parasitic on the existing rights of common on the part of the commoners was based on the proposition that the Council had no power under section 1(1) of the 1899 Act to make a scheme save in respect of common land. Thus the power to make a scheme conferred by section 1(1) of the 1899 Act was only "for the regulation and management of any common...with a view to the expenditure of money on the drainage levelling and improvement of the common and to the making of bye-laws and regulations for the prevention of nuisances and the preservation of order on the common." The Council would not have been entitled to exercise its power under section 1(1) to make a scheme other than in respect of common land over which there were existing rights of common. The existence of rights of common was he submitted central to the purpose of enabling the Council to make schemes since the purpose of the schemes was to manage the common over which existing rights of common existed. If those rights of common fell away the justification for any other rights conferred by a scheme made pursuant to section 1(1) of the 1899 Act must fall away as well.
64. Mr Colville submitted that the purpose of the 1965 Act was to ensure that rights over common land were registered. In his submission that must include those rights arising out of the 1899 Act. Otherwise it would defeat the purpose of the 1965 Act.
65. Mr Colville further submitted that it would be odd to allow rights of access conferred on residents of the district and neighbourhood to survive once the rights of common were extinguished by reason of their lack of registration. No such survival was permitted in respect of rights of access for air and exercise conferred by section 193(1) of the 1925 Act. Section 193(1)(d)(i) of the 1925 Act provided that the rights of access for air and exercise conferred on members of the public by section 193(1) shall cease to apply to any land over which the commonable rights are extinguished under any statutory provision.
66. As I understood Mr Colville's argument it was not that, as a matter of statutory construction of the 1965 Act, the rights of access conferred by the Scheme lapsed under the 1965 Act by virtue of their non-registration. Rather his submission was that the fact that the Act did not expressly provide for such automatic lapse of rights of access conferred pursuant to the 1899 Act in the same way as the 1925 Act provided for such automatic lapse in respect of rights of access for air and exercise conferred by section 193(1) of that Act, supports his contention that the rights of access conferred by the Scheme pursuant to section 1(1) of the 1899 Act must have been more than mere rights of access for air and exercise and must have been rights of common or rights akin to rights of common. That is what Parliament must have assumed when the 1965 Act was passed. The purpose of that Act was to ensure that all rights over common land were registered, failing which they would automatically lapse and that must have included all rights arising out of the 1899 Act. Parliament must have assumed that rights of access which were parasitic on rights of common which lapsed for non-registration would also lapse. Otherwise it would have defeated the purpose of the 1965 Act.

67. I do not accept that submission. It seems to me to be based on a number of *non-sequiturs*. At its heart appears to be the proposition that since, when it passed the 1965 Act, Parliament cannot have intended rights conferred under the 1899 Act to survive notwithstanding the non-registration of any rights of common, the rights conferred by schemes made pursuant to section 1(1) of the 1899 Act must have been dependent for their continued existence on the continued existence of the rights of common on which they were parasitic. That proposition in my judgement confuses the question of what Parliament intended in 1965 with the questions of what Parliament intended when it passed section 1(1) of the 1899 Act and what the Council intended in 1915 when it made the Order constituting the Scheme including in particular Article 5. The former cannot be a relevant guide to construction of the latter which preceded the former. Logically if anything it is an argument in support of Mr Colville's prior argument that the Scheme conferred rights of common or rights akin to rights of common on the residents. I have already rejected that argument.
68. In my judgement the fact that, as Mr Colville accepted, the 1965 Act did not contain a provision such as that contained in section 193(1)(d)(i) of the 1925 Act providing that rights of access conferred by schemes made pursuant to the 1899 Act shall cease to apply to any land over which the commonable rights are extinguished under any statutory provisions points in precisely the opposite direction to that contended for by Mr Colville.
69. Nor, in my judgement, does it follow from the fact that the powers conferred by section 1(1) were exercisable only for the purpose of regulating common land that the rights of free access conferred by schemes made pursuant to section 1(1) must for that reason have automatically lapsed if and when rights of common over such common land themselves lapsed.
70. In *Lewis v Mid Glamorgan* a portion of certain common land was compulsorily acquired for the creation of a reservoir. The land was subject to common rights enjoyed by commoners to depasture and otherwise use the land and also to public rights of access created by the Commons Regulation (Coity Wallia) Provisional Order Confirmation Act 1919 and an award made thereunder. The right of free access conferred by the 1919 Act was similar to that conferred by Article 5 of the Scheme in this case. It was "for the benefit of the neighbourhood..a right of free access at all times to the commons..and a privilege of recreation by walking and enjoying air and thereon;..." (at 325/C). As already mentioned Lord Jauncey held that sections 7 and 12 of the 1876 Act were undoubtedly the warrants for the reservation of the right of free access in the 1919 Provisional Order.
71. Schedule 4 to the Compulsory Purchase Act 1965 provided that where persons were entitled to commonable or other rights over land which was subject to compulsory purchase such land could be acquired, on payment of compensation, free and discharged from all such commonable or other rights. Section 4(1) of the Mid Glamorgan Water Act 1968 applied the procedure under Schedule 4 to the Compulsory Purchase Act 1965 to the reservoir works.
72. Lord Jauncey held that on coming into force of the 1968 Act the land was waste land of a manor having been recognised as such by the 1919 Provisional Order and was common land within the meaning of section 22(1)(a) of the 1965 Act because it was subject to rights of common. He posed the question whether, on the assumption that the commonable rights were validly extinguished as a result of the procedure under Schedule 4 to the Compulsory Purchase Act which was applied to the reservoir works by section 4(1) of the 1968 Act, the provisions of either of those Acts had had the effect of extinguishing the public rights of access or of converting the land from that which was waste land of a manor into land which was no longer a common within the meaning of section 22(1) of the 1965 Act.
73. He held that the matter was not specifically addressed in either the Compulsory Purchase Act or in the 1968 Act. The latter nowhere referred to the public right of access created by the 1919 Provisional Order although making specific provision for other public and private rights. Schedule 4 of the Compulsory Purchase Act dealt with the acquisition of rights in the soil of a

common and of commonable rights thereover but did not deal with the extinction of public rights, whether created by usage or statute. Lord Jauncey held that the only statutory provisions which were inconsistent with the continued existence of the public rights were those in the 1968 Act which authorised the use of the land as a reservoir. If and when work on the reservoir started it would, so far as it was inconsistent with the existence of public rights, extinguish them but until the work started the rights remained. Until such time the public rights of access were unaffected.

