

DEVELOPMENT CONTROL AND REGULATION COMMITTEE
Meeting date: 19 January 2021
From: Executive Director – Economy and Infrastructure

CA14/52 – APPLICATION TO AMEND THE REGISTER TO RECORD AN HISTORIC EVENT – HISTORIC SEVERANCE OF A RIGHT OF COMMON

(& CR19, APPLICATION NUMBER 1353 - APPLICATION FOR THE AMENDMENT OF A REGISTER IN RELATION TO A RIGHT OF COMMON)

REGISTER UNIT CL3 EASTERN MARTINDALE COMMON (HALLIN FELL, SWARTH FELLS, FUSEDALE) ENTRY 5 (NOW ENTRY 31)

1.0 EXECUTIVE SUMMARY

- 1.1 Cumbria County Council is the registration authority for common land and town and village greens under the Commons Act 2006, and previously under the Commons Act 1965.***
- 1.2 Applications have been received from Gillian Margaret Hedworth (“the Applicant”) to amend the register of common land at entry 5 of register unit CL3 Eastern Martindale Common (Hallin Fell, Swarth Fells, Fusedale (“CL3”), in consequence of an historic severance of a right of common.***
- 1.3 Members must ultimately determine whether, when Hause Farm and some of its associated land was repossessed by the bank, did the common rights that attached to a section of that land also transfer, or were retained by the previous owner.***
- 1.4 The purpose of this report is to request Members make a decision as to whether the applications should be granted and amendments made to the Council’s register of common land.***
- 1.5 A glossary of terms is included as section 11.***

2.0 POLICY POSITION, BUDGETARY AND EQUALITY IMPLICATIONS, AND LINKS TO COUNCIL PLAN

- 2.1 *The relevant corporate theme is the creation and protection of a high quality environment for all.*
- 2.2 *This matter is a decision-making process of a quasi-judicial nature. There should be no policy or political consideration given and any potential financial implication should be ignored.*

3.0 RECOMMENDATION

- 3.1 *It is recommended that the Committee reject the applications for the reasons contained within this report, and on the specific grounds that, on the balance of probabilities, severance of a right of common did not take place and the disputed common rights remain attached to the land in question.*

4.0 BACKGROUND

- 4.1 A right of common to graze 350 sheep over the whole of the land comprised in register unit CL3 was provisionally registered on 8th October 1968, as being attached to 17 Ordnance Survey (O.S.) fields at Hause Farm in the parish of Martindale, Westmorland ("the Right"). Being undisputed, the Right became final on 1st August 1972.
- 4.2 In April 1986 Mr Hedworth (husband of the Applicant) agreed to purchase five properties in Martindale, one of which was Hause Farm.
- 4.3 By a facility letter dated 20th May 1986 Barclays offered Mr Hedworth a bridging loan of £190,000 to finance the purchase of the Martindale properties, on terms that it be granted a first legal charge over the Martindale properties.
- 4.4 On 18th September 1986 Mr Hedworth drew down on the bridging loan to enable the purchase, and on 26th September 1986 completion took place and the Martindale properties were conveyed into the joint names of Mr and Mrs Hedworth.
- 4.5 On 5th March 1987 Mr and Mrs Hedworth were noted in the register as being entitled to the Right (to graze 350 sheep) attributed to Hause Farm. This note, and the Right itself, can be seen at entry 5 of **Appendix 1**.
- 4.6 By early 1990 Barclays was pressing for repayment of Mr Hedworth's indebtedness.
- 4.7 On 20 August 1990 UCB Bank plc ("UCB") agreed to Mr Hedworth's proposal that it grant him a loan of £420,000, representing 75% of the current value of both Hause Farm and two other properties, for the purpose of "replacing an overdraft with Barclays Bank", and by letter dated 25th September 1990, UCB agreed to increase the amount of the advance.

- 4.8 On 20 December 1990 the re-mortgage transaction was completed and UCB advanced over £428,000 to Mr Hedworth on the security of first charges over the three properties, including Hause Farm and 6 of the 17 fields listed at entry 5. I will refer to the document embodying that transaction as “the Charge” and the six parcels of land which were subject to the Charge as “the Charged Land”. The effect of the Charge is central to much of the dispute, for reasons which will be explained in this report. A copy of the Charge is provided as **Appendix 2**.
- 4.9 UCB obtained a possession order in respect of Hause Farm and the Charged Land on 1 February 2002, which was confirmed by the Court of Appeal on 4th December 2003. The Charge was thereafter assigned to another party who sold the Charged Land on 7th June 2007.
- 4.10 On 15 June 2007 Mrs Hedworth (having subsequently acquired all of Mr Hedworth’s assets) contacted Cumbria County Council (“the Council”) seeking to have the register amended to record her as the sole person entitled to the Right. A formal CR19 application for this amendment was received by the Council on 1 March 2010 under section 13 of the Commons Act 1965 (“the 1965 Act”). I will refer to this application as Application CR19, a copy of which has been provided as **Appendix 3**. Application CR19 was made on the basis that the right of common had ceased to be attached to that part of Hause Farm which consisted of 6 of the 17 numbered O.S. parcels when those parcels were charged to UCB by the Applicant (and her husband) on 20th December 1990.
- 4.11 In effect, Mrs Hedworth’s assertion, was that the common rights were not included within the Charge, and therefore the common rights remained in her possession when the ownership of the land itself was transferred to the lender.
- 4.12 Application CR19 was never progressed to determination by the Council. None of the current Commons Registration Officers were working for the service in 2010, and it is unclear why the application was not progressed at that time.
- 4.13 The Charged Land was eventually acquired by a Mr and Mrs Rowley (“the Rowleys”) on 5th February 2010.
- 4.14 On 30th August 2017 the Rowleys applied under regulation 43 of The Commons Registration (England) Regulations 2014 (“the 2014 Regulations”) to record a declaration of their entitlement as the owners of the Charged Land to exercise the right to graze 135 sheep over register unit CL3. The number of 135 sheep is arrived at by a pro-rata apportionment by areas of the O.S. parcels within the Charged Land compared with the total area of the 17 O.S. parcels within Hause Farm as a whole.
- 4.15 Officers, being unaware at this stage of the existence of Application CR19 and that it remained undetermined, processed the Rowleys’ application. The Rowleys proved their ownership of 6 of the fields (the Charged Land) to which the register still stated that the Right was attached to. On that basis Officers recorded the Rowleys’ entitlement to exercise the right to graze 135

sheep at entry 31 of register unit CL3. This entry, created on 11th September 2017, can be seen at **Appendix 4**

