SUBMISSION: BEECHAM'S FIELD EXCHANGE, WALTON HEATH INQUIRY FENCING OF REPLACEMENT LAND

At this morning's session, I raised the possibility of a fence being erected to enclose the release land. This followed my evidence on Wednesday that, if the replacement land were duly registered as release land, there would be nothing to prevent any means of access onto the land, once opened, being closed off again.

Mr King rightly drew my attention to the controls on works on common land contained in section 38 of the Commons Act 2006, which he said would prevent any such new interference with public access. In particular, it was noted that subs.(2)(a) restricts "works which have the effect of preventing or impeding access to or over any land to which this section applies", and as Mr King observed, this appeared to prevent fencing on the perimeter of the common, because such fencing would clearly prevent access 'to' the common.

However, further consideration demonstrates that this cannot be the practical effect of section 38. That section applies to registered common land (subs.(5)(a): there are other descriptions of land to which section 38 applies not relevant here). It follows that potentially restricted works may be erected without constraint (so far as section 38 is concerned) on any land which is not registered, regardless of whether they prevent or impede access to the common. Whether a fence is on registered common land will be a matter of fact, but a person who wishes to fence the boundary need only withdraw the line of the fence sufficiently far to fall outside the boundary to ensure that it is not on the registered land and therefore not subject to restriction. Insofar as exact measurements can be derived from a register map, that will be a matter of a few centimetres: the fence within the boundary of the registered common land requires consent, the fence beyond it does not. Accordingly, if the intention of section 38 is to restrict such works, it is likely for the large part to be ineffective.

That is why the householders along the north-west side of Walton Heath, parallel but west of Dorking Road, to which I referred this morning, can fence off their properties from the common: we can assume (subject to the possibility of register mapping errors, encroachments or other variations) that the boundary of the registered common land lies along the property boundary, and that they may freely erect a fence within that boundary if none currently exists. And indeed, that is how most common land, particularly extensive areas of manorial waste such as Walton Heath, is divided from adjacent enclosures. Such fences (or walls or hedges) are not on the registered common land, and do not require consent under section 38.

Given the redundancy of this superficially more obvious interpretation, it is more likely that the word 'to' in the expression 'access to or over any land' in subs.(2)(a) means access to the soil of the common, particularly as regards commoners' animals. In *Gadsden on Commons and Greens*, the authors write (para.8–124): "While it might have been assumed that there was no obligation under the LPA 1925 to seek consent for the erection or improvement of a fence on the boundary of a common, on the basis that the boundary was no part of the common itself, the position under Part 3 of the 2006 Act is less clear, in that the extent of any registered common land is defined in the register map held under Part 1 of the 2006 Act. Strictly, therefore, the obligation to seek consent may arise even where the fence is to be erected on land which was never part of the common, if the register map shows that land to be part of the registered common. There is no authority for the widely held belief that no consent is needed to fence between commons (for example, following the manorial

boundary), and the question is now redundant in the context of Part 3 of the 2006 Act." In other words, the authors suggest that the question of consent for fencing the boundary arises from whether that boundary forms part of the registered common land, rather than the interpretation of 'to'.

As *Gadsden* implies, this interpretation is further supported by the predecessor provision, section 194 of the Law of Property Act 1925, which was repealed and re-enacted with amendments in section 38. Subs.(1) of section 194 restrained work "whereby access to land to which [section 194] applies is prevented or impeded" (my emphasis). That section applied to land subject to rights of common (subs.(3)).

The effect of section 193(1) was considered in *Attorney-General v Southampton Corporation* (1970) 21 P. & C.R. 281, in which counsel for the corporation submitted, "that section 194 only deals with enclosing the periphery of the common". That was a heroic claim, some 45 years after enactment, as history shows that applications under section 194 were consistently made for works on common land (Defra historic casework database, www.gov.uk/government/uploads/system/uploads/attachment_data/file/218774/pink-slips.xls). In the event, the court found that occupied car parks laid out on the common would interfere with access for air and exercise.

In a county court judgment, *Eaton v Kurton* (Cheltenham County Court, 14 October 1966, reported in Journal of the Open Spaces Society, XVII, no.6), a hardcore track across the common was found to impede access to the grazing (*i.e*. the grass covered by the hardcore) on the common. These cases, and the history of implementation of section 194, show that that provision was interpreted as restricting works which interfered with access for the public or commoners' animals on the common itself.

Gadsden concludes in relation to section 194 (para.16–13) that "consent is still required if the access of the legal interests is obstructed or access by the public for open air recreation…is prevented or impeded". So, in section 194, the expression 'to' is used to mean 'to the surface or across the surface of the common", and in section 38, the amended expression "to or over" cannot have been intended to give a wider meaning to 'to' than in the predecessor provision (but presumably 'or over' was added to clarify that the provision was not wholly concerned with access to the surface of the common, but also public access across it).

This approach is consistent with the widespread customary obligation on owners of land adjacent to common land to fence against the common. In *Egerton v Harding and another* [1974] 3 All ER 689, which recognises that such an obligation may exist in relation to a common, and need only be proved, there is no discussion whether such a custom might be in breach of section 194. Prior to 1970, there were no registers of common land, but it might be presumed that the land subject to rights of common ran up to the boundary fence (or wall or hedge), leaving the adjoining landowner free to maintain or rebuild the boundary fence, even after enactment of the 1925 Act.

However, it may be a matter for common ground that, under section 38, what matters is whether any works to prevent access to the replacement land, whenever erected and by whomever, are erected on registered common land. If they are not, then they are not restricted under section 38, however egregious the impact on public access. If they are, then they are so restricted. This is a question of fact. It cannot immediately be answered, because the land has not been registered, and so the land

is not shown in any register. If it were so registered, the register map would be derived from the application map, which I take to be the large scale A0 plan in the applicant's bundle — although there would be severe difficulties in accurately representing the boundary of the replacement land on a register map typically drawn at a scale of 1:10,000. We therefore cannot conclude whether it would be possible to erect a new fence along the boundary of BW477, without consent under section 38. If the fence were erected outside the boundary of the replacement land, but without encroaching on the public bridleway, then no consent would be needed. But nor can we conclude that it could not be done.

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