

Neutral Citation Number: [2009] EWHC 1361 (Ch)

Case No: CH/2008/PTA/0662

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM THE ADJUDICATOR TO
HER MAJESTY'S LAND REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2009

Before :

MR JUSTICE WARREN

Between :

POLO WOODS FOUNDATION
- and -
MICHAEL ALAN SHELTON-AGAR (1)
SARAH KATHERINE SHELTON-AGAR (2)

Appellant

Respondents

Timothy Cowen (instructed by **Messrs Burley and Geach**) for the Appellant
William Batstone (instructed by **Messrs Penningtons LLP**) for the Respondents

Hearing date: 5th February 2009

Judgment

Mr Justice Warren :

1. This is an appeal from an order dated 19 June 2008 of Ann McAllister (whom I shall refer to as Ms McAllister) sitting as a Deputy Adjudicator to HM Land Registry. The order reflects her decision of that date (“the Decision”). Ms McAllister refused permission to appeal; but permission was granted by Kitchin J on 28 October 2008. I adopt the abbreviations used by Ms McAllister in the Decision thus referring to the appellants as Polo Woods and the respondents as Mr and Mrs Shelton-Agar. Before her, Mr Cowen appeared for Polo Woods and Mr Batstone appeared for Mr and Mrs Shelton-Agar. They both now appear before me.

The Decision

2. In the first few paragraphs of the Decision, Ms McAllister identifies the parties and their respective properties. In particular, she identifies the Farm, the Cottage, the Triangle (the subject matter of the present dispute) and a field known as the Common. The Farm comprises 111 acres and has at all material times been used for rearing polo ponies. The Common forms part of the Farm of which Polo Woods is the registered proprietor. The Cottage is the home of Mr and Mrs Shelton-Agar; they are the registered proprietors of it. The Triangle adjoins the Cottage; Mr and Mrs Shelton-Agar are the registered proprietors of that too.
3. The only access to the Triangle had for many years been from the Common. Polo Woods and Mr and Mrs Shelton-Agar had believed that the Triangle formed part of the Farm and held that belief until at the earliest some time after 8 February 2001 when first registration of the Farm took place. Mr and Mrs Shelton-Agar acquired the Triangle for £10,000 from the executors of Beryl Hunter Trimmer on 23 November 2004; Ms Hunter had acquired it on 13 October 1966 from the Parish Council of Iping.
4. Ms McAllister next identifies the issue in the case as being whether Polo Woods has established a *profit à prendre* by prescription to graze a limited number of horses on the Triangle. The original application made by Polo Woods sought the registration of the benefits and the noting of a burden of a *profit à prendre* by prescription and/or lost modern grant appurtenant to the Farm being “a right of pasturage for up to 20 ponies between the months of March and October each year”. During or following the hearing, the claim was modified: the right claimed is now limited to up to 10 horses for the period 1 March to 31 October each year and is further limited to the hours of 5.30 pm to 6.00 am.
5. Paragraphs 13 to 27 of the Decision are headed “Nature of a profit à prendre” in which Ms McAllister considers the relevant law. I propose to deal with the law after referring to the findings of fact made by her and after considering the reasoning leading to her conclusion to reject Polo Woods’ application.
6. Ms McAllister reviewed the evidence in paragraphs 32 to 68 of the Decision. Her central factual conclusions are summarised in paragraph 69 as follows:

“As I have stated I am satisfied that for over 20 years from 1972 onwards an indefinite number of ponies (never more than 10 and frequently less than 5) entered onto the Triangle between the hours of 5.30 pm to 6.00 between March and October as part of their daily routine and that, in the course of so doing, they occasionally

grazed. Taken on its own, the Triangle would not be capable of providing enough stocking material for even one horse over the period in question.”

7. She also records at paragraph 75 that the area of the Triangle is 0.8 acres and that only 70% of it can be grazed. She finds that:

“It is not, on any footing, necessary for the Farm to be able to allow ponies to graze on this land [the Triangle]. The value of the grass on the Triangle is negligible. As I have said above, the grass can only provide grazing for less than one horse over the period”.

8. Mr Batstone attacks the conclusion about the number of animals on the Triangle. I will come to that in due course.

Ms McAllister’s analysis and conclusions

9. Having summarised the position in paragraph 69 of the Decision, Ms McAllister then deals with a number of points raised by Mr Batstone.
10. The first points she deals with are interrelated. One is that the ponies did not take all or substantially all of their nutritional requirements from the grass on the Triangle. Another is that the number of ponies on the Triangle fluctuated over time. Her conclusion is that the first of those is not a relevant consideration since the ponies had undoubtedly taken grass from the Triangle. I agree that the mere fact that not all or substantially all of their nutritional requirements were taken from the grass is not sufficient to prevent a *profit à prendre* being acquired. I am not so sure that that fact is altogether irrelevant. I also agree that the mere fact that numbers fluctuate over time is not conclusive against establishing a *profit à prendre* in relation to the maximum number. However, the position is not straightforward in relation to a profit acquired by long user. These are matters which I will need to return to later.
11. Next, Ms McAllister deals with an argument concerning “ouster” raised on behalf of Mr and Mrs Shelton-Agar. She rejects the argument, a decision which is challenged by Mr and Mrs Shelton-Agar. I will deal with this aspect in due course.
12. That left Ms McAllister with one final point of substance. She found in favour of Mr and Mrs Shelton-Agar on the point with the result that they were successful in resisting Polo Wood’s application. The point in effect is whether the right claimed “accommodates” the dominant tenement or is capable of forming the subject matter of a grant.
13. She deals with the point in paragraphs 75 to 77 of the Decision. I have already set out what she says in paragraph 75. What she then says in paragraphs 76 and 77 is this:

“76.Mr Cowen argues that the test is not whether the right sought is necessary, but whether it is reasonably necessary, and that this is to be tested subjectively. I agree (subject to the points made below) that the test is not one of strict necessity, and also agree with the further point that the test is whether the right benefits the dominant tenement rather than the owner at any given time of the tenement. This is why the question is not (or is not necessarily) whether the right confers a commercial benefit. But I disagree that the test is a subjective one. It is a question of fact in each case, dependent on the nature of the dominant tenement and the right claimed. The

connection must be a real one. Even if the test were subjective, I heard no evidence to suggest that any one involved in the Farm seriously believed that the Triangle could provide any real or appreciable benefit to the Farm. On the contrary, it seemed to me quite clear to everyone that there would be no additional benefit in being able to use the Triangle for grazing.

77. The formulation in earlier authorities (such as *Lord Chesterfield v Harris*) that there must be some relation between the needs of the estate and the extent of the profits, or that the right is limited to the wants of the estate is, in my judgment, another way of articulating the test (whilst also taking account of the particular nature of common rights). It is an important test. It is not enough to say that it is merely an 'accident of title' (as Mr Cowen put it) which means that the Triangle is in separate ownership. Without an objective test relating the profit sought to the needs of the estate, one or two horses, occasionally grazing on any land, however small, and regardless of the extent of the dominant tenement or the real benefit to the dominant land, could create a profit in favour of the dominant tenement. On the facts of this case the benefit to the dominant land is, it seems to me, so slight as to fail this test."

14. Mr Cowen submits that Ms McAllister has applied the wrong test. There is, he says, no test of "real benefit" when deciding whether an easement or *profit à prendre* subsists in law; there is no authority for such a test nor for what the threshold should be if there were such a test.

15. Mr Cowen identifies the basis of Ms McAllister's decision in this way. She decided:

- a. The rules and principles governing the acquisition of profits are the same as those for easements.
- b. The right claimed must accommodate the dominant land and be capable of being the subject matter of a grant.
- c. The test is an objective one and must relate the right sought to the needs of the estate. The test is whether there is a real benefit to the estate.
- d. On the fact of this case, the benefit to the dominant land is so slight as to fail this test.

Mr Cowen accepts the first two of those propositions (indeed, they are common ground) but not the third and fourth.

16. Mr Cowen submits that the correct test (to be derived from *Re Ellenborough Park* [1956] Ch 131) and the only relevant test for accommodation of the dominant land is "connection". He says that, to the extent that benefit is part of the test of whether the right is capable of being the subject matter of a grant, it is a question of the nature or quality of the right and not a question of the degree of benefit.

17. Mr Batstone contends that Ms McAllister applied the correct test and applied it correctly, in particular in relation to the way she dealt with *Lord Chesterfield v Harris* [1908] 2 Ch 397. However, in case Polo Woods is successful in its argument on this aspect of the case, he relies on a number of additional reasons for rejecting Polo Woods' application:

- a. The maximum number of ponies which made use of the Triangle could not be identified.
- b. The right claimed is too wide and vague in character.
- c. The right claimed would substantially deprive the owners of the Triangle of possession (the “ouster” argument).
- d. The right claimed possesses no quality of utility or benefit.
- e. The user relied upon lacks the requisite quality of being as of right.
- f. The right claimed cannot be acquired by prescription because it is incapable of judicial control.

The nature of a *profit à prendre* and the relevant law

18. Before dealing with the arguments of Mr Cowen and Mr Batsone, I should say something about the nature of a *profit à prendre*, the acquisition of such a right and the relevant law.

Nature and extent

19. It is helpful to start in the same way as Ms McAllister. In paragraph 13 of the Decision, she refers to the definition of a *profit à prendre* in Halsbury’s Law of England (Vol 16(2), para 254 as follows:

“A *profit à prendre* is a right to take something off another person’s land. It may be more fully defined as a right to enter another’s land to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right.”

20. See to like effect Megarry & Wade: The Law of Real Property (7th ed) at 27-043 citing *Duke of Sutherland v Heathcote* [1892] 1 Ch 475 at 484. Those definitions can be taken as accurate for the purposes of this application at least. Although profits can be classified as appurtenant, appendant or in gross, Polo Woods seeks only to establish a profit appurtenant. I need say no more about the other classifications.
21. It is in the nature of a profit that something is taken from the land. In the case of a profit of pasture, grass is taken from the land; this is done by the grazing of animals. A profit of pasture appurtenant is not limited to any particular animals: clearly horses and ponies are included. Where a right is claimed by prescription or under the doctrine of lost modern grant, the extent of the profit depends on the animals habitually turned out to pasture: see Megarry & Wade at 30-027, citing Hall, *Profits à Prendre* (1871) 263. The number of animals may, according to the same paragraph “either be limited by levancy and couchancy, or be fixed; it cannot be unlimited”. Whilst that proposition is no doubt correct (see for instance Walker LJ in *Bettison v Langton* [2000] Ch 54 (affirmed on appeal [2000] 1 AC 27)) that is not to say that the fixed number can be as large as you like: the right granted must nonetheless have some proper relationship with the dominant tenement. In any case, an appurtenant right without limit is a right unknown to the law: *Anderson v Bostock* [1976] 1 Ch 312. In the present case, Polo Woods asserts a limited claim; the requisite limit is said to be found in the number of animals actually turned out on the Triangle, resulting in the limit of 10 horses.