- 4.16 Mrs Hedworth was unaware of the Rowleys' application until after its completion (it may be worth noting that the registration authority would not issue a notice in relation to a declaration of entitlement such as that of the Rowleys).
- 4.17 Mrs Hedworth then submitted a second application under Schedule 3 to the Commons Act 2006 ("the 2006 Act") to amend the register to record an historic event not registered under the 1965 Act. This application received on 4th May 2018 will be referred to as "Application CA14/52". A copy of the application and the supporting evidence is provided as **Appendix 5**. Application CA14/52 seeks the deletion of entry 31 in the register and its replacement by a new entry recording that the right of common at entry 5, to the extent of 135 sheep, was severed from the land to which it was attached (i.e. the Charged Land) on 4th December 2003 and became a right of common in gross owned by Mrs Hedworth.
- 4.18 Broadly speaking, application CA14/52 was made under the same assertions as the CR19 application made eight years previously, and which are briefly described at 4.11 of this report.
- 4.19 Application CA14/52 was deemed to have been duly made and the Notice of Application was advertised on Cumbria County Council's website and was also sent to all relevant parties in accordance with Schedule 7 of the Commons Registration (England) Regulations 2014 ("the 2014 Regulations"). Anyone wishing to make a representation in relation to the application had until 3rd July 2018 to do so in writing.
- 4.20 Two representations amounting to objections were received, one from the Rowleys, and one from a Mr Christopher Lasper ("Mr Lasper"), who has no legal interest in the land. Copies of these objections can be found at **Appendix 6**.
- 4.21 Put in its simplest terms the Rowleys' objection involves a dispute between themselves and Mrs Hedworth as to the ownership of the right to graze 135 sheep on register unit CL3.
- 4.22 Again, in its simplest terms, Mr Lasper's argument is that common rights are attached to the farm as a whole, and not any part. Therefore, Mr Lasper argues that all 350 of the grazing rights became severed from the land when the Charge was entered into and therefore all of the grazing rights were held in gross as a separately tradeable asset from that point.
- 4.23 There has been significant correspondence received in relation to application CA14/52 (whilst Mrs Hedworth's previous CR19 application also remains undetermined). Full copies of all material received can be made available on request.
- 4.24 After an initial evaluation Officers were minded to recommend that the applications should be refused. With that in mind Officers wrote to the Applicant, offering a chance to make oral representations with regards to the

issues cited for this refusal. The Applicant submitted a response in writing on 5th December 2019. A copy of these representations (and the invitation to submit) is provided as **Appendix 7**.

5.0 PROCEDURAL POINTS

5.1 Cumbria County Council's duty to determine the CR19 Application

The CR19 application was submitted under the 1965 Act, before the coming into force of the 2006 Act (implemented in Cumbria on 15 December 2014). Officers' interpretation of the statutory provisions is nevertheless that the CR19 application is still capable of being determined and that the Council remains subject to a duty to determine it.

Article 5(3) of The Commons Act 2006 (Commencement No. 7, Transitional and Savings Provisions) (England) Order 2014 provides that "*the commons registration authority shall continue to deal with the application on and after 15th December 2014 as if section 13(c) of the 1965 Act had not been repealed.*" This duty applies to the Council in this case in respect of the CR19 Application and, therefore, the CR19 Application should still be determined.

5.2 The processing of the two distinct applications which centre upon the same issue

Applications CR19 and CA14/52 revolve around the same initial issue, the effect of the Charge by which land at Hause Farm was charged to UCB Bank plc ("UCB") by Mrs Hedworth (and her husband). More specifically, both applications contend that the right of common was not included in the Charge and thereby ceased to attach to the Charged Land, so that, in other words, the right of common was severed.

Officers' view is that the Council must be pragmatic about this situation and that we must consider all material received across both applications before reaching an overall recommendation and conclusion, and then, having done so, issue a decision on each application at that stage.

It is acknowledged that the claimed date of severance differs between the two applications, as application CA14/52 postpones the date of severance to a consequential outcome of the Charge (the Court of Appeal Order of 4th December 2003), whilst the CR19 Application lists the date of the Charge itself (20th December 1990). Nevertheless, it is the Officers' view that it would be a mistake to treat each application as separate and distinct in the sense of only looking at the material received for each application in isolation.

5.3 Should matters proceed by way of a correction to the register under section 19 of the 2006 Act?

Mr Lasper, as part of his objection against application CA14/52, raised the point that matters should proceed by way of a correction to the register under section 19 of the 2006 Act. Mr Lasper's basic argument is that, in the present case, the right of common for a fixed number of animals was

appurtenant to the whole of Hause Farm and this appurtenancy would be destroyed by a transfer of part of the farm (in other words, the rights would be severed and held in gross). In Mr Lasper's view entry 31 was therefore created in error and should be corrected.

Mrs Hedworth has also asked the Council to proceed, on its own initiative, by way of powers under section 19 of the 2006 Act. This was on a different basis to that put forward by Mr Lasper and was based upon the contention that, as a matter of procedure, the Council was wrong to make entry 31 on the application of the Rowleys (CA15/72) whilst her CR19 Application was still outstanding.

Officers' opinion has been and remains that there would be little point in proceeding in that manner until the underlying substantive question requiring resolution – whether severance has occurred – has been determined. The Officers' position is that should severance be established, then at that stage the Council would exercise its powers under regulation 43(6) of the 2014 Regulations to cancel the declaration at entry 31. If severance was not established, then the Council intends to leave the Rowleys' declaration at entry 31 as it stands.

