

Relevant Definitions – which apply immediately before the provisional registration of the land as common land, i.e. 8th October 1968.

(i) “land subject to rights of common”

Section 61(1) of the Commons Act 2006 provides that (for the purposes of the Act):

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

Traditionally, rights of common include:

- (a) pasturage - the right to put livestock out to feed on the land, usually grass but can be heather or other vegetation
- (b) pannage - the right to put pigs out to feed in wooded areas of the land
- (c) estover - the right to take specific timber products from the land, like whole trees or firewood
- (d) turbary - the right to take turf or peat from the land to burn as fuel
- (e) piscary - the right to take fish from ponds, lakes, rivers and streams
- (f) rights in the soil - the right to take soil or minerals from the common
- (g) animals ferae naturae - the right to take wild animals

With reference to the definition in Section 61 set out above, Lord Justice Lewison said in Norbrook Laboratories v Carlisle City Council [2014] EWCA Civ 54:

“7. In my judgment it is unarguable that rights of recreation are rights of common within that definition. A right of common has a well recognised meaning in English law. It is a right to take something from the land of another in common with the landowner. It is in short a right to take what is surplus to the landowner's requirements. It is perfectly true that the definition in the 1965 Act goes a little bit further, but that is because it also includes as a right of common a right of sole vesture or herbage, that is to say the exclusive right to pasture animals on land to the exclusion of the landowner.

8. But it is in my judgment impossible to say that a right of common includes a right of recreation. It is quite clear from the scheme of the Act that rights of recreation are rights which support registration as a town or village green and not a common. A right of recreation confers no entitlement to any of the natural produce of the land.”

(ii) “waste land of a manor”

In Hampshire County Council v Milburn [1991] 1 AC 325 at 338, Lord Templeman said that the land of a manor can be divided into three parts, namely (1) the land held by the lord of the manor for his own use or occupation (or sometimes leased to third parties), known as "demesne" land; (2) land in the possession of tenants of the lord of the manor; and (3) the "waste" of the manor.

The "waste" of the manor was defined by Watson B in Attorney-General v. Hanmer (1858) 27 L.J.Ch. 837 at 840 as follows:

"The true meaning of 'wastes' or 'waste lands,' or 'waste grounds of the manor,' is the open, uncultivated, and unoccupied lands parcel of the manor... other than the demesne lands of the manor."

The waste could be subject to different rights, such as rights of pasture (grazing rights), estover (the right to take wood), piscary (fishing rights) and turbary (the right to dig peat).

(iii) “a town or village green within the meaning of the 1965 Act as originally enacted”

Section 22 of the 1965 Act as originally enacted defines "town or village green" as

“land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years.”

“As of right”

In R (Barkas) v North Yorkshire County Council [2015] AC 195, Lord Neuberger said:

“14. ... 'as of right' is ... almost the converse of 'of right' or 'by right'. Thus, if a person uses privately owned land 'of right' or 'by right', the use will have been permitted by the landowner – hence the use is rightful. However, if the use of such land is 'as of right', it is without the permission of the landowner, and therefore is not 'of right' or 'by right', but is actually carried on as if it were by right – hence 'as of right'. The significance of the little word 'as' is therefore crucial, and renders the expression 'as of right' effectively the antithesis of 'of right' or 'by right'.

15. In his discussion on the point in [R v Oxfordshire County Council and others, ex parte Sunningwell Parish Council [2000] 1 AC 335], Lord Hoffmann began by explaining that ... such enjoyment having to be ... “ nec vi, nec clam, nec precario ; not by force, nor stealth, nor the licence of the owner”. He went on to explain that each of “these three vitiating circumstances” would amount to “a reason why it would not have been reasonable to expect the owner to resist the exercise of the right”, namely, “in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of

the user and in the third, because he had consented to the user, but for a limited period". For the avoidance of doubt, I should interpose that the reference to "a limited period" clearly includes an indefinite period (as would arise under an unlimited but revocable permission), and that the word "limited" was meant to be contrasted with "permanent"."

(iv) "land of a description specified in section 11 of the Inclosure Act 1845 (c. 118)"

Section 11 of the Inclosure Act 1845 states:

"And be it enacted, That all such Lands as are herein-after mentioned, (that is to say,) all Lands subject to any Rights of Common whatsoever, and whether such Rights may be exercised or enjoyed at all Times, or may be exercised or enjoyed only during limited Times, Seasons, or Periods, or be subject to any Suspension or Restriction whatsoever in respect of the Time of the Enjoyment thereof; all Gated and Stinted Pastures in which the Property of the Soil or of some Part thereof is in the Owners of the Cattle Gates or other Gates or Stints, or any of them ; and also all Gated and Stinted Pastures in which no Part of the Property of the Soil is in the Owners of the Cattle Gates or other Gates or Stints, or any of them ; all Land held, occupied, or used in common, either at all Times or during any Time or Season, or periodically, and either for all Purposes or for any limited Purpose, and whether the separate Parcels of the several Owners of the Soil shall or shall not be known by Metes or Bounds or otherwise distinguishable ; all Land in which the Property or Right of or to the Vesture or Herbage, or any Part thereof, during the whole or any Part of the Year, or the Property or Right of or to the Wood or Underwood growing and to grow thereon, is separated from the Property of the Soil; and all Lot Meadows and other Lands the Occupation or Enjoyment of the separate Lots or Parcels of which is subject to Interchange among the respective Owners in any known Course of Rotation or otherwise, shall be Land subject to be inclosed under this Act."