74. Lord Jauncey further held that the land was still waste land of the manor for the purposes of section 22(1) of the 1965 Act although separated from the ownership of the Lordship thereof, relying on the speech of Lord Templeman in *Hampshire County Council v Milburn* at 344/A. Accordingly he held that the land was common land within the meaning of section 22(1)(b) of the 1965 Act, being waste land of a manor not subject to rights of common and as such it could not be removed from the register.
75. Thus Lord Jauncey held that public rights of access very similar to those conferred by Article 5 of the Scheme in this case whose statutory origin was very close to those in this case were not only distinct from existing rights of common over the same common land but were not extinguished by and indeed survived the extinction by statute of the rights of common. In that case no less than in this it could be said that the public right of access could not have been created save over common land which was subject to rights of common. However that did not stop Lord Jauncey from holding that the rights of access were capable of and did survive the extinction of the rights of common. (at 321/A-F).
76. Lord Browne-Wilkinson reached the same conclusion as Lord Jauncey. He held that if the appellants were still entitled to common rights, the land remained “common land” within limb (a) of the definition in the 1965 Act. Even if their rights of common over the land had been extinguished, if the public rights of access over the land were still exercisable, he did not understand it to be seriously disputed that the land remained “common land” within limb (b) as being “waste land of a manor not subject to rights of common.” It was established that “waste land” meant “open, uncultivated and unoccupied lands parcel of the manor, or open lands parcel of the manor other than the demesne lands of the manor”. Moreover it was established by *Hampshire County Council v Milburn* that for the purposes of section 22 of the 1965 Act the phrase “waste land of the manor” included land which had at any time been waste of a manor even though, at the relevant date, the land in question was no longer owned by the lord of the manor. It followed that if (as in the present case) the land had in the past been waste land of the manor, so long as it was bound to remain “open” it constituted “waste land of the manor” within limb (b) of the definition in the 1965 Act and was properly registered thereunder. (at 328/B–D).
77. He therefore held that the appellants were entitled to succeed and the land must remain registered if it were shown that either the appellants still enjoyed common rights over the land or the public still enjoyed rights of access over the land which ensured that the land must remain “open”. (at 328/D).
78. Lord Browne-Wilkinson held that the acquisition of the common rights could not be set aside. However like Lord Jauncey he held that the public rights of access had not been extinguished. Having traced the history of the creation of the public right of access, Lord Browne-Wilkinson described it as a very special form of public right. It was created by statute pursuant to a statutory procedure introduced by the 1876 Act for the specific purpose of ensuring that only enclosure schemes “for the benefit of the neighbourhood” were to be sanctioned. Lord Browne-Wilkinson held that a “public right of access created for the specific purpose of ensuring access to an open space for the benefit of the public of the neighbourhood is not to be extinguished save by clear words or inescapable implication” (at 330/B-C). That had not occurred in that case. He concluded that the land, formerly waste of the manor, remained and was bound to remain open. Accordingly it was “common land” within limb (b) of the definition in section 22 of the 1965 Act and was properly registered as such under that Act. The definition of “common land” in section 22(1)(b) of the 1965 Act is “waste land of the manor not subject to rights of common.”

79. It is in my judgement implicit in the speeches to which I have referred, with both of which Lord Griffiths and Lord Ackner agreed, that a public right of access conferred on residents of a district and neighbourhood may survive the extinction of rights of common which were exercisable over the common land over which the public right of access exists. Such public rights are not to be extinguished save by clear words or inescapable implication. In my judgement neither of those exceptions applies in this case and the right of free access conferred on the inhabitants of the district and neighbourhood by Article 5 of the Scheme was not extinguished by the non-registration and consequent lapse of the rights of common over the Land.
80. It is at this point necessary to refer to the second issue identified by Mr Colville in his Skeleton Argument, namely “Did the Council err in finding that the Land was “waste land of the manor” **which gave the public rights of access to the Land?**” (emphasis added). The words which I have emphasised suggest that the error alleged in the second issue was a different error to that alleged in the first, namely a conclusion reached by the Council that the Land was “public open space” because it was common land and the public had rights of access to it.
81. In his Skeleton Argument Mr Colville described the second alleged error as an alternative argument put forward to the Committee and unsupported by any reasoning orally on 11 March 2011 to the effect that the absence of a registered right of common meant that the Land was accordingly “waste land of the manor not subject to rights of common”.
82. This argument was based on an extract of a note taken by the Claimants of the meeting of the Committee on 11 March 2011 at which it considered whether to confirm the TPO. It recorded advice given by Ms Clare Liddle, a legal officer of the Council to the Committee. The extract was in these terms:
- “The Development Control Committee members were then given a summary from Clare Liddle. CL [Ms Liddle] noted that IC [Mr Colville] had commented that to confirm the TPO was inappropriate as the Land was subject to the Forestry Commission and that the owners argued that rights of common had been extinguished in respect of the land. However, CL noted that in her opinion this was a flawed argument as a right of access to a common land is not a right of common and therefore cannot be included in the Register as a right of common. CL noted that a right of common referred to the right to take products or animals off the land or onto the land. However in her opinion, a right of access did not constitute a right of common. CL noted that the land was registered common land but rights of common had not been registered in respect of the Land. However, she argued that the land was still protected as “waste land of manor”.
83. In oral submissions Mr Colville confirmed that in his submission in the last two sentences in that extract Ms Liddle was putting to the Committee an alternative argument as to why the Land was public open space. The first argument was that the right of access, not being a right of common and therefore incapable of being included in the Register as such, had not been extinguished. The alternative argument was that even if the right of access was a right of common which had been lost by non-registration, nonetheless the fact that the Land was waste of a manor itself created or preserved a right of access.
84. In my judgement Mr Evans was right to submit that that is an improbable interpretation of the note. As he put it, it is hard to see how someone who had just advised that “a right of access did not constitute a right of common” could think that, if that were wrong and it **were** a right of common which had been lost for non-registration, the public right of access would never the less be preserved if the Land were “waste land of the manor”. As he pointed out the second limb of the definition of common land in section 22(1)(b) of the 1965 Act is “waste land of a manor **not subject to rights of common**”. (emphasis added).
85. He submitted that a more probable interpretation of the note is that the advice given was addressing the more general issue of how the Land was registered as a common when there were no rights of common registered over it and that Ms Liddle was referring, although not by name,