Overall, Officers see no reason to switch the procedural track to that of register correction.

6.0 THE LAW

The Commons Act 1965

- 4.1 The CR19 application was made under Section 13(c) of the 1965 Act which provides for: *"amendment of the registers maintained under this Act where ... any rights registered under this Act are apportioned, extinguished or released, or are varied or transferred in such circumstances as may be prescribed."*

The Commons Act 2006

- 4.2 Part 1 of the 2006 Act was implemented in Cumbria on 15th December 2014 and allows applications to be made to amend the Register of Common Land and Town or Village Greens.
- 4.3 Application CA14/52 is made under Schedule 3 to the 2006 Act where paragraph 2(1) provides that: *"Regulations may make provision for commons registration authorities, during a period specified in the regulations ("the transitional period"), to amend their registers of common land and town or village greens in consequence of qualifying events which were not registered under the 1965 Act."*
- 4.4 It is implicit in paragraph 2(1) that a qualifying event, or a consequence thereof, must have been capable of giving rise to an amendment of the register under the 1965 Act. If something was not possible under the 1965 Act, then it will not be possible under Schedule 3 to the 2006 Act.

4.5 The relevant qualifying event in the present case is found in paragraph 2(2)(b) of Schedule 3 to the 2006 Act. This refers, so far as relevant to, *“any relevant disposition in relation to a right of common registered under the 1965 Act ..., where occurring at any time-*

(i) after the date of the registration of the right under that Act; and

(ii) before the commencement of this paragraph”.

4.6 A *“relevant disposition”*, for present purposes, is defined in paragraph 2(3)(c) where it states that *“in the case of a right of common attached to land, the apportionment or severance of the right”*.

The Commons Registration (England) Regulations 2014

4.7 The relevant section of the 2014 Regulations is section 41 which states at paragraph 3:

“A right of common attached to land is not to be treated as having been severed from that land in consequence of a qualifying event, unless the determining authority is satisfied that the severance was lawful and—

(a) there is documentary evidence showing that the parties to the transaction or disposition which is a qualifying event intended the transaction or disposition to have the effect of severing the right of common; or

(b) there is evidence that the right of common has been treated since the qualifying event as having been severed.”

The Law of Property Act 1925 (“LPA 1925”)

4.8 Section 62(2) LPA 1925 provides that *“A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.”*

4.9 Section 62(4) LPA 1925 provides that *“This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.”*

4.10 Section 205(1)(ii) LPA 1925 provides that a *““Conveyance” includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will”*.

7.0 THE APPLICATION OF THE LAW TO THE FACTS AND EVIDENCE OF THE APPLICATION

- 7.1 Application CR19 and application CA14/52 comply with the formal requirements as to form and content as stipulated in The Commons Registration (General) Regulations 1966, and The Commons Registration (England) Regulations 2014, respectively.
- 7.2 I have considered the requirement of regulation 41(3) that the severance must be lawful. Severance of the rights registered under the 1965 Act became registrable in 2001 following the judgement in *Bettison v. Langton* where the House of Lords determined that “a consequence of the quantification of grazing rights was to enable a commoner to dispose of rights of common independently from the land to which they were traditionally attached or, alternatively, sell the land and retain the rights”¹.
- 7.3 The registration authority must be satisfied that the Right is an appurtenant right capable of being severed from the land rather than an appendant right which cannot be severed from the land to which it is attached. Appurtenant rights are defined as rights attaching to grazing land, whereas appendant rights are ancient rights which existed from time immemorial, which could not be created after 1290 and were attached to arable land. I am satisfied that the land around Hause Farm, Martindale, including the Charged Land, is grazing land, and in all likelihood, has been so for many centuries. I am therefore satisfied that, on the balance of probabilities, the Charged Land has never been arable land and the Right is an appurtenant right.
- 7.4 Section 9 of the 2006 Act prohibits severance of rights of common with effect from 28th June 2005. Application CR19 lists the date of severance as the date of the Charge (20th December 1990), whilst application CA14/52 originally listed the date of severance as the date on which the effect of the Charge was brought into being - the Court of Appeal Order (4th December 2003).
- 7.5 In this case section 9 does not apply as the dates of claimed severance given within the application forms precede the date after which severance was prohibited. On that basis any purported severance on the dates given above would be lawful.
- 7.6 The Applicant, however, in a letter dated 29th April 2019, stated that they “*hereby apply that those dates [of severance] be amended to 7 June 2007, the date of the sale of the property.*” The Applicant claims that the sale was not caught in the provisions of section 9. Whilst section 9 of the 2006 Act generally restricts the ability to sever grazing rights to narrow circumstances after 28th June 2005, the Applicant believes that the sale in 2007 (or the instrument by which it was effected) was a sale pursuant to a contract in writing pre-dating 28th June 2005.
- 7.7 Section 9(6) of the 2006 Act provides that –

¹ The Commons Act 2006: Guidance note on Severance, revised August 2006, www.defra.gov.uk

“ Nothing in this section affects any instrument made before, or made pursuant to a contract in writing before, the day on which this section comes into force. ”

- 7.8 The Applicant contends that the 1990 Charge is a contract in writing and that the 2007 sale was made pursuant to this contract.
- 7.9 Officers consider that this contention is well-founded and are therefore satisfied that the newly claimed date of severance, 7th June 2007, would be lawful were a severance to have occurred then in consequence of grazing rights having been excluded from the Charge.

The effect of Section 62 of the LPA 1925 in relation to the Charge - were the grazing rights included within the Charge itself?