22. The reason why a right to graze without limit on the number of animals cannot subsist as a profit appurtenant although it may exist as a profit in gross is because the extent of the profit must be linked in some way to the estate: see *Lord Chesterfield v Harris* both in the Court of Appeal at [1908] 2 Ch 297 and in the House of Lords (under the name *Harris v Earl of Chesterfield*) at [1911] AC 623, in particular the passages cited by Ms McAllister from the judgments in the Court of Appeal.
23. Thus Cozens-Hardy MR (see at p 410) regarded the idea of a profit [in that case, fishing] as involving “some relation between the needs of the estate or its owner and the extent of the profit à prendre”. Buckley LJ (see at p 421) considered that prescription is “necessarily measured by the size or nature or wants of the estate in respect of which the prescription is made” so that “if it be for common of pasture it must be for cattle levant and couchant...”. Or as he put it later (see at p 424) “[prescription] must be for a profit à prendre measured by the nature, size and necessities of the estate”. And Kennedy LJ, says, in the context of the reasons for the different categorisation of profits appurtenant and profits in gross, that “the fact of the appendancy of the right to the tenement points naturally to the maintenance of some relation, in the exercise of the right, between the extent of that exercise and the nature of that tenement and the requirements of its enjoyment”. I should add the observations of Robert Walker LJ in *Bettison v Langton* [2000] Ch 54, doubting

“whether it is correct to imply that a profit of pasture appurtenant can never in any circumstances be acquired by prescription for a fixed number of animals, but that does not affect the basic point that prescription of a profit appurtenant must be by way of activities which accommodate the land to which it becomes appurtenant”.

24. Before turning to what is meant by needs of the estate (in which phrase I subsume the different descriptions of the required relationship articulated by the three judges in the Court of Appeal in *Lord Chesterfield v Harris* in slightly different language), I need to say something about the acquisition and essential characteristics of a profit.

Acquisition

25. Like an easement, a profit appurtenant is capable of being created by express grant, prescription or under the doctrine of lost modern grant. In the present case, Polo Woods relies on the doctrine of lost modern grant. Although the characteristics of a valid profit are the same whatever the method of acquisition, the differences between the various methods of acquisition are nonetheless of importance. The extent of an express grant is a matter of construction of the grant and the validity can be assessed on the basis of the true meaning of the grant. The position is different in relation to a right acquired by user since the court then has the task of assessing the evidence about the alleged use to see if the right claimed is established. To put it another way, an activity which would be justified by an express grant does not necessarily support the existence of the same right claimed by prescription since the evidence, overall, may establish a different right or no right at all. In this context, see paragraph 23 of the judgment of Latham LJ in *Jackson v Mulvaney* [2003] 1 WLR 360.

26. Great care must, I consider, therefore be taken in assessing the extent of any right established where the claim to it is based on user. For instance, in the case of a profit of pasturage, it obviously makes a difference to the owner of the servient tenement whether the owner of the profit has the right to graze 5 animals or 20 animals. The fact that 20 animals have on occasions been seen grazing the land is not necessarily enough to establish a profit in relation to 20 animals. It is a matter of fact and degree. Thus if the evidence shows regular grazing of 5 animals sufficient to establish a profit of pasturage in relation to 5 animals, the fact that 20 animals have been grazed on a small number of occasions over a period of years would not be enough to establish a profit in relation to 20 animals.
27. The spirit of that proposition is captured in a passage in the judgment of Buckley J in *White v Taylor (No 2)* [1969] 1 Ch 160 at 192:

“To make good a prescriptive claim in this case it is not necessary for the claimant to establish that he and his predecessors have exercised the right claimed continuously. This is a profit of a kind that, of its nature, would only be used intermittently. Flocks would not, for instance, be on the down at lambing time, or for 24 hours of the day, or very possibly on every day of the week or all round the year. But the user must be shown to have been of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, **and of a right of the measure of the right claimed.**” [my emphasis]

28. See also Gale: The Law of Easements (18th ed) at 4-122 appearing in the section headed “Enjoyment must be definite and continuous” starting at 4-120 citing this decision.

Characteristics of a valid *profit à prendre*

29. As a general rule – and it is not suggested otherwise in the context of the present case – there are four conditions which must be complied with for there to be a valid easement or profit:
- a. There must be a dominant and servient tenement.
 - b. The easement or profit must accommodate the dominant tenement.
 - c. The dominant and servient tenements must not both be owned or occupied by the same person.
 - d. The easement or profit must be capable of forming the subject matter of a grant.
30. Condition c. does not give rise to any issues in the present case and I need say no more about it. Conditions a., b. and d. do give rise to issues.
31. As to condition a, although I am dealing, in this part of my judgment, principally with the law rather than its application to the facts, I can dispose of it quickly. Ms McAllister did not make any finding about what land comprised the dominant tenement. That may be seen as unsurprising given the contents of Mr Batstone’s skeleton argument before her where he accepted (at paragraph 17) that condition a. presented no problems. It is perfectly apparent that that concession was made in the context of the Farm being the

dominant tenement. No point was taken, either, in the skeleton arguments before me. However, in his oral submissions, I understood Mr Batstone to say that his clients knew nothing about any connection between the Farm and the ponies which came onto their land; they knew only that they came off the Common and the Mission field (an adjoining field). There was accordingly nothing to tie the right claimed to the needs of the Farm rather than the needs of the Common and the Mission field. I do not consider that this is a point which Mr Batstone can now rely on. But even if it is, I doubt very much that there is anything in the point since the question concerns the character in which the right was enjoyed in fact. As to that, it must surely be the case that the breeding and stabling of ponies relate to the activities of the entire Farm and not just the Common and Mission field; it would be entirely artificial to think that these grazing rights, if valid at all, are appurtenant to the Common and the Mission field rather than the Farm.

32. As to condition b. concerning “accommodation”, I start with the decision of the Court of Appeal in *Re Ellenborough Park* [1956] 1 Ch 153 (where the recital of the arguments in the Court of Appeal begin). The greatest respect must be shown to the judgments of the Court of Appeal in that case, particularly given the importance of that decision in this area of the law. But I do have to bear in mind that the decision is not a statute which needs to be construed, but a judgment the principles of which need to be applied. This was a case concerning an easement rather than a profit but the relevant applicable principles are the same.
33. The starting point is to note the reference, at page 163, to the four characteristics formulated by Dr Cheshire in his *Modern Real Property* (7th ed) at pp 456 *et seq.* These are the four characteristics identified at paragraph 29 above. As to the meaning of “accommodate”, Evershed MR (giving the judgment of the Court) identified (at p 164) the question as being “whether there exists the required “connexion” between the one and the other”. [The relevant rights can be found set out on p 165.] The word “connexion” comes from Cheshire, as appears from the later passage in the judgment quoted below.
34. In addressing “accommodation” in more detail, Evershed MR said this at p 169:

“.....it was one of the main submissions by Mr. Cross on behalf of the appellant that the right of full enjoyment of the park, granted to the purchaser by the conveyance of December 23, 1864, was insufficiently connected with the enjoyment of the property conveyed, in that it did not subserve some use which was to be made of that property; and that such a right accordingly could not exist in law as an easement. In this part of his argument Mr. Cross was invoking a principle which is, in our judgment, of unchallengeable authority, expounded, in somewhat varying language, in many judicial utterances, of which the judgments in *Ackroyd v. Smith* (1850) 10 CB 164 are, perhaps, most commonly cited. We think it unnecessary to review the authorities in which the principle has been applied; for the effect of the decisions is stated with accuracy in Dr. Cheshire's *Modern Real Property*, 7th ed., at p. 457. After pointing out that “one of the fundamental principles concerning easements is that they must be not only appurtenant to a dominant tenement, but also connected with the normal enjoyment of the dominant tenement” and referring to certain citations in support of that proposition the author proceeded: “We may expand the statement of the principle thus: a right enjoyed by one over the land of another does not possess the status of an easement unless it accommodates and serves the dominant tenement, and is reasonably necessary for the better enjoyment of that tenement, for if it has no

necessary connexion therewith, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is not an easement at all, but a mere contractual right personal to and only enforceable between the two contracting parties."

35. The phrase "normal enjoyment" appears to be Dr Cheshire's own. He uses it as a shorthand to describe the requirement which, according to him, had

"been stated in many ways: -

"An easement must be connected with the enjoyment of the dominant tenement and must be for its benefit." [Fn Gale on Easement (12th ed)]

"It must have some natural connection with the estate as being for its benefit." [Fn *Bailey v Stephens* (1862) 12 CBNS 91]

"The incident sought to be annexed.....must be beneficial to the land in respect of the ownership". [Fn *ibid* (although this reference seems to be incorrect)]

36. This concept of "normal enjoyment" may create difficulties in some cases. But in the present case, the enjoyment of the Farm as a farm including its use for the rearing of ponies must surely constitute normal enjoyment as much as growing crops or keeping a dairy herd. Further, the use of the words "benefit" or "beneficial" must be taken with a great deal of caution. The words do not stand in isolation in these quoted sentences (or in other similar contexts where one finds them); they are used to distinguish that which is of benefit or utility to the land or the owner of land as such from that which is a benefit or utility to an individual personally albeit he is an owner of land. The benefit is simply assumed to exist because it is nearly always obvious that there is a benefit to someone, the issue being whether it is a benefit to the land. Thus Dr Cheshire refers to the now well-known remark of Byles J in *Bailey v Stephens* that you cannot have a right of way over land in Kent appurtenant to an estate in Northumberland for a right of way in Kent cannot possibly be advantageous to Northumberland land.