to the well known case of *Corpus Christi College, Oxford v Gloucestershire County Council* [1983] Q.B. 360 which held that where land is finally registered as common land but no rights of common are registered against it the effect of section 10 of the 1965 Act is that the Land is conclusively presumed to be waste land of the manor within the meaning of section 22(1)(b).

86. In my judgement it is reasonably clear that the last two sentences were part and parcel of a single piece of advice given by Ms Liddle to the Committee explaining why in her opinion the Forestry Commission were right to take the position that the Land was “public open space” for the purposes of the 1967 Act. She was not advancing an alternative legal basis on which the Council could or should conclude that the Land was public open space and certainly not an argument, as suggested by the words which I have emphasised in the second issue, namely that what gave the public rights of access to the land was the fact that it was waste land of the manor.
87. The reason I raise this point now is that as it seemed to me Mr Colville himself relied, in support of his submissions on the first issue, on the submission that common land ceases to be common land upon the loss of the rights of common over it by reason of their non-registration under the 1965 Act, at which point any right of access granted under Article 5 over the land must also lapse. That he submitted is because the 1899 Act pursuant to which the Scheme conferring the rights of access was made was designed only to regulate common land over which there were rights of common and to give a public right of access over such land. Unlike in *Lewis v Mid Glamorgan* the Land was not described as waste land of a manor in the Scheme in, before or after the Scheme. It had always been common land with rights of common over it. That being so the common land ceased to be common land by reason of the non-registration of the rights of common over it, the right of access thereby came to an end and it was not permissible submitted Mr Colville to transfer rights of access whose origin depended on the existence of common land with rights of common over it to waste land of a manor.
88. In support of the first proposition Mr Colville pointed out that section 1(1) conferred a power to make a scheme for the regulation and management of a “common” which was defined in section 15 of the 1899 Act as including “any land subject to be inclosed under the Inclosure Acts, 1845 to 1882 and any town or village green.” The Inclosure Act 1845 was described as an Act to facilitate the Inclosure and Improvement of “Commons and Lands held in common...” and section 11 provided that all such lands as were thereafter mentioned that is to say “all lands subject to rights of common whatsoever...” shall be land subject to be inclosed under this Act.” That he submitted did not include waste land of a manor.
89. I do not accept Mr Colville’s second submission, partly for the reasons which I have already given. It does not in my judgement follow from the fact that the purpose for which the powers in section 1 of the 1899 Act were conferred was to make schemes to regulate common land that any rights of free access conferred by schemes made pursuant to section 1 of the 1899 Act must for that reason automatically lapse if and when rights over such common land themselves lapsed. That does not seem to me to follow as a matter of statutory construction of section 1(1) itself. That being so in my judgement the matter is subject to the general principles enunciated by the House of Lords in *Lewis v Mid Glamorgan*, namely that a public right of access created for the specific purpose of ensuring access to an open space for the benefit of the public and the neighbourhood is not to be extinguished save by clear words or inescapable implications.
90. In addition I am not in any event persuaded that the Land ceased to be common land by reason of the non-registration under the 1965 Act of the rights of common or that the fact that the Land was registered as waste land of a manor under section 22(1)(b) rather than land subject to rights of common under section 22(1)(a) meant that the right of access conferred by Article 5 was thereby extinguished or could not survive. First Lord Templeman in *Hampshire County Council v Milburn* in his historical review stated that the 1876 Act was passed in part to preserve the waste land for the benefit of the inhabitants generally (at 339/C). Further in *Corpus Christi College* Oliver J held:

“It has to be borne in mind that there are potentially three and not merely two categories of common land, for the first category of land subject to rights of common may include land which is waste land of the manor but which is so subject. It was unnecessary for definition purposes to specify this as a separate class of land since it would be included in paragraph (a) of the definition in section 22(1), but it is inherent in the definition that the extinguishment of rights in such a case would not result in the land ceasing to be common land but merely in transferring it from one branch of the definition to the other.” (377E –F).