- 4.11 It is agreed by those representing Mrs Hedworth and those representing the Rowleys that section 62 is capable of applying to the Charge as it is a “conveyance” within the meaning of section 205 LPA 1925, and that the right of common referred to in previous conveyances of the land is a profit a prendre “*appertaining to or reputed to appertain to*” the land conveyed.
- 4.12 All parties agree that the Charge itself does not mention the common rights; however, this is where the consensus ends.
- 4.13 The Council must determine if the Charge was effective to convey the grazing rights attached to the Land itself, or whether (as contended by the Applicant) the Charge should be interpreted as excluding those rights.
- 4.14 Officers’ position had been that section 62 applies “*only if and as far as a contrary intention is not expressed in the conveyance...*” (see 6.9), and as the Charge itself is silent on the subject of grazing rights, they would be deemed to be included within the Charge (see 6.8 and 6.9 above). This is the position taken by the Rowleys.
- 4.15 Officers note that the authors of the current edition of **Gale on Easements** express the view (at paragraph 3-32 and footnote 103 thereto) that the words “*appertaining or reputed to appertain to*” in section 62 are “*in one sense superfluous*”, because “*Strictly, it is not necessary to rely on s. 62 in relation to existing easements which are appurtenant to the land conveyed as these pass automatically with the land and without express mention*”. The authorities cited in support of that proposition are the decision of Joyce J in **Godwin v Schweppes Ltd [1902] 1 Ch. 926** and the decision of the Court of Appeal in **Snell & Prideaux Ltd v Dutton Mirrors Ltd [1995] 1 EGLR 259**.
- 4.16 In **Godwin**, Joyce J had to consider a claim whether a right of light was granted under a conveyance by virtue of section 6(2) of the Conveyancing Act 1881 (the predecessor section to section 62 LPA 1925) and stated that “*Easements and privileges legally appendant or appurtenant to property pass by a conveyance of the property simply without any additional words*”. In **Snell & Prideaux Ltd** the Court of Appeal had to consider whether the plaintiffs, who had the benefit of an express right of way over a passageway

owned by the defendants had abandoned their vehicular right over the passageway. Hoffmann L.J., as he then was, noted that “*In this case, the easement being appurtenant to the freehold of the dominant tenement would have passed whether section 62 was there or not, but section 62 is also a ground upon which the easement would pass since it expressly refers to easements and says that the easement will pass unless the express language of the conveyance shows a contrary intention*”.

- 4.17 Officers consider that the decision in **Godwin** provides authority for the proposition that a profit a prendre appurtenant to land will pass automatically when that land is conveyed irrespective of the additional effect of section 62 LPA 1925.
- 4.18 The Applicant contends that Lord Hoffman’s well-known principles of contractual interpretation set out in **Investors Compensation Scheme Ltd v West Bromwich Building Society [1997] UKHL 28** apply, so that the Charge should be construed having regard to what a reasonable person having all the background knowledge available to the parties would have understood.
- 4.19 Correspondence between the solicitors and surveyors acting for UCB, made prior to the execution of the Charge, does provide indirect, hearsay evidence that the intention of Mr and Mrs Hedworth was that the grazing rights should not be included within the Charge, and also that UCB’s valuer had valued the security without reference to the grazing rights. The Applicant claims that this demonstrates a common understanding of both the Hedworths and of UCB in relation to the grazing rights being excluded from the Charge, and that this forms part of the “factual matrix”, which according to Lord Hoffman’s principles of contractual interpretation, should be taken into account when interpreting the Charge. This correspondence was provided by the Applicant and can be seen within **Appendix 5**.
- 4.20 Officers accept that the principles which govern the construction of the terms of a mortgage are those which govern the construction of deeds and contracts generally. However, after evaluating the correspondence upon which the Applicant relies, Officers consider that it is unlikely to assist them.
- 4.21 This is because first, Officers believe that the consideration of the correspondence upon which the Applicant relies as part of the factual matrix, is likely to fall foul of the exclusionary rule identified in **Prenn v Simmonds [1971] 1 W.L.R 1381**, whereby evidence of the parties’ subjective intentions is inadmissible (other than in an action for rectification).
- 4.22 Whilst there are reported decisions in which it has been held that a concluded antecedent agreement may be relied upon when interpreting the contract made pursuant to it², the correspondence does not evidence a detailed agreement between the parties in relation to the contents or drafting of the Charge. The letter from UCB’s solicitors to UCB enclosing the certificate of title shows what that firm considered to be the effect of the omission of any reference to the grazing rights in the Charge itself, but there

² See the decisions in **Rugby v Proforce [2007] EWHC 1621 (QB)** at [82] and **KPMG LLP v Network Rail Infrastructure Ltd [2007] EWCA Civ 363** at paras [34] to [50].

are no surviving letters from Hedworths solicitors which go to show what they considered to be the effect of such omission.

- 4.23 Officers note that in the leading decision in **Arnold v Britton [2015] UKSC 36**, in which the Supreme Court had to consider the interpretation of a service charge provision in leases of holiday chalets on a leisure park, Lord Neuberger considered on a hypothetical basis³ what the significance would have been of letters or notes of discussions in connection with the original drafting and granting of the leases, had these been available to the court. He stated that *“even if such notes or letters had survived, I very much doubt that they would have thrown any light on what was intended to be the effect of the drafting of the various forms of clause 3(2). Even if they had done, they would probably have been inadmissible as I strongly suspect that they would merely have shown what one party thought, or was advised, that the clause meant. If such documents had shown what both parties to the lease in question intended, they would probably only have been admissible if there had been a claim for rectification”*.
- 4.24 Whilst Officers are unaware of a reported decision in which the admissibility of evidence of precisely the type in issue here has been adjudicated upon by a court, the (obiter) dicta of Lord Neuberger in **Arnold** lends support to the view that the correspondence on which the Applicant relies is not admissible as part of the background or factual matrix to be taken into account in construing the Charge.
- 4.25 Secondly, Officers are unaware of any reported case in which a court has found that an existing easement or profit a prendre appurtenant to land did not pass under a conveyance of that land (either by virtue of the principle identified in **Godwin** or in accordance with the general words in section 62 LPA 1925), on the basis that an agreement or understanding evidenced in correspondence prior to the conveyance precluded the automatic transmission of the rights or demonstrated a “contrary intention” for the purposes of section 62(4).
- 4.26 Nevertheless, on the basis that the points above are arguable, Officers have considered whether, assuming that the letters (contained within **Appendix 5**) are to be taken into account in interpreting the Charge, a court would be prepared to effectively add in a clause excluding the grazing rights as part of the process of construction so that the Charge should be read as if such a clause had been included.
- 4.27 After consideration of the case law in this area, Officers believe that a court’s willingness to read the Charge as though it contained a provision expressly excluding the transmission of the grazing rights would likely turn on the analysis of the nature of the parties’ mistake in relation to the drafting of the Charge. Was the mistake one of language and wording, or was the mistake a failure to appreciate the legal effect of the document in the form in which it was executed?
- 4.28 In Officers’ view it was the latter. It would seem that this is not a case in which the parties had intended to use certain wording but as a result of an