37. Some care must be taken in reading the language of Dr Cheshire in 2009 when he uses the phrase "reasonably necessary". Those words, in the expansion which he adumbrates in the passage quoted and approved in *Re Ellenborough Park*, must be read not only in the context of the whole passage but also in the context of the example which follows the text quoted, for Dr Cheshire goes on to say that the principle is

"perhaps best illustrated by *Hill v Tupper*, where the facts were as follows:

A canal company leased land adjoining the canal to Hill and gave him the "sole and exclusive right" to let out pleasure boats on the canal. Tupper, an innkeeper, disregarded this privilege by himself letting out boats for fishing purposes. Hill thereupon brought an action in his own name against Tupper, his alleged cause of action being a disturbance of his easement to put boats on the canal.

It was held that the right conferred upon Hill by the contract with the company was not an easement but a mere licence personal to himself, since it obviously did not

exist for the accommodation and better enjoyment of the land held by him at the waterside. The right was not beneficial to the land as land; rather, the land was required for the exploitation of the right.”

38. Dr Cheshire then observes that the same principle applies to profits appurtenant, citing *Bailey v Stephens*. In that case, the owner of Bloody Field did not have a valid profit to cut down trees in an adjoining close, taking them away and converting them to his own use, because the wood was not employed for the beneficial enjoyment of Bloody Field; it was not connected with it and so was not a valid profit.
39. I do not think that the use of the phrase “reasonably necessary” does anything more than to emphasize that the right must be connected with the normal enjoyment of the property. It is not concerned with setting the height of the hurdle somewhere lower than absolute necessity but above mere convenience in the way that Lord Neuberger explains reasonable necessity in *Moncrieff v Jamieson* [2007] 1 WLR 2620 at paragraph 112. It was not being used in the sense that the person claiming the right has to show a need without which the dominant tenement cannot be reasonably enjoyed. For instance, consider a house served by an adequate driveway. The owner wishes to obtain from his neighbour a right of way to construct a more convenient access to his house. It cannot be said that the new access is incapable of being an easement because it is not necessary or not reasonably necessary. The phrase is simply another way of referring to the requirement that the enjoyment of the right must benefit the dominant tenement or the owner of it in his capacity as owner rather than just personally.
40. Later in *Re Ellenborough Park*, setting the facts against the principles, we find more being said about connection at pp 173 – 175.

“Can it be said, then, of the right of full enjoyment of the park in question.....that it accommodated and served that property? It is clear that the right did, in some degree, enhance the value of the property, and this consideration cannot be dismissed as wholly irrelevant. It is, of course, a point to be noted; but we agree with Mr. Cross's submission that it is in no way decisive of the problem; it is not sufficient to show that the right increased the value of the property conveyed, unless it is also shown that it was connected with the normal enjoyment of that property. It appears to us that the question whether or not this connexion exists is primarily one of fact, and depends largely on the nature of the alleged dominant tenement and the nature of the right granted.....Mr. Cross submitted that the requisite connexion between the right to use the park and the normal enjoyment of the houses which were built around it or near it had not been established. He likened the position to a right granted to the purchaser of a house to use the Zoological Gardens free of charge or to attend Lord's Cricket Ground without payment. Such a right would undoubtedly, he said, increase the value of the property conveyed but could not run with it at law as an easement, because there was no sufficient nexus between the enjoyment of the right and the use of the house.”

After rejecting that analogy, Evershed MR went on:

“A much closer analogy, as it seems to us, is the case of a man selling the freehold of part of his house and granting to the purchaser, his heirs and assigns, the right, appurtenant to such part, to use the garden in common with the vendor and his

assigns. In such a case, the test of connexion, or accommodation, would be amply satisfied; for just as the use of a garden undoubtedly enhances, and is connected with, the normal enjoyment of the house to which it belongs, so also would the right granted, in the case supposed, be closely connected with the use and enjoyment of the part of the premises sold.....The test for present purposes, no doubt, is that the park should constitute in a real and intelligible sense the garden (albeit the communal garden) of the houses to which its enjoyment is annexed.....”.

41. This concept of connection can also be seen in the judgment of Kennedy LJ in *Harris v Lord Chesterfield*. Although the case is primarily concerned with the quantitative limit which must be placed on a profit, he had something more general to say about the nature of a profit. In the course of his judgment, he used the word “accessorial” rather than “accommodation” to encapsulate the concept of connection: see at pp 426-7. The word accessorial is defined in the OED as meaning “Of the nature of an accessory or accompaniment; associated in a secondary yet useful manner; auxiliary, supplementary”. And as Kennedy LJ said, no right can be annexed to a house or land which is unconnected with the enjoyment or occupation thereof.
42. Reference was made by Ms McAllister to the decision of the Court of Appeal of New South Wales in *Clos Farming Estates v Easton* [2002] NSWCA 389. This had not been referred at the hearing. Although Mr Cowen complains about that – indeed the reliance placed by Ms McAllister on it forms one of the grounds of appeal – I can clearly take account of the decision, as any other case, in the conclusions which I reach. In that case, a question arose whether a right to enter the servient land, to carry out works of viticulture and to harvest the grapes and sell them was a right capable of existing as an easement. The judge at first instance held that there was no easement creating an interest in land. The Court of Appeal agreed holding that not only were the rights claimed novel but that they breached what is fundamental to constituting an easement in two respects. First, the connection between the benefited land and the supposed servient tenement went no further than to render the latter but “a convenient incident to the exercise of the right”. As it is put in the headnote “The imperatives of the commercialising of the viticulture operation cannot be seen as necessarily supporting a finding that the rights conferred do sufficiently accommodate the dominant tenement”. Secondly, the owners of the servient tenement were left with mere rights of residual recreational activities that are totally subordinated to the overarching rights of Clos Farming Estates. The rights of the servient owner were so attenuated that they no longer met the description of exclusive possession. [It might be noted that that language is more consistent with the *Moncrieff v Jamieson* approach rather than the *Batchelor v Marlow* approach: see paragraphs 119ff below.]
43. Ms McAllister cited a passage at the beginning of paragraph 31 of the judgment of Santow JA with whom Mason P and Beazley JA agreed. In this context “accommodation” firstly required that:

“... there be a natural connection between the dominant and servient tenement. The right must be reasonably necessary for the enjoyment of the dominant tenement and not merely confer an advantage on the owner of that tenement, as would a mere contractual right.”
44. Santow JA also referred, with apparent approval, to the trial judge’s conclusions: (i) the question of accommodation was one of fact depending on whether the right granted was

connected with the *normal enjoyment* of the dominant tenement (ii) that was a question of fact dependent on the nature of the dominant tenement and the right granted (iii) it was not enough that the land be a convenient incident to the right and (iv) the nexus must exist in a real and intelligible sense. These conclusions reflect what is found stated in the English cases, and in particular *Re Ellenborough Park*. Neither the judge nor the Court of Appeal adopts a test, or the language of a test, of “real benefit” (or even “benefit”) to the dominant tenement.

45. As an aside, it must, I think, be from Santow JA that Ms McAllister derives the propositions stated in paragraph 76 of the Decision that the test (as I understand her, the test for a valid easement) is a question of fact. Actually what Santow JA identified as a question of fact was not so much whether there was the necessary accommodation but whether the right granted “was connected with the *normal enjoyment* of the dominant tenement”. And what he said reflects *Re Ellenborough Park* both in respect of the quotation from Dr Cheshire and the other passages quoted at paragraph 34 above; the right claimed must be “connected with the normal enjoyment of that property”. It is the existence of that connection which is primarily a question of fact and which depends largely on the nature of the alleged dominant tenement and the nature of the right granted.
46. I do not consider that the use of the word “benefited” in paragraph 34 of the judgment detracts from that conclusion. Santow JA refers to the “long established principle that the dominant tenement, as land, must nonetheless be benefited by the easement” and to the submission that the dominant tenement was not “relevantly benefited”. It is clear to me that the judge was not attempting to lay down any new test. He was simply using the words he did to describe the existing state of the law seeing “accommodation” in the case before him as sufficiently encapsulated by the use of the word “benefiting”. Indeed, there could have been no question that the rights in respect of the servient tenement were of benefit to the owners of the alleged dominant tenement, the question being whether the right claimed “relevantly benefited” the land, that is to say whether they accommodated it.
47. One thing is to be noted: the court certainly regarded itself as applying, and not departing from, the approach in the English cases summarised in *Re Ellenborough Park*. In any case, Mr Cowen accepts that there has to be some benefit to the dominant tenement for an easement to subsist. He no doubt does so because, in the absence of any benefit at all, it is not easy to see how there could be any accommodation or connection or any accessorial element as between the right claimed and the dominant tenement. One must, however, be very careful indeed in using the word “benefit”; it can mean different things in different contexts. I will return to this in the context of Ms McAllister’s findings about benefit.
48. Accordingly, I do not find this authority particularly helpful. It is no more than an example, in my judgment, of the application of established principle. I prefer to stick with the English authorities and what they establish.

Needs of the estate

49. I return now to the “needs of the estate” and *Harris v Lord Chesterfield*. To be valid, a profit appurtenant must, as I have said, be limited and that limit is assessed by the “needs of the estate” (referring back to *Harris v Lord Chesterfield*). The “needs of the estate” take their meaning from the context of the history of rights of common; they reflect the

maximum amount of any profit which the estate could reasonably enjoy for its own purposes. As Dr Cheshire in the same (7th) edition of his book puts it “...the limit is arrived at by estimating the needs of the estate”. It is not easy to describe how to identify the “needs of the estate”. The flavour can be captured when one sees how these needs are described in the authorities concerning well-established rights which qualify as *profits à prendre*. The main types are listed in *Megarry & Wade The Law of Real Property* (7th ed) at 30-024 to 30-034. Let me take three very different examples:

- a. Profits of turbary. This is the right to dig and take peat or turf for use as fuel in a house. It can be used only for use in the house and cannot be taken for sale even if the owner is entitled to a fixed quantity.
- b. Profits of estovers. This is the right to take wood from the land of another for certain purposes. Similar considerations apply.
- c. Profit of pasture. This is the right to take away pasture, the taking away being effected by means of the mouths and stomachs of the cattle. As with any other profit, there must be a limit on the amount which can be taken. Unless limited to a definite number of cattle, the amount is limited by the needs of the estate which, in this context, is the number of cattle levant and couchant which can be supported by the dominant tenement.