91. Further there is nothing in the 1845 Act to compel the conclusion that the common land to which it applied excluded waste land of a manor. Moreover in *Lewis v Mid Glamorgan* the land in question was subject to a right of public access the warrant for whose statutory origins Lord Jauncey held were in part sections 7 and 36 of the 1876 Act. The House of Lords in that case saw no tension or inconsistency between the land in question being common land and it being waste land of a manor. Nor, upon the cessation of the rights of common over the land, did the House of Lords hold that the land ceased to be common land.
92. Mr Colville submitted that this case is to be distinguished from *Lewis v Mid Glamorgan* on the basis that in that case it was not disputed that the land in question had at some point in the past been waste land of the manor, whereas the same has not been said in this case. In my judgement if and to the extent that it were right that the Land was never waste land of a manor nothing material turns on that for the purposes of the question whether the right of free access conferred by Article 5 of the Scheme survived the extinction of the rights of common over it.
93. Mr Colville accepted, as he was bound to, that the Court of Appeal in *Corpus Christi College* held that even where land over which rights of common are exercisable has never been waste land of a manor the land does not cease to be common land by reason of the extinction for non-registration under the 1965 Act of the rights of common.
94. In *Corpus Christi College* a right of common to graze animals over land within the parish was extinguished by reason of its non-registration in the rights section of the register under the 1965 Act. The land itself however was registered in the land section of the register. The college, which owned the land, applied to the County Council to amend the register under section 13 of the 1965 Act by striking out the registration of the land as common land. That application was refused and the college applied to the County Court for a declaration under the section that the land had ceased to be common land. The judge held, that by virtue of section 10 of the 1965 Act the registration was conclusive evidence that the land was common land within the meaning of section 22(1) of the 1965 Act and he refused the application.
95. Dismissing the appeal the Court of Appeal held that in order to succeed in a claim for amendment of the register under section 13(a) of the 1965 Act it was necessary to show that the land in respect of which the amendment was sought had ceased to be common land since registration, that where the land was finally registered as common land but no rights of common were registered against it the effect of section 10 of the Act was that the land was conclusively presumed to be waste land of a manor within the meaning of section 22(1)(b) and that therefore, although the registration of the right of common had been avoided and cancelled, the land remained common land and the judge had been right to refuse the declaration sought.
96. Lord Denning MR identified the ultimate question as being:–

“What is the effect in law of land registered in the land section as “common land” but with no “rights of common” registered in the rights section, and that entry becoming conclusive under section 10? This must be judged by the effect the entry would have on a reader examining the register, who wanted to know what the position was. He is not to be credited with any knowledge of the previous history of the land. He ought to have by his side the definition of “common land” in section 22(1) of the Act: (a) land subject to rights of common... (b) waste land of a manor not subject to rights of common:...”

“Seeing that no rights of common are entered on the register, the person examining the register would at once assume that the land must be “waste land of the manor”. That is the only way of reconciling the entry in the land section with the non-entry in the rights section. As the land is conclusively to be regarded as “common land”, it follows that it must conclusively be deemed to be waste land of the manor. “

Now in this case it is said that, on the agreed Statement of Facts, this land was never waste land of the manor. But our reader of the register is not to know this. He is entitled to go by the register itself.” (at 368/H – 369/C).

97. Lord Denning concluded as follows:

“The common lands scattered all about England and Wales are part of our heritage from the past. They have enabled considerable areas of land to be preserved intact and unspoilt. Wherever they are registered as “common land” they should be preserved intact – even though there is no entry against them of any particular rights of any particular commoners. The conclusive presumption from such an entry is that in time past they were “waste of the manor” and have never lost that character even though now separated from the Lordship of the Manor. For this reason I think the Judge in the County Court was right and I would dismiss the appeal.” (at 369/G-H).

98. *Corpus Christi* was an extreme case in that on the agreed Statement of Facts the land had never been waste land of a manor. That did not prevent Lord Denning MR from holding that the common land over which there had been rights of common, which rights of common were lost by reason of non-registration, was conclusively to be regarded as “common land” and must conclusively be deemed to be waste land of the manor. Indeed as part of his reasoning there was a conclusive presumption from the entry of the land in the land register as “common land” that in time past it had previously been “waste of the manor” even though that past was entirely fictitious.

99. A curiosity is that in describing the outcome as a most just result as shown by that very case, Lord Denning MR stated that the tenants of the manor had had the undoubted right to graze Temple Hand Meadow when it was part of the demesne lands of the manor. Now he added they had the same rights but under the deemed description of waste land of the manor. How those rights survived the non-registration of the rights of common is not clear. Be that as it may, Lord Denning MR continued:

“As I have said in the passage about the history of the manor these parcels of land, demesne land and waste land of the manor, became in the course of time virtually the same – so far as the commons were concerned. It was all common land. So there is no harm done to anyone by holding that wherever common land is registered conclusively in the land section as common land – and no rights registered in anyone in the rights section – the common land is deemed conclusively to be waste land of the manor....” (at 368/D–E).

100. Lord Denning MR referred to a letter from the Department of Environment sent to all county councils which expressed the view, among other things, that:

“The registration system created by Parliament allows for commons to be on the register unsupported by rights of common, even where the land is not manorial waste. This seems clear from the case of a common which is not objected to but where all the rights thereover are objected to and are struck down. The common itself is entitled to final registration without regard to whether or not it is waste of the manor....” (at 368/D–E).

101. Lord Denning MR referred to the fact that that letter had been considered by Goff J in *Central Electricity Generating Board v Clwyd County Council* [1976] 1 W.L.R. 151, who had declined to accept the view of the department. Mr Hugh Francis QC, sitting as a Commons Commissioner, had confirmed the registration of the Dee Marsh Saltings as common land. Goff J had over-ruled

him. Lord Denning MR said that he preferred the ruling of the department and Mr Francis to the ruling of Goff J. (at 368/G).