³ At paragraph 12 of the judgment.

error, it did not find its way into the final document which was executed. What appears to have happened is that the solicitors acting for USB made a mistake of law, in failing to appreciate the need to include an exclusion clause in the Charge, and the Hedworths in turn failed to pick up on the error. The case law indicates an unwillingness on the part of the courts to correct such a mistake as part of the process of construction⁴. Officers accordingly disagree with the Applicant's interpretation of the Charge.

- 4.29 It must be recognised that the position put forward by the Applicant in relation to the Charge is an arguable one, but **on balance Officers remain of the view that the grazing rights did pass under the Charge**, because the parties intended the Charge, in its executed form, to be worded exactly as it was.

UCB's title as equitable mortgagee

- 4.30 Being aware of the Officers' initial view that the common rights probably did pass with the Charge, the Applicant, whilst maintaining their stance regarding the common rights being excluded from the Charge, raised an additional point within the written representations of 5th December 2019 (attached as **Appendix 7**):

"It is important not set too much store by the legal charge dated 20 December 1990: that charge was found not to be binding. Rather, UCB's title as mortgagee was that of equitable mortgagee by sub-subrogation" [sic]

- 7.30. Officers note that the first instance decision that was under appeal in **UCB Group Ltd v Hedworth [2003] EWCA Civ 1717** was that of Mr Recorder Narayan sitting in Carlisle County Court, in which he had made a possession order in respect of Hause Farm on the basis of the Charge, rejecting Mrs Hedworth's arguments that the Charge had been procured by undue influence and/or misrepresentation by Mr Hedworth. The Court of Appeal held that the judge's conclusion could not stand and would have ordered a retrial but in the event found that this was unnecessary as UCB was entitled in any event to be sub-subrogated to the lien to which Barclays had become entitled upon financing part of the purchase price of five properties in Martindale, the Barclays charge itself being voidable. In more simple terms, the right to the debt vested in UCB.

- 7.31. The judgment of Jonathan Parker L.J. makes clear that UCB was granted a declaration that it was entitled to an equitable charge on Hause Farm to secure £132,906.75, together with interest and costs and "appropriate relief to enforce that security (including an order for possession of Hause Farm)".

- 7.32 It is stated that the Court of Appeal granted and vested in UCB a 3000 year term of the mortgaged property, which must have been pursuant to section 90 LPA 1925. That section is headed **Realisation of equitable charges by the court** and subsection (1) provides that:

⁴ See the decisions of the Court of Appeal in **Cherry Tree Investments Ltd v Landmain [2012] EWCA Civ 736** and **Honda Motor Europe Ltd v Powell [2014] EWCA Civ 437**.

“Where an order for sale is made by the court in reference to an equitable mortgage on land (not secured by a legal term of years absolute or by a charge by way of legal mortgage) the court may, in favour of a purchaser, make a vesting order conveying the land or may appoint a person to convey the land or create and vest in the mortgagee a legal term of years absolute to enable him to carry out the sale, as the case may require, in like manner as if the mortgage had been created by deed by way of mortgage pursuant to this Act”.

As the only purpose of making a vesting order under LPA 1925 would have been to allow UCB to sell Hause Farm, Officers infer that the Court of Appeal made an order for the sale of Hause Farm, as well as granting possession to UCB.

- 7.33 The Applicant contends that the grazing rights were excluded from UCB’s equitable charge on Hause Farm, with the effect that severance occurred on 4th December 2003, the date of the judgment in **UCB Group Ltd v Hedworth [2003] EWCA Civ 1717**⁵.
- 7.34 Officers note that the unpaid vendor’s lien operates as a form of equitable charge implied by law, giving the vendor full security in equity for full payment of the agreed purchase price. If the unpaid vendor is paid off by a third party, the third party can claim the benefit of subrogation, entitlement to which is based on unjust enrichment.
- 7.35 UCB was sub-subrogated to the rights of the vendors who sold the Martindale properties to Mr and Mrs Hedworth, namely the personal representatives of the estate of Ethel Barraclough. As a result of the judgment of the Court of Appeal, notwithstanding that it could not rely upon the Charge, UCB was able to revive and take advantage of a different security designed for a different purpose and a different person. So, the intentions of the parties to the Charge in relation to the transmission of the grazing rights under that instrument are irrelevant. What falls to be considered is the scope of the vendor’s lien which arose for the benefit of the personal representatives.
- 7.36 As the grazing rights were existing rights appurtenant to Hause Farm at the date of the sale to the Hedworths in September 1986 it must follow that they were included within the scope of the equitable charge and passed automatically with Hause Farm under the order made by the Court of Appeal in December 2003⁶.

⁵ The Applicant also suggests, in the alternative, that severance took place on 7th June 2007 when UCB’s assignee sold the Charged Land to the Rowleys’ predecessor in title. This alternative date is not further explained in the Applicant’s letter but it is assumed that it is provided simply to locate the severance, if not occurring on the date of the equitable charge, then in a consequential sale event forming part of the process of realising the security provided by the equitable charge. As such, the point is inseparable from the equitable charge point (see 7.6 – 7.8).