50. The “needs of the estate” are not to be judged by what the estate in fact needs as a matter of practical necessity. Thus the express grant of a profit of turbary would not be invalid as a profit (so as to subsist only as a licence) by showing that the dominant tenement already had sufficient reserves of peat or turf to meet the needs of the house. Similarly with estovers, it could not be maintained that such a profit could not exist if there already existed on the dominant tenement an adequate supply of wood.

51. Similarly, in my view, with pasturage. The needs of a dominant tenement, a farm perhaps, are not to be judged by the extent of the practical need for grass-feed. It cannot successfully be maintained that a profit of grazing over that farm cannot exist simply because the farm can manage perfectly well without it and that it brings the farm very little, or perhaps no, practical benefit.

52. The “needs of the estate” (as described in *Harris v Lord Chesterfield*) are not to be confused with the requirement that the profit must be “reasonably necessary” for the better enjoyment of the dominant tenement (the accommodation/connection requirement in *Re Ellenborough Park*) although the concepts probably do inform each other in the context of *profits à prendre*. After all, if the needs of the estate really were nil, it is difficult to see how the right claimed could be reasonably necessary in any sense. Equally, if the needs of the estate can be seen to be real (and not just *de minimis*) it is not easy to see why a grant within that need should not also be “reasonably necessary” for the enjoyment of the dominant tenement.

53. In my judgment, there is no test of real or appreciable benefit to the dominant tenement which has to be passed before a right claimed can be said to “accommodate” it or to establish the necessary connection or nexus between the right and the dominant tenement (or the “accessorial” nature of the right in the language of Kennedy LJ). Such a test is not to be found in the long line of cases leading up to *Re Ellenborough Park*, nor in the cases

thereafter. Instead, the courts have attempted in different language to describe what is meant by accommodation whilst recognising that question to be one of fact depending largely on the nature of the alleged dominant tenement and the nature of the right granted.

54. There is a further attempt by Mr Batstone to introduce a “real benefit” test by reference to the words “real and intelligible”. The only use of those words in *Re Ellenborough Park* itself is to be found on page 175 where in the context of the facts of that case the test was that “the park should constitute in a real and intelligible sense the garden”; that is not a surprising formulation given the discussion on the second half of page 174 and the top half of page 175. It is inadmissible to distil from that discussion a general principle that any easement must, to accommodate a dominant tenement, provide a benefit in a “real and intelligible sense” if that is meant to mean more than that there must be some benefit albeit slight to the dominant tenement. I do not read the words in the judgment of Santow JA that the nexus [between the right and the dominant tenement] must exist in a real and intelligible sense as expanding the idea of accommodation. I would not, in any event, accept as accurate Ms McAllister’s formulation (or perhaps re-formulation of what Santow JA said) in paragraph 24 of the Decision where she identified the second element of accommodation as being whether “there is, in a real and intelligible sense, a benefit to the dominant tenement” unless, circularly, benefit is read in the sense of that sort of benefit which is necessary (or sufficient) to establish accommodation.
55. I reach that conclusion as a matter of principle. But the consequences of the alternative view should not be overlooked. A threshold of “real or appreciable benefit” is uncertain; it is clearly meant to mean something over and above that which is more than *de minimis*. But if so, how much over and above? It is a test which, it seems to me, would be enormously difficult to apply in practice. Further, as Mr Cowen submits, if this test is correct in relation to “accommodation”, that must be so whether the right is acquired by prescription or is the matter of an express grant. That would lead to uncertainty about the validity of easements which confer little if any real or appreciable benefit such as the unnecessary but slightly more convenient extra driveway to a house.
56. I ought to mention that Mr Batstone relies on the passage in Halsbury’s *Law of England* vol 16(2) (4th ed 2003 Reissue) paragraphs 114-5 where it is said that an easement must be such as “to confer on the dominant tenement a real and practical benefit”. He reads that passage as introducing a threshold test equivalent to some sort of reasonable need. I do not read it that way but instead think that the passage is part of a larger explanation of the law generally, explaining that there must be a connection between the land and the right and not simply a benefit to the land owner personally. Neither this passage nor the cases deal with the quantitative assessment of benefit; rather, they assume there is some benefit to something or someone and are concerned to relate that benefit to the land (in a “real and practical” way) rather than to the person. In any case, these paragraphs rely on *Re Ellenborough Park* as authority which does not contain anything to support the proposition as Mr Batstone would have me read it.
57. I pause here to remark that it has not been suggested that the maximum number of ponies which the Farm could sustain at a time when no grazing took place on the Triangle exceeded the 10 ponies in respect of which the claim is now made. This is of some relevance because Mr Cowen submits *Harris v Lord Chesterfield* was concerned only with the limits of a profit appurtenant and not with what it means for a profit to be

appurtenant to a dominant tenement. He says that the decision relevantly established two points:

- a. that a profit appurtenant may not be unlimited; and
- b. that the limit must be related to the needs of the estate.

58. He submits that these points would be a reason to reject Polo Woods application only if it was claiming an unlimited profit *ie* the right to graze an unlimited number of horses. Since it is not claiming such a right, he says that the “needs of the estate” are not relevant to the question whether the right exists in the first place.
59. Put that way, I do not agree with Mr Cowen’s submission that the needs of the estate are relevant only to the limit: I do not think that an express right to graze what, on any view, is a far larger number of animals than that dictated by the “needs of the estate” whatever that may mean, would be any more capable of subsisting as a profit appurtenant than an unlimited number. Some, at least, of the objections to the existence of such a right appurtenant are the same in both cases; in particular, there would not be that relation between the needs of the estate and its owner and the profit which Cozens-Hardy MR refers to. Thus the grant of a profit of pasturage in respect of an excessive number of animals is as objectionable – and as invalid – as a grant without stint.
60. Nonetheless, it is clearly possible to make an express grant of grazing rights in respect of a number of animals less than the limit ascertained by the “needs of the estate”. It should therefore be possible to prescribe for such a right. Indeed, if the “needs of the estate” would justify a grant in respect of 100 animals, I see no reason, although I know of no authority to this effect, why regular and continuous pasturing of 10 cattle, but never more than 10 cattle, should not give rise to a profit in relation to 10 cattle. This sort of case may be one of the aspects which Ms McAllister had in mind when she added at the end of paragraph 20 of the Decision that this number “may, of course, on the facts, be much lower than that number”. But as will be apparent, it seems that she went further than that since, as we have seen, she equated the “needs of the estate” with benefit to the dominant tenement which, according to Mr Cowen, was to apply the wrong test.

The decisions and reasoning of Ms McAllister

61. What then did Ms McAllister decide and what were her reasons for her decision. I have already set out what she actually said at paragraph 13 above. There is a dispute between the parties as to whether she found that there was no benefit to the Farm or whether she said that the benefit was so slight as to fail whatever test it was she was applying as relevant for establishing a profit. As to that, the submissions have taken the following course. Mr Cowen said in his original skeleton argument that Ms McAllister had found as a matter of fact that there was some benefit to the dominant tenement of the right claimed. Mr Batstone in his skeleton argument said that this was wrong without enlarging on why that was so. Mr Cowen then responded. He relies on the conclusion in paragraph 77 of the Decision that “the benefit to the dominant land is, it seems to me, so slight as to fail this test”. He submits that it is to be inferred from this that Ms McAllister found there to be some benefit albeit very small, otherwise she would have said that there was no benefit.

62. In contrast, it can be argued that a careful reading of the Decision shows that Ms McAllister really decided that there was no benefit at all. What she actually says is this:
- a. In paragraph 75: Only 70% of the Triangle can be grazed and the value of the grass is negligible – the grass could only provide grazing for less than one horse over the period sought.
 - b. In paragraph 76: There was “no evidence to suggest that anyone involved in the Farm seriously believed that the Triangle could provide any real or appreciable benefit to the Farm. On the contrary, it seemed to me quite clear that there would be no additional benefit in being able to use the Triangle for grazing”.
 - c. In paragraph 77: “the benefit to the dominant land is, it seems to me, so slight as to fail this test”.
63. As to paragraph a, what she says is unambiguous. It is unfortunately not conclusive of whether she considered there was anything more than a *de minimis* benefit to the Farm in grazing. I add the words “in grazing” because it does not follow from the fact that it may be beneficial to the Farm to allow ponies to loaf and graze that the grazing element is anything more than *de minimis*.
64. As to paragraph b, it is important to read what she says in the context of paragraph 76 as a whole. In this paragraph, Ms McAllister is addressing the test for accommodation as to which she had earlier in the Decision referred to the relevant case-law. She agreed with Mr Cowen that this test whether the right claim is reasonably necessary for the enjoyment of the dominant tenement and whether the rights claimed benefited the land rather than merely the owner. Contrary to Mr Cowen’s submissions, she decided that the test was objective. She went on to consider the position even if the test was subjective – by which I suppose was meant that the view of the owner of the dominant tenement as to whether the right claimed accommodated the land was what mattered. It was in that context that she made the remarks about benefit which she did.
65. It is clearly implicit in what she says in paragraph 76 that, applying an objective test, she was of the view that the right in question did not satisfy that objective test. That is confirmed by what she says in paragraph 77 in relation to what she saw as simply an alternative way of articulating the same test. She did not need, therefore, to say anything about the application of a subjective test. However, what she did say casts some light on how she viewed the objective test. It seems from what she did say that she must have regarded the proper test as asking whether, objectively speaking, the Triangle could provide any real or appreciable benefit to the Farm. Thus she was looking, and I must emphasise this, not at the evidence of use to see whether it justified the right claimed, but at the right claimed itself. In other words, what she is saying would be equally applicable to an express grant of grazing rights over the Triangle as an accommodation to the Farm. She is not addressing the question whether, on the facts, the actual use made of the Triangle established the right claimed but is saying that the right claimed does not pass the test for a valid profit. This is confirmed by reference again to what she said about the subjective test. She referred not to the lack of evidence that anyone believed that the actual use of the Triangle had provided any real or appreciable benefit to the Farm but to

the lack of evidence that anyone believed that the Triangle could provide any such benefit.