102. Oliver LJ agreed with Lord Denning MR that the appeal should be dismissed and reached the same conclusion as the county court judge, albeit by what he described as possibly a slightly different route. (at 379/A).
103. Kerr LJ also agreed with Lord Denning MR that the appeal should be dismissed. He also agreed with Oliver LJ that the appellant's application to amend the register in effect involved them in seeking to show that the land had never been common land because it had never been waste land of a manor but that that was clearly precluded by section 10 of the 1965 Act (at 381/E–F). He held that the clear prima facie effect of section 10 must be that it was not then open to anyone to dispute the fact that Temple Ham Meadow was common land and further that to that extent it was now irrelevant whether it was common land because it was subject to rights of common or because it was waste land of the manor. (at 380/D).
104. In my judgement it follows from *Corpus Christi College* that the non-registration of the rights of common over the Land and their automatic lapse by reason of section 1(2)(b) of the 1965 Act did not have the effect that the Land ceased to be common land. Whether or not it had at any previous stage been waste of a manor (and for these purposes it would have been waste of a manor if it had been such at any time in its history – see *Hampshire County Council v Milburn* at 344/A and *Mid Glamorgan v Lewis* at 328/B–C), the registration of the Land under the 1965 Act as common land is deemed by section 10 of the 1965 Act to be conclusive evidence of the fact that it is common land. Thus the central plank of Mr Colville's alternative submission, namely that the Land ceased to be common land upon the loss by non-registration of the rights of common must in my judgement fail.
105. Even if, as submitted by Mr Colville, there is no evidence that the Land was ever waste land of a manor that would not affect the conclusiveness of the deemed status of the Land as common land. In my judgement if, as I find to be the case, the right of free access conferred by Article 5 of the Scheme was still in existence when the registration of the Land as common land became effective, the fact, if it is a fact, that the conclusive presumption that was waste land of a manor did not reflect the historical facts is not in itself a reason why the right of free access should at that moment have been extinguished. On the contrary the clear principles enunciated by the House of Lords in *Lewis v Mid Glamorgan* show that it was not extinguished.
106. Mr Colville sought to rely on the decision of the Court of Appeal in *Dance v Savery* [2011] EWCA Civ 1250 as showing that the Council was wrong to conclude that if there was a loss of the right of common established by the Scheme it meant that the Land automatically became waste land of the manor. That approach was said not only to do violence to the factual matrix but to impose rights lost by operation of section 10 of the 1965 Act and thus created rights which were never granted.
107. As I have indicated I do not consider that the passage in the note of Ms Liddle's Advice to the Council bears the meaning attributed to it by Mr Colville. I do not consider that Ms Liddle was advancing an alternative argument that if the right of access conferred by Article 5 of the Scheme was a right of common and was lost by non-registration thereof that meant that the land automatically became waste land of the manor, whereupon the right of access was reborn, recreated or preserved by reason of the change of the Land from common land to waste of a manor.
108. First there is nothing to suggest that she was advising the Council even as an alternative argument, that the right of access conferred by Article 5 might have been a right of common. Second I do not consider that she was advising the Council even in the alternative that if the right of access conferred by Article 5 was lost for whatever reason by non-registration, somehow it was recreated or revived by reason of the Land becoming waste land of the manor. She was in

my judgement doing no more than explaining as part of her single advice to the Council that (1) the right of access was not a right of common, (2) therefore it did not have to be registered as a right of common and (3) since the existing rights of common of the commoners had lapsed by non-registration, the Land was deemed to have been registered as common land within the definition of section 22(1)(b) as distinguished from section 22(1)(a).

109. The Court of Appeal in *Dance v Savery* did not in any way suggest that the decision or reasoning of the Court of Appeal in *Corpus Christi College* was wrong. The fact that it held that it was possible to look behind the Register to identify the nature of the rights of common which had been registered does not in my judgement assist Mr Colville's submission that the right of access conferred by Article 5 was extinguished. Nothing that was said by the Court of Appeal in *Dance v Savery* departed from the clear and authoritative principles laid down by the House of Lords in *Lewis v Mid Glamorgan* to the effect that a right of access conferred on the public cannot be extinguished without clear and unambiguous words. No such clear and unambiguous words have been identified in this case.
110. For these reasons in my judgement the Council did not err in concluding that the Land was "public open space" for the purposes of section 9 of the 1967 Act because the Land was common land and the public had a right of access to it and therefore that any woodland management of the Land was outwith the jurisdiction of the Forestry Commission. Accordingly the answer to the question posed by Mr Colville's first issue is no.
111. As to the second issue for the reasons which I have given in my judgement the Council did not make any additional or alternative error to that alleged in Issue 1. Accordingly the answer to the question posed by the second issue is also no. Even if I were wrong on that, as Mr Evans pointed out, since, as I have held, the Council's approach in not treating the public right of access and recreation conferred by Article 5 as a right of common which had been extinguished for non-registration but rather as an independent right which was not extinguished by clear words, the second ground of challenge would be academic.

Issue 3: Did the Council's Development Control Committee fail to consider, properly or at all, whether it was expedient in the interests of amenity to confirm the Tree Preservation Order?

112. Section 198(1) of the 1990 Act empowers a local planning authority to make an order for the purpose of making provision for the preservation of trees or woodlands in their area if it appears to them that it is expedient in the interests of amenity to do so. A TPO may in particular make provision for prohibiting the cutting down of trees except with the consent of the local planning authority and for enabling that authority to give their consent subject to conditions and also for securing the replanting in such manner as may be prescribed by or under the order of any part of a woodland area which is felled in the course of forestry operations permitted by or under the Order. (section 198(3)).
113. The first and main argument advanced by Mr Colville (and Mr Drabble QC) in their Skeleton Argument in support of this third ground of challenge was that the statement of reasons relied on for the TPO was incorrect because the Forestry Commission did have jurisdiction over the Land so that before any felling could take place the estate had to obtain permission of the Forestry Commission. There was therefore protection from felling. Since the Council's only justification for making the TPO was fundamentally flawed and wrong in law and given that there was adequate protection under the Forestry Commission's jurisdiction to which the estate acceded it followed that it was both irrational and unreasonable to confirm the TPO. In effect this argument stands or falls with the fate of the first and second grounds of challenge. Since as I have held those first two grounds of challenge fail it follows that the principal argument advanced in support of the third ground of challenge fails with it.
114. The second argument advanced under this ground of challenge was that, even excluding the allegedly flawed reasoning as to jurisdiction, the Council's actions did not follow the guidance

issued by the *Department for Communities and Local Government: Tree Preservation Orders: A Guide to the Law and Good Practice*. It was submitted that the proposed felling and replanting was good arboricultural or silvicultural management. Further it was submitted that the TPO and the procedure followed in making it conflicted with the Guide at paragraph 3.16 which stated:

“A woodland TPO should not be used as a means of hindering beneficial management work, which may include regular felling and thinning. While LPAs may believe it expedient, as a last resort, to make TPO’s in respect of woodlands they are advised (whether or not they make a TPO) to encourage landowners to bring their woodlands into proper management under the grant schemes run by the Forestry Commission.”