⁶ As stated by Millett L.J. in **Barclays Bank plc v Estates & Commercial Ltd [1977] 1 WLR 415**, the vendor’s lien comes into being independently of the agreement between the parties. However, Officers note for completeness that the conveyance of the Martindale properties dated 26th September 1986, Part IV of Schedule 1 of which refers to Hause Farm and the 1955 conveyance thereof, did not exclude the grazing rights- they passed under the transaction and were part of what the Hedworths paid for.

- 7.37 The Applicant further contends that “*neither section 62 of the 1925 Act nor the rule in Wheeldon v Burrows applies to such a grant*” (i.e. to the grant to UCB of a 3000 year term of the mortgaged property) having regard to the decision in **Sovmots Investments Ltd v Secretary of State for the Environment [1977] 1 Q.B. 411**.
- 7.38 The **Sovmots Investment** case was concerned with the purchase of land by a local authority in the exercise of statutory powers of compulsory purchase and the court had to consider whether ancillary rights over part of a building necessary to enable maisonettes to be used as dwellings were “appurtenances” belonging to them and whether the ancillary rights were required to be specified in the compulsory purchase order. It was originally argued that such rights would be acquired automatically on completion of the compulsory purchase under section 62(2) LPA 1925 or under the first rule in *Wheeldon v Burrows*, but the argument was ultimately abandoned and was rejected in the House of Lords on the basis that “*These rules, applicable to voluntary conveyances of land and to contracts for the sale of land, have no place in compulsory purchase. They are founded upon the principle that a grantor may not derogate from his grant, for which there is no room when the acquisition is compulsory*”⁷.
- 7.39 The grant of a 3000 year term in Hause Farm to UCB in December 2003 was not the result of compulsory acquisition but flowed from the court’s finding that (to the extent of the £132,906.75 advanced by Barclays to fund the purchase price, which UCB had in turn paid to Barclays) UCB was entitled to stand in the shoes of the original vendors who had a lien over Hause Farm (including the rights enjoyed by that property) to secure the purchase price. The grazing rights were not quasi-easements, but existing profits a prendre. This being so, Officers do not consider that the decision in **Sovmots Investments** is of relevance to the present case.
- 7.40 Officers are therefore of the view that the grazing rights were included within the equitable charge and that they passed automatically with the Charged Land under the order made by the Court of Appeal on 4th December 2003.

The subsequent treatment of the common rights

- 7.41 Officers raised the issue of the subsequent treatment of the rights as a potential alternative way in which severance could have taken place, and there has been much correspondence on the matter since, from the Applicant, the Rowleys, and a tenant farmer.
- 7.42 After a detailed review, and for reasons further explained in “*The subsequent treatment of the common right*” section of the letter dated 19th September 2019 (provided as part of **Appendix 7**), Officers do not believe that the subsequent treatment of the right is relevant in this case.
- 7.43 In summary, the notion of the subsequent treatment of the common rights would only be engaged where there is an absence of an instrument or any contemporaneous documentary evidence. That is not the present case,

⁷ Per Lord Keith of Kinkel in the House of Lords: see [1979] A.C. 144 at p. 185.

where we have a copy of the instrument itself (the Charge), and documentary evidence contemporaneous with it.

- 7.44 Furthermore, as stated in the letter of 19th September, if the subsequent treatment of the rights were relevant, it would not impact on matters in any event. If the rights passed under the Charge as a matter of law (as for the reasons outlined above Officers believe they did) then they would not have been severed at that point or, so it must follow, upon the (consequential) sale of the Charged Land. The rights would have passed under the Charge and then with the Charged Land on its sale. The same analysis applies if the rights were, as a matter of law, included in the equitable charge (as Officers consider is the case).
- 7.45 After this analysis Officers can therefore not see how the subsequent treatment of the rights could alter the legal effects of what had occurred at those points in time and turn what was not then a severance into one.

Mr Lasper's representations

- 7.46 Mr Lasper's essential argument is that the execution of the Charge manifested an intention on the part of the Applicant to treat the tenement (Hause Farm) and the rights of common as separately tradeable, and therefore at the point of the claimed severance all (350) rights were severed from the land, not just the (135) rights proportionally attributed to the Charged Land. Copies of emails received from Mr Lasper, expanding upon his initial representation, can be seen at **Appendix 8**.
- 7.47 In Mr Lasper's view the appurtenancy of the rights could only be to Hause Farm as a whole and not to any part or parts of it. Therefore the conveyance of part of the dominant tenement destroys the only appurtenancy which exists (to the whole of the dominant tenement) and thereupon transforms the previously appurtenant rights into rights in gross, that is, effects a severance of the whole of the rights.
- 7.48 Therefore, in Mr Lasper's opinion, the effect of a division of Hause Farm would have been that no one could have acquired any grazing rights appurtenant to the Charged land thereafter, because the appurtenancy was never divisible and that there could, for the same reason, never have been any partial severance of a proportion of the rights, but only severance of the whole.
- 7.49 Mr Lasper's argument is one that he has submitted against several other applications made under Schedule 3 Paragraph 2 of the 2006 Act and, he alleges, is based on common law.
- 7.50 The Registration Authority's settled position to date has been that severance of part of such a right of common was, in theory, possible. Gadsden on Commons and Greens states, *'It has clearly been established in Wyatt Wyld's Case that, where a dominant tenement with appendant, or appurtenant levant and couchant rights is divided..., each divided portion will*

continue to enjoy rights based on levancy and couchancy apportioned rateably to the separate parts.⁸