66. I need to say a bit more about paragraph 76 since there is a dispute about what Ms McAllister actually decided about benefit. As to that, the first sentence quoted at paragraph 62b above is unambiguous and it is reasonable to infer from that that not only was there no evidence but also that no one did believe that the Triangle could provide any real or appreciable benefit. The meaning of the second sentence is less clear. Mr Cowen submits that “additional benefit” is to be read as referring to “real or appreciable benefit”; Ms McAllister did not repeat the adjectival phrase from the previous sentence. Mr Cowen is, of course, correct to say that all of the paragraphs of the Decision must be read together. Accordingly, the second sentence must be read in a context which includes paragraph 77 where the reference to “slight benefit” shows that Ms McAllister must have considered that there was some, albeit slight, benefit even if that benefit was not “real or appreciable”. He also says that she cannot have made a finding that the use of the Triangle for grazing was of no benefit at all because it would not accord with logic or common sense; as long as there is some grass on the servient land, a right for ponies to graze it must be of some benefit even if it is very small.
67. Mr Batstone disagrees. He says that paragraphs 75 and 76 read together show that Ms McAllister considered that there was no benefit at all. The second sentence is to be read as meaning that, in contrast with some “real or appreciable” benefit, there was no benefit. In other words, as I would put it, “no additional benefit” is to be read as “no benefit at all”. It could be added to what he says that the reference to a “slight” benefit in paragraph 77 does not help one way or the other. Given the test that Ms McAllister was applying at this stage – namely that there has to be a “real or appreciable benefit” she did not need to decide whether there was a benefit of any sort. In other words, she is to be read as saying “..the benefit **if any** to the dominant tenement..... is so slight.....”.
68. Ms McAllister can certainly be read as going no further than to say that Polo Woods had failed to establish that level of benefit which, according to the test applied by her, was necessary to establish the right claimed. On this reading, she did not hold that there was no benefit but nor did she hold that there was a relevant benefit albeit a slight one. She is to be read as saying no more than that if there was a benefit it was inadequate. In other words, she made no finding of fact on what it is suggested may now be a critical issue since, if she had found that there was no relevant benefit, then the right claimed would not be established.
69. On another reading, however, it might be said that she is drawing a distinction between use for loafing and use for grazing: there was no evidence that anyone thought loafing would provide any real or appreciable benefit; indeed, on this reading, she is to be taken as seeing it as clear that everyone thought there would be no additional benefit in being able to use the Triangle for grazing.
70. It is not appropriate to subject the words of the Decision to an examination as if it were the words of a statute. A more sensible approach might be to remit that matter to her to make further findings, if necessary. I will return to this in due course.
71. I now need to say something about Mr Cowen’s submission that it would not accord with logic or common sense for Ms McAllister to have held that there was no benefit in being

able to use the Triangle for grazing. It is important to note the use *ie* for grazing. The right claimed is a profit of grazing; but the actual use of the Triangle has been rather different. As to that, there are two points which need to be made.

72. The first point relates to the word “loafing” which Ms McAllister used and which one or both of the experts must have used. As I understand the word – I think an ordinary word of the English language even when used in this particular context of what horses do – it describes what a horse does when it is not eating, sleeping or being ridden. Thus a horse wandering round a paddock (or even standing still), flicking its tail at flies and viewing its neighbours over a fence is “loafing”. During the course of loafing, the horse may eat some grass or have a drink of water; it is perhaps a matter of absolutely no importance whether such eating or drinking is seen as being comprised within the concept of loafing or is a separate activity. But that type of activity is to be contrasted I think with intensive grazing. Indeed, that contrast is made clear when one notes the expert evidence as recorded in paragraphs 66 and 67 of the Decision. Dr Capper (on behalf of Mr and Mrs Shelton-Agar) expressed the view that the primary purpose of ponies being put on the Common was not to eat but to exercise: *a fortiori*, although he is not recorded as having said so, in respect of the Triangle. Mr Brigstocke (on behalf of Polo Woods) gave evidence which is recorded by Ms McAllister and which I can summarise in this way:
- a. The use of the Common and other fields at night is standard practice to stop animals eating too much and developing certain disorders;
 - b. It is highly unlikely that the ponies would have been intensively feeding but rather the fields were used as a loafing or exercising area;
 - c. Loafing, however, includes some element of feeding and;
 - d. The optimum number of ponies on the Triangle would be 5.
73. The second point relates to the evidence about loafing and grazing. I note the evidence from Penelope Johnson at paragraph 40 of the Decision which Ms McAllister did not doubt. This includes the evidence that drifters came onto the Triangle through 3 or 4 gaps and “kept the grass down”. Whether this is regarded as part and parcel of loafing or something separate does not matter.
74. In paragraph 52, Ms McAllister appears to make the following factual findings: The number of ponies on the Triangle fluctuated from 3 to 10. The purpose of putting them onto the Common, and the purpose of going onto the Triangle, was both to graze and loaf or exercise. Ms McAllister is clearly using “loaf” in a sense which excludes grazing; but even so, the decision as a whole cannot be read as a finding that the horses both loafed, including casual grazing, and also grazed in the sense of intensive grazing. The land could not support intensive grazing. She is simply referring to the type of grazing referred to by Dr Capper and Mr Brigstocke.
75. This is confirmed when paragraph 53 is looked at. Ms McAllister states her clear impression to be that “the principal grazing ground was the Common and the Mission field, and that it was less usual for a large number of ponies to spend very much time in the Triangle”. Indeed, in paragraph 69 of the Decision – the first paragraph under the

heading **Analysis** – she says, of the ponies which entered onto the Triangle as part of their daily routine, that “in the course of doing so, they occasionally grazed”.

76. Mr Cowen submits that Ms McAllister made a finding at paragraph 52 that the activity of grazing was at least equal to the loafing or exercise and arguably the primary activity. He says that the references to the expert evidence which I have mentioned were no more than that and were not findings on her part. In particular, Dr Capper’s evidence that the primary purpose of the ponies being put on the Common was not to eat but to exercise would be inconsistent with her finding at paragraph 52. Mr Cowen even seems to refuse to accept the evidence of Polo Woods’ own expert as a relevant fact, on the basis that Ms McAllister did not expressly accept it. I am bound to say that in context it would be very surprising to find that she had set out that evidence in the way that she did, and uncritically, unless she had either accepted it or regarded it as common ground between the parties. I am not sure that anything turns on this since Mr Brigstocke’s evidence was simply to the effect that there was no intensive grazing but only loafing (which according to him included an element of feeding).
77. Accordingly, I see no inconsistency between Ms McAllister’s finding in paragraph 52 that the purpose of going onto the Triangle was both to graze and loaf and her conclusion in paragraph 69 that ponies entered onto the Triangle as part of their daily routine and that in the course of doing so they occasionally grazed.
78. Returning then to Mr Cowen’s submission that there would be no logic or common sense in a conclusion that there was no benefit (*ie* in grazing) to the Farm one needs to be clear what is being talked about. Mr Cowen is using the word “benefit” in the same sense as I think Santow JA was using it, really as no more than a shorthand for what is encapsulated in accommodation which, in accordance with *Re Ellenborough Park* requires that the right be appurtenant to the dominant tenement and to have a connection with the normal enjoyment of the dominant tenement.
79. In contrast, the sense in which Ms McAllister is using the word is not entirely clear. The most natural reading is that she is viewing benefit in a quantitative sense, judging benefit (or rather real and appreciable benefit) by reference to what the Farm in practice might gain from by the use of the Triangle for grazing, her conclusion being that the practical utility is at best slight. That she is using the word benefit in that sense seems to me to follow from what she says in paragraph 77. In that paragraph, she refers to the need for a relationship between the needs of the estate and the extent of the profits but seems to view the needs of the estate as being restricted to the practical requirements of the estate rather than those needs as they are explained in the case-law. Using the word “benefit” in that sense, it would not be illogical for Ms McAllister to have concluded (if she did) that the Triangle afforded no benefit at all to the Farm. Whether it would be illogical to do so in the sense in which Mr Cowen is using the word is a different matter. Just as it would be wrong to say that a profit of turbary could not subsist in relation to a servient tenement if the dominant tenement already had an adequate supply of turf, so too it would be wrong to say that a right of pasturage could not exist because a dominant tenement already had adequate year-round grazing for the beasts which could be kept on it.
80. At this stage, I note Mr Batstone’s submission that Ms McAllister gave two reasons for her decision and has not confused the tests at all:

- a. The first reason is, he says, to be found in paragraphs 75 and 76 where she expresses her conclusion. She had identified in paragraph 23 of the Decision that two elements were required namely (a) some geographical connection and (b) in a real and intelligible sense a benefit to the dominant tenement. The words “real and intelligible sense” come, as I have said, from *Re Ellenborough Park* and do not, for reasons given, justify a “real or appreciable benefit” test which are the words used by Ms McAllister in paragraph 76. Similarly, those words as used by Santow JA do not justify such a test.
- b. The second relates to the need for a relation between the needs of the estate and the extent of the profit. There was, he says, no evidence of any relationship between the needs of the Farm and the right claimed, going on to assert that it is “reasonable to infer from this part of the decision that the Adjudicator was expressing herself to be not satisfied of this condition of the establishment of a profit *à prendre*”.

81. I think his submission is then that, if one reason is wrong, it does not mean that the other is wrong and that they must be looked at independently.

82. Mr Cowen says this is quite wrong. He says that one must read paragraphs 75 to 77 of the Decision together and submits that there is only one reason for the decision namely that there was no real or appreciable benefit to the Farm; Ms McAllister has simply interweaved the language of different elements of the law in an inadmissible way.

83. I agree with Mr Cowen. Ms McAllister has, it seems to me, applied a single test of real benefit which, for reasons given, is not in my judgment the correct test.

84. In doing so, she has elided two matters which should have been kept distinct namely (i) accommodation and (ii) the needs of the estate. This elision is apparent from the first part of paragraph 77 of the Decision. She refers to *Harris v Lord Chesterfield* and describes the requirement that there be some relation between the needs of the estate and the extent or the profits, or that the right is to be limited to the wants of the estate, as another way of articulating the same test. That seems to be saying that a real or appreciable benefit to the estate (her interpretation of the accommodation test) is equivalent to the requirement that there be a relation between the extent of the profit and the needs of the estate (a conclusion which derives added force from her use of the words “real benefit” in paragraph 77 itself).