115. It was submitted that there was no attempt to engage with the estate on management of the woodland on the Land. Instead the Council simply served the TPO on a wrong analysis of the facts and relevant law. It was submitted that there was no basis on which it could be said that the TPO was issued as a last resort: there was no risk to the woodland, just a desire properly to manage the Land. I do not accept any of these submissions or the premise on which they were in part based, namely that a TPO may only lawfully be made as a last resort.
116. In the Statement of Reasons for the provisional TPO reference was made both to the test of whether it appeared to the authority that it was expedient in the interests of amenity to make provision for the protection of trees and woodlands in its area and to the guidance set out in *Tree Preservation Orders: A Guide to the Law and Good Practice*. In particular reference was made to the fact that the Guide stated that TPOs should be used to protect selected trees and woodlands if their removal would have a significant impact on the local environment and its enjoyment by the public. It was said that the woodland [on the Land] was prominent in the landscape and clearly visible from footpaths that pass through it and from Clints Road. It was said to be considered to be of significant visual amenity and landscape value to the locality and its loss would be detrimental to the area and its enjoyment by the public. Reference was made to the fact that the woodland was situated on registered common land and that a felling licence application had recently been submitted in respect of the woodland to the Forestry Commission to clear, fell and replant. However it was stated that because trees on common land are exempt from the felling licence regime the woodlands had no protection from felling and there was no mechanism to ensure replanting. It was stated that it was considered that a TPO was appropriate as the loss of the woodland would be detrimental to the character of the area and its enjoyment by the public.
117. As mentioned, in the officers’ report to the Committee the guidance document issued by the Department was highlighted in the first paragraph as was its advice that TPOs should be used to protect selected trees and woodland if their removal would have a significant local impact on the environment and its enjoyment by the public.
118. Reference was made to the fact that the initial woodland grant scheme on which the Council had been consulted included the clear felling of the woodland and replanting. Reference was also made to the fact that the application was later amended to selective thinning of the woodland by 50 to 60% and replanting.
119. Under the heading “The Trees Amenity Value,” it was stated that in accordance with good practice an objective assessment of the woodland based on experience and amenity had been undertaken. The assessment found that the woodland achieved a score which indicated that it warranted the statutory protection afforded by a TPO.
120. Reference was made to the fact that the Forestry Commission had declined to determine the application for an English Woodland Grant Scheme because it fell outside the scope of the 1967 Act because the Land was public open space. Because the Forestry Commission had taken the view that the Land was public access land and therefore the trees were exempt from the felling licence regime, it was stated that there was no mechanism other than the TPO for controlling the management of the woodland in accordance with the Scheme for the benefit of the inhabitants of

the district and the neighbourhood. The TPO was the only mechanism controlling the woodland management and was not an additional control.

121. It was concluded that the TPO was the only available mechanism to ensure good woodland management. The Council's green spaces officers were opposed to felling of the woodland which was under a Scheme of Regulation granting authority to the Council to preserve the trees on the Common for the benefit of the inhabitants of the district and the neighbourhood. The TPO would not prevent the owners from carrying out good woodland management, albeit an application would have to be made to and approved by the local planning authority. Having duly considered the representations and having weighed the objections against the present and future value of the woodland it was considered that the woodland would provide a significant level of public amenity for a reasonable period of time and therefore merited the protection afforded by a TPO.
122. In my judgement there was no material misstatement of the nature, extent or purpose of the Committee's powers. Nor in my judgement was there a failure to comply with the *Wednesbury* principles.
123. Although by the time the matter was considered by the Committee the extent of the felling proposed by the Claimants had been reduced to 50 to 60%, the original application was for 100% and the Committee was in my judgement entitled, when considering whether a TPO order should be made, to take that into account. The main thrust of the representations made on behalf of the Claimants to the Council was to the effect that a TPO was unnecessary for the purpose of protecting the woodland and controlling any felling of trees in it because such protection would be afforded by the powers of the Forestry Commission who had jurisdiction over the matter. In particular the argument that the "last resort" approach referred to in the Guide was being infringed was advanced on the ground that an application for a felling licence had been made to the Forestry Commission. Thus having quoted the terms of paragraph 3.16 of the Guide referred to above, the Claimants' written submissions submitted that the Council's approach contradicted that guidance "given the application that has been submitted to the Forestry Commission." In oral submissions the matter was advanced in the same way on the basis that "it would not be expedient to make the Order as there was an alternative," the alternative in question being the application to the Forestry Commission for a felling licence. That that is how the "last resort" argument was understood by the Council appears from the advice given to the Committee by Ms Liddle at the 11 March 2011 meeting: "[t]he Legal Services Manager further advised in relation to the argument that it was not expedient to make the Order when an application had been made to the Forestry Commission. The Forestry Commission had declined to deal with the landowners' application so that was no longer an option."
124. I do not accept the submission that there was no attempt by the Council to engage with the estate on management of the woodland on the Land. In a letter to the First Claimant's solicitors dated 17 January 2011 the Council's landscape architect/tree officer and author of the later report for the Committee stated that it was not "the purpose of the Tree Preservation Order to prevent good woodland management, but to ensure such management and maintenance in accordance with the Scheme of Regulation and the Council's interests. The letter stated: "An application under the Tree Preservation Order would be welcomed, and I would welcome pre-application discussions on this with your Forestry Agent." As already mentioned the officers' report specifically made the point that the TPO would not prevent the owners from carrying out good woodland management and the same point was made orally by the reporting officer at the Committee meeting and was confirmed by Ms Liddle when she said that "the beneficial management of the woodland was not prohibited by the Tree Preservation Order."
125. Mr Colville correctly in my view accepted that the Council was not obliged to follow the guidance in the Department's Guide but merely to take it into account. As I have indicated it is clear that the attention of the Committee was drawn to the Guide and in any event in my judgement there is nothing to suggest that the Council or the Committee used the TPO as a means of hindering beneficial management work. Quite the reverse. The Claimants had themselves