- 7.51 Mr Lasper has now put forward a detailed analysis of *Wyat Wild's Case and White v Taylor (No. 2)*.
- 7.52 In respect of *Wyat Wild's* Mr Lasper notes, correctly, that the case did not concern an appurtenant right for a definite number of animals.
- 7.53 He therefore contends that the case cannot be applied to such a right for two main reasons. The first is because such a right is not connected to any particular part of a dominant tenement.
- 7.54 The second is that it is not necessary, in the case of a right limited by a definite number that can be freely disposed of anyway by virtue of its grant, to resort to the reasoning used by the court in *Wyat Wild's Case* in respect of freedom of alienation of land, thereby obviating any risk of loss of the right upon partial dealing with the dominant tenement. Mr Lasper further states that rateable apportionment was no part of the decision in *Wyat Wild's Case*.
- 7.55 Officers believe that there is some force in Mr Lasper's arguments in relation to *Wyat Wild's Case*, and believe that the decision cannot, in fact, be authority for the case of an appurtenant right of common for a definite number of animals (as is the case here). Whilst the case might not be authority to show that, in the absence of provision to the contrary in the transfer, the attached rights will be apportioned and transferred along with the land to which they were attached, it equally follows that the case cannot be authority for Mr Lasper's position that, in the case of such a right, the transfer of part of the dominant tenement destroys the appurtenancy and converts the rights into rights in gross.
- 7.56 In the case of *White v Taylor (No. 2)*, Buckley J concluded that upon the sale of part of a dominant tenement to which there is appurtenant a right of common in respect of a fixed number of animals, in circumstances where nothing is said about reserving, assigning or apportioning the right, a rateably apportioned part of the right will also pass. An important part of this reasoning is that this outcome would not increase the burden on the servient tenement. This is the position held by Officers.
- 7.57 Mr Lasper's analysis of *White v Taylor (No. 2)* appears to effectively be that the case is of no assistance, as the case can only be considered authority in respect of its specific facts and regarded as turning simply on construction of the trusts in question.
- 7.58 Officers do not think that there can be found in Buckley J's remarks support for Mr Lasper's proposition that a partial transfer of a dominant tenement destroys the appurtenancy of a right of common for a definite number of animals. On the other hand, Officers can find support for their position within Buckley J's reasoning. In his treatment of *Wyat Wild's Case* and the other historical cases he cites, he seems to regard them as establishing a rule of law rather than simply being decisions which are the products of an exercise

⁸ Cousins, E.F, Honey, R, Craddock, H, Gadsden & Cousins on Commons and Greens, Third Edition, Sweet & Maxwell, London, 2020 at 5.86

in construction of the grants in question. Officers also consider that Buckley J's conclusion cited in paragraph 7.55 above in relation to appurtenant grazing rights for a fixed number of animals was one of general principle rather than one related only to the particular facts of the case or the result simply of a fact-specific exercise in construction.

- 7.59 Officers are satisfied that, on balance, their current position is correct, and that a sale of part of the dominant tenement would not result in the entirety of the common right being severed from the land.

8.0 LEGAL IMPLICATIONS

- 8.1 The Council has a statutory duty to keep a register of Common Land and since the implementation of Part 1 of the 2006 Act, has the power to amend the register. The Council's Constitution at Part 2G 2.1) f) i) delegates this responsibility to the Development Control and Regulation Committee.
- 8.2 In considering the Applications, Members must consider all the evidence available to them and must be satisfied that the evidence shows that each aspect of the statutory conditions are met. In respect of the CA14/52 application, these are set out at paragraph 2 of Schedule 3 of the 2006 Act and regulation 41(3) of the 2014 Regulations have been met. In respect of the CR19 application, these are set out at section 13(c) of the 1965 Act and paragraph 29 of the 1966 Regulations. The burden of proof in this regard is firmly upon the Applicant to provide the required evidence. The standard of proof to be applied is the usual civil standard "on the balance of probabilities", i.e. it must be more likely than not. It is however worth noting that for these particular Applications, if the case comes down to the correct understanding of law, of the effect of the Charge or the equitable charge, or, indeed, to the correct approach to Mr Lasper's point, then those are not issues which turn on the burden or standard of proof. Those latter concepts concern the resolution of evidential matters, but something is either the law or it isn't.
- 8.3 The role of this Committee is to reach its own determination on the matters of fact and law arising as a result of the Applications. It is for Members to determine the Applications fairly, putting aside any considerations of the desirability of the rights being severed or not being severed from the land.
- 8.4 Although the recommendation is for the Committee to proceed with determination and rejection of the Applications, the Committee is not bound to follow the Recommendation; provided that in reaching its decision it applies the correct legal principles and duly considers the evidence. Therefore Members are free to accept or reject any of the reasoning in the report. If Members reject the Officers' reasoning and decide either not to determine the Applications or to accept the Applications, the Committee should set out their reasons at the meeting.
- 8.5 It should be noted that under regulation 27(7)(b) of the 2014 Regulations the Council may not accept an application without first offering any person (other than the applicant) for whom the grant of an application would represent a determination of that person's civil rights an opportunity to make oral representations. Accordingly, if Members go against the Officer

recommendation and are inclined to accept the applications, the matter will be deferred to allow such an offer will be made before a further report to Committee is made.

All other legal considerations, issues and implications have been addressed within the detail of the report.

9.0 OPTIONS

- 9.1 The Committee may accept or reject the recommendation in whole or in part.
- 9.2 If the recommendation is accepted the Registration Authority will give effect to the determination by rejecting both applications and leaving the register unaltered. The 135 sheep rights will remain attached to the Charged Land that is within the ownership of the Rowleys. The Rowleys declaration of entitlement to exercise those rights of common at entry 31 of register unit CL3 will therefore remain live and unaltered.
- 9.3 If the Officers' recommendation is rejected then oral representations will be sought from the Rowleys and any other party who has a legal interest in the land. The matter will be deferred to a later committee meeting, and if at that committee meeting members accept the applications then the commons registers will be amended accordingly. The Rowleys' declaration at entry 31 will be cancelled and a new entry will be created, which will show the 135 sheep rights as having been severed from the land and held in gross in the name of the Applicant.
- 9.4 Members should note that the decision of the Committee in relation to an application to amend the common land register is a legal decision and is not a matter of policy or discretion.