85. That, with respect, cannot be correct (taking the needs of the estate as those identified in *Harris v Lord Chesterfield* and other cases) as a matter of generality although in a particular case, the tests may produce the same result.

86. For example, consider the case of pasturage in respect of a farm where the maximum number of cattle judged by the needs of the farm (*ie* cattle levant and couchant) is 100. Pasturage for 50 cattle would both accommodate the farm and also be within the needs of the farm so as to fulfil the requirements of both *Re Ellenborough Park* and *Harris v Lord Chesterfield*. It would also be of “real or appreciable benefit” to the farm. Pasturage of 150 cattle, however, would be more than could be justified by the needs of the farm and thus exceed the *Harris v Lord Chesterfield* limit; it would not be possible to grant or prescribe for such a right as an interest in land, although of course an express licence to

that effect could be granted. All the same, such a right, if granted by deed, would certainly be of real or appreciable benefit to the Farm since, at least in respect of 100 cattle, the right of pasturage would benefit the owner of the land in his capacity as owner. It would thus fulfil the *Re Ellenborough Park* requirement as articulated by Ms McAllister. The two tests which she articulates are clearly not equivalent.

87. In any case, even if it were correct that she has given two distinct reasons for her decision, the second reason, based on the “needs of the estate” is not a good reason. The needs of the estate, in the sense in which that phrase is used in the cases, is not a concept by which the question of accommodation is to be judged. That phrase is used as a measure of the maximum limit of a profit. However, in spite of her reference in paragraph 77 to *Harris v Lord Chesterfield*, it does not seem to me that she is using the phrase in that sense; she is using it the sense of the practical requirements of the Farm and in that latter sense, the Farm has no need of the Triangle at all, at least for grazing, since adequate grazing can be found elsewhere on the Farm.

88. It is also interesting to note what Ms McAllister derives from her analysis in paragraph 77 of the Decision. In relation to the “needs of the estate” and the importance of an objective test relating the profit sought to those needs, the position would be reached, she says where:

“one or two horses, occasionally grazing on any land, however small and regardless of the extent of the dominant tenement or the real benefit to the dominant land, could create a profit in favour of the dominant tenement.”

89. I do not dissent from the proposition that that limited sort of use would not be sufficient to create a profit appurtenant by long user. But this is not because the right does not accommodate the land nor is it because the right is irrelevant to the needs of the estate. Rather it is because the user must be shown to have been of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and of a right of the measure of the right claimed: see paragraph 27 above. It is by applying that factual test that there would be no right to a profit established in the type of case to which Ms McAllister refers. The example lends no support at all, in my judgment, to the proposition that a test such as Ms McAllister propounds is necessary.

90. Accommodation depends on a connection between the right and the normal enjoyment of the dominant tenement. Whether there is such a connection in the present case is not a question which Ms McAllister appears to have asked herself; and by putting the question in terms of benefit, she may have missed the essence of what “accommodation” entails. Had she asked herself that question, I think that she could have come to only one conclusion, namely that there is the requisite connection between the right claimed and the Farm. The normal enjoyment of the Farm includes the rearing of ponies. It is in connection with that normal use of the Farm that the grazing rights, if they would otherwise be established, are exercised. The profit, in the form of the taking of grass, is enjoyed by the grazing of ponies; arguments about whether a benefit to the pony is also a benefit to the Farm or whether the ponies are rendered happy and content are beside the point.

91. The contrary view would lead to the conclusion that even an express grant of the right claimed *ie* to graze up to 10 ponies on the Triangle at the specified dates and times, would

be invalid as the grant of a profit and would give rise only to a contractual licence, even though a right of pasturage as such is a well-established type of profit. I would find that a very surprising conclusion. Indeed, asking the question whether there is the necessary connection in the context of an assumed express grant focuses the mind on the real question.

92. There is, in my view, therefore no need to answer the question whether a benefit, in the sense that Ms McAllister appears to have been using the concept, is established and no need, therefore, to remit the matter to her for further findings on that question.
93. This conclusion does not, however, resolve the appeal in favour of Polo Woods. The question then is whether the evidence of actual use establishes the right claimed (or any other right). That leads me on to precisely what the evidence does establish since the scope of any right acquired by prescription must reflect the actual use established by the evidence. As to that, the critical points are summarised in paragraph 69 of the Decision read, of course, with paragraph 52 (identifying the purpose of entering onto the Triangle), paragraph 53 (concluding that the principal grazing ground was the Common and the Mission field) and the fact, as noted in paragraph 40, that the ponies kept the grass down. It is also pertinent to note that ponies have never been put on the Triangle by Polo Woods in the sense of being led there and they have certainly never been shut in. The ponies were only ever on the Triangle because they wandered there having been put or let out onto the Common and Mission field.
94. In the course of writing this judgment, I sought further submissions from counsel on a point which had not been fully argued. My concern was that the evidence did not establish a free-standing grazing activity at all; rather, it established only that a number of ponies had been allowed to wander or exercise on the Triangle and that, although they might graze a little, that grazing activity was wholly subsidiary and ancillary to the wandering or exercising. If grazing was subsidiary in that way, then it could be argued that the only right which could be asserted would be a right to wander to which feeding would be ancillary. However, such a right could not subsist as an incorporeal hereditament. It could not be recognised as an easement since there is no easement to wander or exercise. Further, if the use of the Triangle was principally of a type which created no rights, then to hold that occasional grazing whilst wandering gives rise to a profit of grazing would be to elevate the wandering and exercising to the status of a legal right since it would be needed to exercise the right to the profit. That might be thought to be a curious result.
95. Mr Batstone has made helpful submissions in support of the proposition that such grazing as was established was simply ancillary or secondary to the main activities of loafing and exercising and, he would add, sleeping. He submits that the evidence is consistent with that conclusion, suggesting that, read in the context of the Decision as a whole, paragraph 52 of the Decision is not inconsistent with grazing having such a parasitic status.
96. Mr Cowen says, politely, that this is all wrong. He suggests (and there is some force in this) that the comments made by the experts might support a conclusion that all nocturnal grazing by ponies or horses is of a loafing type. He says that a decision to that effect could have wide-ranging consequences because, if a primary/ancillary purpose test is correct, then it applies as much to an express grant as acquisition by long user. This, he says, would lead to the conclusion that an attempt to grant a right of nocturnal grazing

expressly would be invalid as the grant of a property right. That proposition has not been the subject of argument; I do not propose to decide whether it is right or wrong. I only say that it is far from obviously right.

97. Mr Cowen's submission then is that the only relevant question on this point is whether ponies have been taking something from the land on a regular (albeit occasional) basis for the requisite period. He notes, correctly that an ancillary right which is necessary for the enjoyment of the principal or primary right will be implied citing *White v Taylor (No 2)* at p 196. He says that the grazing is inseparable from the loafing and claims not a right to loaf and graze but only a right to graze. Accordingly, ancillary to the right to graze is the right to go onto the Triangle and necessarily to loaf since loafing is something which a pony inevitably does when it is not actually feeding.
98. I am afraid that I may have set an unnecessary hare running here. In the end, the question is not, it seems to me, one about primary and secondary purpose, as to which I can see a number of difficulties which Mr Cowen has identified (and which go beyond what I have expressly mentioned above). It seems to me, on reflection, that the question is not so much about the primacy of one use over another. Rather, the question is whether the use established is of that "character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and of a right of the measure of the right claimed" as indicated by *White v Taylor (No 2)*, an aspect to which I will turn later in this judgment.
99. There has been some disagreement about the date on which the grant which is assumed to have been made under the doctrine of lost modern grant, was made. Given that the actual use of the servient tenement is supposed to be referable to a grant, it must logically be before the beginning and not at the end of the period that the grant is assumed to have taken place. That conclusion really follows from *Tehidy Minerals v Norman* [1971] 2 QB 528, see especially at pp 552-3.
100. As to condition d. (see paragraph 29 above), the question is whether the right claimed is capable of being the subject matter of a grant. On the facts of *Re Ellenborough Park*, satisfaction of that condition turned on a consideration of the questions whether the rights purported to be given were expressed in terms of too wide and vague a character; whether, if and so far as effective, such rights would amount to rights of joint occupation or would substantially deprive the park owners of proprietorship or legal possession; and whether, if and so far as effective, such rights constituted mere rights of recreation, possessing no quality of utility or benefit: *Re Ellenborough Park* at p164. On the facts of other cases, different questions might arise for consideration. In the present case, similar questions to the first two identified by Evershed MR do arise and Mr Batstone raises other objections to validity as set out in paragraph 17 above. It will be remembered that that case concerned an express grant. I shall address this question and the related question of what the evidence actually establishes in the context of the alternative grounds on which Mr Batstone says the decision of Ms McAllister should be upheld to which I now turn.

Maximum number of ponies

101. The first relates to the number of ponies using the Triangle. It will be remembered that the modified claim is to a right of pasturage for up to 10 horses for the period 1 March to 31 October each year between the hours of 5.30 pm to 6.00 am. Mr Batstone submits that, on the evidence, the maximum number of ponies which made use of the Triangle

could not be identified. I would add that, even if a maximum number of ponies which used the Triangle from time to time could be identified, that is not necessarily to say that the use by that maximum number has been sufficient to establish a right to pasture that maximum number. He criticises paragraph 69 of the Decision. He submits that, as a matter of law, Ms McAllister would have needed to make a finding about that maximum number; although Ms McAllister purports to do this (“never more than 10”), he says that this finding was not open to her on the evidence.

102. In paragraph 43 of the Decision, Ms McAllister refers to some of the evidence of Shirley Kirby who had been employed as a full-time groom between 1972 or 1973 and 1991 or thereabouts. Ms McAllister records that the maximum number of ponies which Ms Kirby had seen on the Triangle was 5, and not the 20 which she would turn out onto the Common, the Mission field and the Triangle. There is also paragraph 36 of the Decision where Ms McAllister accepts the evidence of Mr Graham that he had seen as many as 10 ponies on the Triangle on a few occasions.

103. There is also the evidence of Mr Healy which Ms McAllister deals with in paragraph 44 of the Decision. He began to manage the Farm in 1972. Until 2005, the Common and the Mission field were used for grazing in the summer months with some 10 ponies on each field. In paragraph 47 of the Decision, she records Mr Healy’s evidence that he remembers seeing a maximum of 10 ponies on the Triangle, a figure which she noted was consistent with the fact that ponies were kept in groups of 10 on the Common.