submitted an application to the Forestry Commission which would have involved the need for approval of their proposals and the Council made it plain throughout that their policy in making a TPO was not to prevent or hinder beneficial management work but rather to ensure that it was not uncontrolled. The Council took the view and in my judgement was fully entitled to take the view that uncontrolled felling of the woodland would or might constitute a material loss of amenity and, in the absence of control being exercised by the Forestry Commission, there was no other statutory mechanism for preventing uncontrolled felling. That a mechanism was justifiable, given the background of the Claimants having initially indicated an intention to fell potentially the whole woodland and only subsequently in response to the Forestry Commission's response having modified their proposal to 50 – 60% was in my judgement a conclusion reasonably open to the Committee.

126. In my judgement there is nothing in the “last resort” point. In any event in the officers’ report it was stated that in view of the view taken by the Forestry Commission that the Land was public access land so that the trees were exempt from the felling licence regime, there was no mechanism other than a TPO for controlling the management of the woodland in accordance with the Scheme for the benefits of the inhabitants of the district and the neighbourhood. The TPO was the only mechanism controlling the woodland management and was not an additional control. The TPO was in that sense a last resort and it is in that sense that in my judgement the Guide used the expression “last resort”.
127. The Guide does not suggest that a TPO may only lawfully be made as a last resort. Nor does it suggest that a TPO could only lawfully be made if negotiations as to the method of felling and replanting have failed. Without the protection of a TPO there would be nothing to prevent landowners in the position of the Claimants from felling trees indiscriminately as to number and/or method without replanting appropriately or at all. Whether and when it is appropriate or prudent to make a TPO in order to avoid the risk of inappropriate felling must be a matter for the judgement of the Council depending on the individual circumstances of any case. In principle I see no reason why a council may not lawfully conclude that it is safer and/or more prudent to negotiate with a landowner from a position of strength with the benefit of a TPO or lawfully conclude that it is not prepared to take the risk of the landowner acting in an undesirable way from the point of view of amenity when it is lawfully free to do so without the need to obtain the consent of the council to its plans, as would be the case if no TPO is made.
128. In response to the original application in which the Claimants’ proposal was to fell “all or selected” trees the Forestry Commission in an email dated 6 July 2010 expressed the opinion that the characteristics of the woodland showed it to be Ancient Semi Natural and as such “a clear fell is inappropriate. I note you mention possibly selecting some trees to fell. I feel it would be more appropriate in this important woodland to carry out a number of different operations but it would be reasonably intensive to manage and plan. I would suggest a woodland specialist looks over the site and produces a plan of operations that would fit the woodland. The starting point would always be to ask what the objectives of the estate are?”
129. For all these reasons in my judgement the answer to the question posed in the third issue is no and the third ground of challenge reflected in the third issue fails.

Issue 4: Did the Council act with procedural unfairness by not affording the applicants the opportunity to fully address their objections in oral submissions?

130. The Council had an established scheme which was publicised which enabled persons who might be adversely affected by a planning proposal or TPO to attend and speak at the Committee where the application or proposal was decided. For planning applications decided by the Committee the scheme provided that all persons who registered to speak at the meeting at which the decision on the application was to be taken were given three minutes to make their submissions. Only where there were several objectors to a proposal and where they had given notice of an intention to nominate a single spokesperson was it stated in the scheme that the Chairman of the Committee

had the discretion to allow an extended time period for the representations to be made. The scheme provided for the objector(s) to speak first and the applicant last. Under no circumstances would speakers be permitted to question each other or the Committee or officers.

131. In relation to TPOs the procedure was for the making of TPOs to be delegated by the Council's constitution to the Director of Development Services and Head of Legal Services unless there were objections to the proposed TPO, in which case it had to be referred to the Committee for confirmation. Where that arose the Council allowed members of the public who wished to speak in opposition to a TPO being made and also anyone in favour of the TPO to be given the opportunity to speak at the Committee considering the matter. In order to exercise a right to speak it was necessary to make a request within the 28 day period specified in notification letters which the Council was required to send to the landowner. Anyone exercising the right to address the Committee under those arrangements would be given three minutes in which to present their comments on the proposed TPO. Opponents of a proposed TPO would make their representations first, followed by anyone who wished to speak in support. No questions would be allowed by anyone making representations.
132. Thus the arrangements for a person, including the landowner, who objected to the making of a TPO were the same *mutatis mutandis* as those for persons objecting to planning applications.
133. In his Skeleton Argument Mr Colville submitted that while decision makers are free to determine their own procedure the limitation imposed by the Council given the complexities of the issues involved denied the Claimants a fair hearing. The limited time and the failure to provide any opportunity to consider the legal arguments advanced by the legal advisor to the Committee established a manifest unfairness in the process of determining that the TPO was to be confirmed. Accordingly it was submitted that the decision was unlawful and the order must be quashed for lack of procedural fairness in the decision making process. In support of this submission reliance was placed on the well known statement by Lord Mustill in *R v Secretary of State for the Home Department ex parte Doody* [1994] 1AC 531:

"The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects... Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification, or both..."