10.0 CONCLUSION

- 10.1 Officers are of the opinion that the Applications have been validly made and that the purported severance of the grazing rights attached to the Charged Land was potentially lawful.
- 10.2 Despite correspondence prior to the Charge being created suggesting that the common rights were to be excluded, the Charge itself is silent on the matter. Officers are therefore of the opinion that the common rights were included within the Charge placed over the Charged Land.
- 10.3 If the rights were intended to be excluded at the time of the final execution of the Charge, then the omission of a clause excluding them was a mistake of law, and one that was not picked up at the time.
- 10.4 Officers believe that the grazing rights further passed automatically with the Charged Land under the order made by the Court of Appeal on 4th December 2003 and the consequential sale.
- 10.5 Officers find that the subsequent treatment of the rights is immaterial to establish severance, as in this case there is an instrument (the Charge) and other contemporaneous evidence from the time of the purported severance.

Officers also do not see how the subsequent treatment of the rights could alter the legal effects of what had occurred at the points in time referred to in paragraphs 10.2-10.4 above and turn what was not then a severance into one.

- 10.6 After carefully reviewing Mr Lasper's representations, Officers conclude that they are happy to maintain the Council's current position in that an apportionment of a dominant tenement would not result (in the absence of any clause reserving, assigning or apportioning the right), in the severance of the entire right of common.
- 10.7 Officers find that the 135 grazing rights (assigned to the Charged Land and calculated via a rateable apportionment) were not severed and remain attached to the Charged Land.
- 10.8 It is recommended that this Committee resolves to reject the applications and to leave the commons register unaltered.

11.0 GLOSSARY OF TERMS

Appendant right – *an ancient right to graze on common land animals which were used to plough and manure arable land. Attached to arable land.*

Appurtenant right – *a right to graze animals on common land which is attached to grazing land and/or buildings, usually a farm. When the land changes ownership, the right passes with the land.*

Apportionment – *a division of a right of common when the land to which it is attached (e.g. farm) is divided into multiple lots. The right of common is divided proportionately between each lot.*

Bridging loan – *a sum of money lent by a bank to cover an interval between two transactions.*

Dominant Tenement – *the land to which a right of common is attached (eg. farm).*

Facility letter - *a letter from a lender to you confirming that they intend to make money available to you, subject to you satisfying their conditions.*

Legal charge – *a method by which a lender protects the money they have lent to an individual or company. It is a legal document signed by the borrower and which is registered against a property so as to alert any potential buyer of the existence of the debt.*

Levancy and couchancy – *the principle which determined the number of grazing livestock allowed on the common by reference to the capacity of the dominant tenement to feed stock over the winter months. E.g. if a farm could sustain a certain number of sheep over the winter months, then the owner of the farm could graze that number of sheep on the common in the summer.*

Lien – *a form of security interest granted over an item of property to secure the payment of a debt or performance of some other obligation.*

Profit a prendre - an interest in land that gives a person the right to enter another's land and take something from the land.

Right in gross – a right of common which is not attached to any land and is held by an individual as a personal right.

Servient Tenement – the land over which a right of common is exercisable, i.e common land or a town or village green.

Severance – an act which destroys the attachment of a right of common to land upon which the right becomes a right in gross. Severance occurs when the land to which a right is attached is sold but the right is reserved by the previous owner or when the right is sold separately from the land to which it was attached. Severance is prohibited from 28 June 2005.

Subrogation - The substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that he or she who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.

Angela Jones
Executive Director – Economy and Infrastructure
29th December 2020

APPENDICES

Appendix 1 – A copy of the original commons entry recorded at entry 5

Appendix 2 – The legal charge dated 20 December 1990

Appendix 3 – The CR19 application, received 1 March 2010

Appendix 4 – A copy of the updated commons entry recorded at entry 31

Appendix 5 – Application CA14/52 and supporting evidence, received 4 May 2018

Appendix 6 – Objections to application CA14/52

Appendix 7 – Oral representations submitted on behalf of the applicant

(and the invitation to provide oral representations)

Appendix 8 – Mr Lasper's further representations (a selection of)

Appendix 9 – Previous conveyances referred to within the Charge

IMPLICATIONS

Staffing: None

Financial: There would be cost implications in the event of an application for judicial review, however the Council is the registration authority and therefore has a statutory duty to decide applications.

Property: None

Electoral Division(s): Kirkby Stephen

Human Rights: The Council as registration authority has to make a decision in accordance with the law and in particular with the provisions of the 2006 Act, given these legal criteria a decision must reflect the legislation despite any other rights of individuals.

PREVIOUS RELEVANT COUNCIL OR EXECUTIVE DECISIONS

No previous relevant decisions

CONSIDERATION BY OVERVIEW AND SCRUTINY

Not considered by Overview and Scrutiny

BACKGROUND PAPERS

- Commons Act 2006
- Commons Registration Act 1965
- Law of Property Act 1925
- Commons Registration (England) Regulations 2014
- Commons Registration (General) Regulations 1966
- Common Land: Guidance to Commons Registration Authorities and Applicants 2015.
- The Commons Act 2006: Guidance note on Severance, August 2006.
- Cousins, E.F, Honey, R, Craddock, H, Gadsden & Cousins on Commons and Greens, Third Edition, Sweet & Maxwell, London, 2020
- Gale on Easements, 21st Edition, Sweet & Maxwell, London, 2020
- *Bettison and others v Langton and others*: HL 17 May 2001.
- *UCB Group Ltd v Hedworth* [2003] EWCA Civ 1717
- *Honda Motor Europe Ltd v Powell* [2014] EWCA Civ 437
- *Cherry Tree Investments Ltd v Landmain* [2012] EWCA Civ 736
- *Arnold v Britton* [2015] UKSC 36
- *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363
- *Rugby v Proforce* [2007] EWHC 1621 (QB)
- *Prenn v Simmonds* [1971] 1 W.L.R 1381
- *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28
- *Snell & Prideaux Ltd v Dutton Mirrors Ltd* [1995] 1 EGLR 259
- *Godwin v Schweppes Ltd* [1902] 1 Ch. 926

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