104. Ms McAllister summarises the position in relation to the Triangle at paragraph 52 of the Decision as follows:

“The numbers of ponies at any given time on the Triangle fluctuated from 3 to 10. The purpose of putting them out onto the Common, and the purpose of going onto the Triangle, was both to graze and to loaf or exercise.”

105. I consider that the evidence which Ms McAllister recites – and it must be remembered that she would have had more detail in her mind when expressing her conclusions having conducted the hearing over a number of days – is sufficient to justify the conclusions reached in paragraph 69 of the Decision. I reject the attack on the Decision based on the proposition that there could not properly have been a finding about the maximum number of animals on the Triangle.

106. Mr Batstone adds that, even if 10 ponies did go onto the Triangle, it is impossible to identify the maximum number that actually grazed. There is nothing, in my judgment, in this point. It is clearly reasonable to infer – and Ms McAllister must have assumed this to be the case – that any animal on the land did actually graze. What she actually said is that they occasionally grazed. Clearly the animals were, on her findings, not intensively and constantly grazing (the pasture would not in any case have supported such grazing even by one pony) but it would be unrealistic to think that a pony which had wandered onto the land did not graze at all.

107. What Ms McAllister does not address, however, is the frequency with which 10 ponies could be found on the Triangle; she makes no finding about that. She does make a finding that the number fluctuated between 3 and 10 (see paragraph 52) which can, I think, be taken as a finding that there were regularly at least 3 ponies on the Triangle at

some time during the night. It cannot, however, be taken as a finding that there was regular use by as many as 10 ponies. Indeed, such a conclusion might be seen as inconsistent with paragraph 69 where she records that there were frequently less than 5 ponies on the Triangle. She does not say that there was regular use by as many as 10 ponies and, to the extent that she recites the evidence, such a conclusion is not supported by the evidence. At best from Polo Woods' perspective is the evidence of Mr Healy that the largest number he records as seeing was 10. But Mrs Graham saw only a maximum of 8 ponies on the Triangle and Shirley Kirby saw a maximum of 5. That evidence, which Ms McAllister has included with no adverse observation, is essentially inconsistent with the idea that as many as 10 ponies regularly and consistently used the Triangle for grazing.

108. I accept, of course, Mr Cowen's submission that it is in the nature of a right of this sort that it will not be enjoyed continuously – it is enjoyed only when the ponies are grazing – and that it will not be enjoyed at all times by the maximum permitted number. However, if there is regular grazing over an area of land by number of ponies sufficient to give rise to a right of pasture in respect of that number, the occasional use of that area of land by a larger number will not necessarily lead to the conclusion that the right subsists in relation to that larger number. It will be a question of fact in each case whether the additional occasional use is sufficient to enlarge the right. The nature of the right is, of course, significant; in the case of a profit of pasturage, it is will be important to establish the maximum number of animals allowed to graze because that is central to the right. In other cases, such as a right of way, quantification may be less relevant. Thus where, for instance, a right of way on foot is established to provide access from a public road to a private house, there is far less need to focus on the precise extent of the user; once a right of way on foot is established, then any lawful visitor to the house will be able to use it subject to the right of the servient owner to prevent excessive use.

109. But in the case of a profit such as a right of pasture, the extent of the right is central. It is for Polo Woods to establish the extent of the right. Mr Cowen cannot, it seems to me, successfully contend before me on the basis of the findings which Ms McAllister did make, that there must be a right for grazing for any more than 3 ponies. Even in relation to 3 ponies, I cannot be confident that Ms McAllister would have found as a matter of fact that the use of the Triangle which took place was sufficient to give rise to a right on the basis of those criteria. This is certainly not a case where I can say that she could properly reach only one conclusion (whether in favour of Polo Woods or Mr and Mrs Shelton-Agar).

110. Ms McAllister touches on this when she refers to *White v Taylor (No 2)* in paragraph 71 of the Decision:

“It also seems to me that the fact that the number may have fluctuated over time is irrelevant: what matters is that a maximum number of ponies can be identified. The right, by definition, is only enjoyed intermittently (see *White v Taylor (NO 2)*).”

If she is to be read as saying that, because the evidence establishes grazing by a maximum of 10 ponies (“never more than 10 and frequently less than 5”), a right for 10 ponies to graze is established, then I must respectfully disagree, especially in the context where 3 is the largest regular number established by her findings. I do not, however, think that that is what she was saying. She was addressing, I believe, the point that a fluctuating number

would, of necessity, render the right claimed uncertain, a proposition rightly rejected. What she did not do was make a finding, on the evidence before her, about the maximum number of ponies in respect of which the right to graze was established. All she did was to determine the maximum number of ponies which had occasionally been on the Triangle.

111. I will come to the consequence of this conclusion later in this judgment.

The right claimed is too wide and vague in character.

112. The heading is taken from Mr Batstone's submissions. I do not consider that the right claimed can be said to be too wide and vague in character. What his submission is really directed at is the nature of the alleged right which can properly be said to arise out of the use of the Triangle actually enjoyed. He says that it does not establish the right claimed and asks rhetorically what the terms of the alleged lost modern grant in the present case would be. The answer he suggests seems at best to be a grant of the right to graze such numbers of ponies as might at any one time be present on the Common and Mission field (not the Farm as whole) and might care to wander onto the Triangle.

113. Mr Cowen professes not to understand the point. I think that must be because he sees the position, putting it simply, this way: the Triangle has been used for grazing; the extent of the grazing established (on his case) has been for 10 ponies; and the grazing has taken place over the period and hours claimed. On this view, it matters not how or why the ponies came to be on the Triangle. The position is simply as if an express grant had been made of the right claimed.

114. Mr Batstone's point, however, is that the actual use of the Triangle as found by Ms McAllister does not establish the right claimed. Even if it were to be accepted that a minimum number of ponies (say 3 in the light of paragraph 52 of the Decision) have regularly grazed on the Triangle during the period and hours claimed, the extent of any right thereby established (rather than claimed) cannot ignore how or why the ponies come to be there. The facts are that ponies have never been put onto the Triangle and they have never been shut into it once on it: they have always been allowed to wander in and out. Further, the numbers wandering in and out have always been circumscribed by the number (not more than 20) on the Common and the Mission field. To hold that the claim is established would be to entitle Polo Woods (i) to put up to 3 ponies (or 10 on Polo Woods' case) onto the Triangle and (ii) to shut them into it.

115. Mr Cowen and Mr Batstone thus both take positions at opposite ends of a spectrum. Mr Cowen, if I have put his position fairly, says in effect that you look only at the how much grazing has taken place and not at the full context in which it took place; Mr Batstone says, in effect, that the notional lost grant must reflect not just the grazing but also the circumstances in which that activity has been enjoyed, so that the grant would be in the terms which he has indicated.

116. I do not think that either position truly reflects the nature of the exercise which has to be undertaken. The question is whether the use of the Triangle has (referring back again to *White v Taylor (No2)*) been of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and of a right of the measure of the right claimed. In answering that question one must, as Mr Cowen does, focus especially on the

use which has been made of the Triangle; but it is right also to take into account all of the circumstances in which that use has been enjoyed.

117. I should add that none of this has anything to do with intensity of user of an established right and the type of issue discussed in *McAdams Homes Ltd v Robinson* [2005] 1 P&CR 520. It has to do with the identification of the right in the first place.

118. I will return the consequences of these points later.

Ouster

119. I return to Mr Batstone's point, which I have already mentioned, about ouster: see paragraph 11 above. He submits that the right claimed would substantially deprive the owners of the Triangle of possession. This was one of the questions addressed in *Re Ellenborough Park* where it was slightly differently articulated as whether the right claimed "would amount to joint occupation or would substantially deprive the park owners of proprietorship or legal possession". Ms McAllister formulated the question in this way: "Is [it] the case that the exercise of the right, in the months and at the time now sought, will leave the servient owners without any reasonable use of the Triangle or will effectively exclude them from possession and control?". She framed the question that way in the light of *Moncrieff v Jamieson* where the test was put in terms of exclusion from possession and control but she also referred to the decision of the Court of Appeal in *Batchelor v Marlow* [2003] 1 WLR 764 where the test was expressed differently namely whether the landowner was left without any reasonable use for his land, a test with which both Lord Scott and Lord Neuberger expressed more than some unease.

120. Ms McAllister, having asked herself that question answered it by saying that, whichever test applied, the right claimed would not be defeated. She reached this conclusion on the basis that it seemed plain to her that the right to graze was "inevitably going to reduce the rights of the servient owner. But the right cannot be defeated merely by saying that the servient owner could not graze his own beasts on the land, or that user will limit the use to which the land can be put". In saying that, she appears to have relied on an example given by Lord Hope in paragraph 23 of his judgment. I can well see that that example is relevant in the context of the *Moncrieff v Jamieson* test, but it is not, I think, an example which is relevant in the context of the *Batchelor v Marlow* test. Lord Hope clearly did not have that test in mind when giving his example and since there is nothing to suggest that Scots law ever applied or applies such a test, the example takes one nowhere.

121. Although *Moncrieff v Jamieson* casts considerable doubt on the correctness of the decision in *Batchelor v Marlow*, Mr Batstone is right, I think, to say that the latter case is binding on me as a matter of law particularly in a case of prescription rather than express grant: see in this context *Gale on Easements* at 9-102 footnote 266. The question for me then is whether Ms McAllister was right to say that the test derived from *Batchelor v Marlow* would not defeat the right claimed in the present case.

122. Ms McAllister is, of course, correct to say that the right to graze was inevitably going to reduce the rights of the servient owner: that is true of any easement or profit. As Lord Scott said at paragraph 54 of his judgment, every servitude or easement will bar some ordinary use of the servient land. The question in any particular case is whether the particular right claimed interferes with the rights of the servient owner to such an extent

that he is excluded from possession and control or is left with no reasonable use for his land (whichever of the two is correct). As to that, Ms McAllister does not unfortunately articulate her reasons for concluding that Mr and Mrs Shelton-Agar were not left without any reasonable use for the Triangle, other than to say that the right claimed cannot be defeated merely (my underlining) by showing that they could not graze their own beasts or that the right claimed would limit the use to which the Triangle could be put. She does not, for instance, identify some reasonable use to which the Triangle could be put. I do not know what, if any, account she has taken of the use which Mr and Mrs Shelton-Agar have of the Triangle during the 4 winter months or the extent to which she has taken account of possible day-time use during the other 8 months.