134. A copy of the Council's public speaking scheme was sent to the first Claimants' Solicitor on 17 January 2011. Ms Liddle in a witness statement dated 17 May 2011 said that on 9 March 2011 the Claimants' Solicitor telephoned her to enquire whether additional material could be circulated to the Committee members in advance of the meeting of 11 March. In response Ms Liddle explained to her that material had to be provided further than two days in advance of the meeting but agreed that written submissions could be circulated. She also explained again the three minute speaking rule of which she said that the Claimant's solicitor was aware. She said that the Claimant's solicitor later that day emailed her a copy of the written submissions on which the Claimants relied which were provided to the Committee Members. On the day of the meeting she said that Mr Colville who represented the Claimants before the Committee spoke for a little over three minutes. It was recorded in the note of the Committee proceedings exhibited to the Second Claimant's witness statement that Mr Colville agreed to endeavour to adhere to the time limit and did not request more time. She said that that accorded with her recollection. Ms Liddle made the point that in any event nothing of substance turned on the procedural issue because if the Council made a substantive error of law in confirming the TPO it would fail for that reason without more whereas if it did not make such an error the procedural fairness point does not lead anywhere.
135. In oral arguments Mr Colville said that the Claimants were not making a blanket challenge to the general limitation in the Council's scheme confining opponents of TPOs to three minutes for oral

representations. He submitted that the complexity of the issues in this particular case were such that three minutes was not enough and said that he had asked for an extension. In his submission whether three minutes is fair depends on the nature of the topic on which representations are made. In addition he submitted that the Claimants through him should have had an opportunity to respond to what he said was a new point raised by Ms Liddle after his representations namely that the right of access is not a right of common. Mr Colville accepted that if his legal submissions to me on the question whether the right of access conferred by Article 5 had been extinguished were wrong then any procedural unfairness would have made no difference to the final outcome and the fourth ground would not avail the Claimants.

136. It seems to me Mr Colville was right to accept that the procedural challenge in this case stands or falls together with the substantive challenge on the central legal question raised by the Claimants. Section 288(5)(b) of the 1990 Act confers on the High Court a discretion to quash a TPO if satisfied that the TPO is not within the powers of the Act or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it. "The relevant requirements" are defined by section 288(9) as meaning any requirements of the Act or of the Tribunals and Inquiries Act 1992 or of any order, regulations or rules made under either Act which are applicable to that TPO.
137. Mr Colville did not submit that if he were wrong in his legal challenges but successful in his procedural challenge to the time made available to the Claimants that that would have rendered the TPO "not within the powers" of the 1990 Act. Any procedural unfairness is not alleged to have constituted a failure to comply with any of the relevant requirements. If they had then in my judgement it would not have been shown that the failure to comply with any of the relevant requirements has led to a substantial prejudice to the Claimants. That is because, as accepted by Mr Colville, the implication is that even if he had had more time and opportunity to develop his submissions and/or answer Ms Liddle's advice to the Committee it would have made no difference. As it is in my judgement it would be wholly inappropriate to quash the TPO if the only successful challenge were the procedural challenge raised in the fourth issue. If the TPO was lawfully made within the powers of the 1990 Act, no useful purpose would be served by quashing the TPO.
138. Further and in any event in my judgement there was no material procedural unfairness in this case. It is true that the reason given for the provisional TPO was erroneous. However it is clear from the written submissions prepared by Mr Colville and circulated to the members of the Committee before they met that he was alive to the need to address the question whether the right of access conferred by Article 5 had survived notwithstanding the non-registration of the rights of common. In his written submissions he submitted that: "Whilst the land is registered common land there are no rights of common registered against the Land. Such rights under the 1915 scheme were not registered in the County Council's register of Common Land and therefore by virtue of section 10 of CRA 1965 the register is now conclusive as to whether there are now such rights of common over the Land. It therefore follows that the Forestry Commission has jurisdiction under the Forestry Act 1967; the Land is not "public open space" as contended."
139. Later in the submissions he watered that submission down by saying "whilst it **could** be argued that the rights of access under the 1915 Scheme would fall within the definition of rights of common, by section 10 CRA 1965 the registration...of any rights of common over such land shall be conclusive evidence of the matters registered.... The register is conclusive as to whether there are any rights of common over the Land." That by necessary implication recognised at the very least that the contrary could be argued to be the case. Mr Colville also referred to *Dance v Savery, Central Electricity Board and Corpus Christi College*. In my judgement it was or should have been obvious that the Council might be advised that, as in fact I have held to be the case, a right of access under the Scheme was not a right of common.
140. The Claimants were made aware in advance of the hearing of the three minute rule in the Council's scheme and in my judgement when considering whether the three minute limitation

was procedurally unfair regard must also be had to the opportunity afforded to the Claimants to advance their legal arguments in as much detail as they wished in writing.

141. In principle as it seems to me it is open to a Council to adopt a scheme governing the procedure for the making of representations opposed to the making of a TPO which includes a three minute time limit. It may be that particular circumstances may arise where for example because of the complexity of the issues raised, the requirements of the common law duty of fairness might require a particular Committee in a particular case to make an exception. That would depend on all the circumstances of the case including whether, as in this case, an opponent or objector had been given an opportunity to address any complex legal factual issues in writing in advance.
142. Although there appears to be some issue as to whether, as suggested in the note taken on behalf of the Claimants Mr Colville did not directly ask the Committee Members to be permitted to speak for any longer than the three minutes, in my judgement the thrust of his arguments were set out in his written submissions.
143. As to the lack of opportunity to respond what Mr Colville described as Ms Liddle's new point made in response to his oral submissions, namely that a right of free access is not a right of common, Mr Colville did not as I understand it ask the Chairman of the Committee for an opportunity to be allowed to reply to Ms Liddle after she had raised what he described as her new point. I am in any event doubtful as to whether it can fairly be described as a new point or at any rate a point which could not reasonably have been anticipated given the nature of Mr Colville's detailed written submissions. The proposition that a right of access is not a right of common was not in my judgement a novel or surprising point for Ms Liddle to have raised in response to Mr Colville's written submissions. To the contrary the proposition that a right of access **is** a right of common or a right akin to it is in my judgement a novel proposition which I have not accepted.
144. For these reasons in my judgement the answer to the question posed in the fourth issue is no and the fourth challenge to the TPO also fails.

Conclusion

145. For the reasons set out above this application fails.