123. On any view, in practical terms, the right claimed is a substantial interference with the use of the land by Mr and Mrs Shelton-Agar. It is true that during the winter months they have full use of the Triangle; but they could not do anything permanent on it which would interfere with the right claimed. They could not build a stable or garage on the grassy areas. They could not even cultivate it if the result would be to make unavailable in the summer months even the poor grass which is presently to be found. But they could, during those months, use the land for keeping their own animals such as pigs and chickens and even put out their own horses so that it can fairly be said that, during the winter months, they are not prevented from making any reasonable use of the Triangle.
124. However, I do not consider that it would be right to regard the potential winter use of the land as a sufficient rebuttal of the suggestion that Mr and Mrs Shelton-Agar are excluded from any reasonable use of the land in the context of establishing the right claimed. It is one thing to regard a temporary exclusion from the servient tenement or part of it as unobjectionable; but where the right claimed is exercisable for a period of 8 continuous months in each year, I consider that one must focus on that period and address the question of exclusion during that period alone. In other words, if Mr and Mrs Shelton-Agar are excluded from any reasonable use of the Triangle during those months, the right claimed is not established.
125. In that context, even during the summer months, the possible use of the Triangle is severely constrained. However, I do consider that it is appropriate to consider the possible use of the Triangle at any time of day in considering ouster. The question is whether the right claimed precludes any reasonable use of the land during the day or the night.
126. During the night, Mr and Mrs Shelton-Agar could use the Triangle only in a way which is consistent with the enjoyment by Polo Woods of the right claimed. Mr Cowen says that Polo Woods does not claim exclusive use of the Triangle at night: in particular, Mr and Mrs Shelton-Agar would, he suggests, be entitled to put their own ponies on the Triangle where they too could graze.
127. That suggested use faces this difficulty: Mr and Mrs Shelton-Agar would not be able in practice to put their own horses on the Triangle unless a closed gate were in place between the Triangle and the Common; otherwise the horses might well wander off the Triangle onto the Common. [Polo Woods would, of course, have to be entitled to open the gate to bring their ponies onto the Triangle and to lead them off again. But it would need to ensure that Mr and Mrs Shelton-Agar's horses did not escape in the process and it would not be able to keep the gate open throughout the night.]

128. But whether Mr and Mrs Shelton-Agar would be entitled to maintain a closed gate in that way is not clear; I very much doubt that they could do so if the right claimed is valid and, if it is valid, I find it hard to see how, on the evidence and findings of Ms McAllister, a right of access ancillary to the right to graze could be curtailed. The owner of a profit *à prendre* is entitled to proper access to enable him to exercise his right and where, as in the present case, the access to the right (if it exists) has been enjoyed without any gate being in place, it may be that a closed gate (even if unlocked and easily opened) would amount to an unwarranted interference with the enjoyment of the right. It is also open to serious question whether Polo Woods could accept that restriction if the result would be to make valid something which would otherwise be invalid. Further, even if a gate were kept closed across the gateway between the Triangle and the Common, there is no certainty that Polo Woods' ponies and Mr and Mrs Shelton-Agar's pony would be able to co-exist in harmony: only time could tell.
129. These points have not been argued before me; indeed, I am left with the impression that it was common ground before Ms McAllister that there would have to be open access.
130. I digress for a moment to say that this all goes to underline the unusual nature of the use in the present case. No doubt a gate would substantially interfere with the use which has been made of the Triangle for loafing in the context of freedom to wander in from the Common. The fact that it might not, at the same time, interfere with an actual profit of grazing because ponies could be let into and out of the Triangle in the evening and morning, is a factor to be taken into account in deciding whether the use established justified the claim made and might be seen as a factor in support of the conclusion that it does not.
131. Returning to ouster, Mr Cowen has not identified any other uses of the Triangle which could be enjoyed by Mr and Mrs Shelton-Agar. During the day, Mr and Mrs Shelton-Agar can use the Triangle to graze their own pony and can keep other livestock as well. Indeed, two areas have been fenced off for chickens and a pig: see paragraph 59 of the Decision. But what the position would be at night is not clear. I have not heard argument about whether the fences would have to be taken down to allow Polo Woods' ponies access to the entirety of the grassed area; if that could be demanded, then the chickens (presumably by then in a coop) and pigs would have to be moved at night to an area which did not interfere with the profit since they could not be allowed to wander. One might think that Polo Woods could not complain if the small area taken up by a chicken house or a pig shelter would not amount to an interference with the grazing rights. It may even be that a small stable could be erected in which their own pony could be stabled at night. Even if it were an interference if placed on the grassy area, it would not be if placed on the area which cannot be grazed (amounting to as much as 30% of the total: see paragraph 75 of the Decision).
132. Ms McAllister expressed the view, albeit without a full explanation, that there was no ouster even on the *Batchelor v Marlow* test. The discussion which I have carried out above shows, I hope, that whilst there is a significant interference with Mr and Mrs Shelton-Agar's enjoyment, there are uses to which the land can be put during the day and which are not curtailed by the restrictions on the use of the land at night. I am not satisfied that there is material before me which would justify me in interfering in any way with Ms McAllister's conclusion on this aspect of the case.

The right claimed possesses no quality of utility or benefit.

133. Mr Batstone submits that the grazing right claimed lacks the necessary quality of utility or benefit, pointing out that Ms McAllister did not expressly address this question as a separate question although she did address the question whether the right benefited the Farm. I do not see this as a separate question from accommodation once it is accepted that a right of grazing is capable of being a profit. Of course, a profit of grazing is a well-established type of *profit à prendre* in ordinary circumstances. I do not consider that there is anything in this point of Mr Batstone.

The user relied upon lacks the requisite quality of being as of right.

134. This point goes to the knowledge of the predecessor in title of Mr and Mrs Shelton-Agar of the Triangle about the use of the Triangle in connection with the Farm. Ms McAllister dealt with this in paragraph 72 of the Decision. I do not consider that the conclusion of Ms McAllister on this point can be challenged. Whether she was right to conclude on the evidence that Mrs Trimmer lived in the locality, the fact of the matter is that the use of the Triangle was open and apparent for anyone to see. She was correct to say that Mrs Trimmer must be taken to have known that the Triangle was used, as part of one field, with the Common, for the grazing of ponies. She relies on *Mills v Silver* [1991] Ch 271. Certainly what Dillon LJ says at p 280, citing *Sturges v Bridgman* (1879) 11 Ch D 852 and *Davies v Du Paver* [1953] 1 QB 184, is consistent only with the conclusion that knowledge in the context of the acquisition of easements by prescription can be constructive knowledge. Clearly Mrs Trimmer, even if she was not resident locally, had every reasonable opportunity of knowledge of the use of the Triangle by the owners of the Farm.

The right claimed cannot be acquired by prescription because it is incapable of judicial control.

135. Mr Batstone addressed arguments to Ms McAllister based on *Dyce v Hay* (1852) 1 Macq 305. He says that she addressed these arguments in paragraph 60 of the Decision saying that she was not persuaded and would come back to them. It is true that she said she was not persuaded by which I understand her to have rejected the point. She then mentioned the ouster point. In the last sentence she says that she will come back to these points (in the plural) below. One might have expected her, therefore, to explain more fully why she was not persuaded in relation to the judicial control point, something which she does not in fact come back to. I do not think Mr Cowen is correct in saying that it was only the ouster point which she would return to. This does not matter because I do not, in any case, think there is anything in the point. As Ms McAllister says, many easements involve parties having to accommodate each other and to co-operate with each other. All Mr Batstone can do is to point to areas where there is scope of disagreement. A gate would have to be erected which would need to be opened and closed between 5.30 pm and 6.00 am over the 8 month period. The number of ponies would need to be limited to 10 on the Triangle when it is known that up to 20 may be on the Common. Difficulties may arise if Polo Woods' ponies are loose in the Triangle with Mr and Mrs Shelton-Agar's pony. There may be uncertainties about whether, and if so where, pig pens or chicken coops could be left at night. I do not consider that these factors can possibly prevent the grazing right arising if, apart from those factors, it would.

Conclusions

136. Ms McAllister rejected Polo Woods' application on the basis of the test applied by her which, in agreement with Mr Cowen, I think is not the correct test. It does not follow from that that the appeal succeeds in the sense that Polo Woods has succeeded in establishing its modified claim. There are three main points.
137. First, Ms McAllister has not, expressly at least, considered in the context of the entire factual matrix, including how and why the ponies grazed on the Triangle, and in the context of grazing taking place as part of loafing rather than as intensive grazing, whether the *White v Taylor (No 2)* criteria are satisfied. That is essentially a factual issue which is a matter for her having heard the evidence. It is not something which I, as an appellate judge, can deal with. It is as part of that exercise that questions of real and appreciable benefit will fall to be considered as one element. Nor has she considered – she did not need to do so in the light of her actual decision – the consequences, if any, of her finding that only 70% of the Triangle is used for grazing.
138. Secondly, as already explained, she has not addressed the question of the maximum number of ponies in respect of which the grazing rights are established (if any such rights are established at all). It is not easy to see how the number could possibly be as high as 10 given the findings in paragraphs 52 and 69 of the Decision. However, it is not absolutely clear that that is the conclusion which Ms McAllister would be bound to reach on the evidence which she heard. Polo Woods must be allowed to persuade her on the basis of the evidence which she did hear to make further findings of fact which would justify that conclusion.
139. Thirdly, even if Polo Woods were successful on the first point, a claim to less than 10 ponies would require a further amendment of the application. There may be argument about whether a further amendment should be allowed.
140. It is with a considerable measure of regret that I consider that I have no alternative but to remit the matter to Ms McAllister to make a further determination in the light of this judgment. Whether she admits any further evidence is, I consider, a matter best left to her. I would be entirely unsurprised if she refused to do so. The parties have had every opportunity to adduce such evidence as they saw fit and have had the benefit of a full and careful hearing. In determining whether the right claimed is established, she will be able to address the arguments which I have discussed under the heading “The right claimed is too wide and vague in character”.
141. I will hear counsel on the precise relief which I should grant.