Neutral Citation Number: [2026] EWHC 1244 (Admin)

Case No: AC-2025-LON-001962

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22nd May 2026

Before:

THE HONOURABLE MR JUSTICE KIMBLIN

- -

Between:

THE KING
(on the application of MAUREEN CONSTANCE COMBER)

Claimant

- and -

HAMPSHIRE COUNTY COUNCIL

Defendant

- and -

ANTHONY GARY PETER WHITFIELD

Interested Party

- -
- -

Paul Stafford and **Helen Bunce** (instructed by Knights Professional Services Limited) for the **Claimant**
Simon Adamyk (instructed by **Hampshire County Council**) for the **Defendant**
Edward Cousins (instructed by Peter Lynn & Partners) for the **Interested Party**

Hearing dates: 3rd to 4th February 2026
Draft circulated: 11th May 2026

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Approved Judgment

This judgment was handed down remotely at 2:30 pm on Friday 22nd May 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE KIMBLIN

MR JUSTICE KIMBLIN:

[A] INTRODUCTION

Issues

1. Broxhead Common is in north-east Hampshire. By her letter dated 9th August 2024, Mrs Comber (now deceased) attempted to register 80 acres of Broxhead Common with the Defendant as Commons Registration Authority ('the Council'), pursuant to Part 1 of the Commons Registration Act 1965 ('the 1965 Act'). That land is owned by the Interested Party and has been referred by the parties as 'the 80 acres'.

2. By a decision dated 3rd March 2025, the Council declined to determine Mrs Comber's application for want of jurisdiction. She now challenges that decision, both substantively and procedurally. Lang J granted permission by her Order dated 12th September 2025. There are three areas of dispute between the parties.

3. Firstly, the Council declined to determine Mrs Comber's application for lack of jurisdiction. This raises questions as to the way that the statutory machinery for commons registration works in Hampshire and other administrative areas which do not presently operate the scheme in the Commons Act 2006 ('the 2006 Act') as what is known as a 'pioneer authority' or a '2014 authority'.

4. Secondly, if the Council did have jurisdiction, is the 80 acres waste land of the manor? More particularly, the parties have agreed the issue to be as follows:

> (1) If the Council does have the statutory jurisdiction in principle, whether the 80 Acres qualifies for registration under s. 22(1)(b) of the 1965 Act as being "*waste land of a manor not subject to rights of common*":
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> (a) at all, and/or;
>
> (b) taking account of the description of manorial waste as set out in *A-G v Hanmer* (1857) 27 LJ Ch 837.
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> (2) Whether the moment in time the Court should consider when determining whether the 80 Acres meets the description in *Hanmer* is the nature of the land when:
>
> (a) the current application was made, or;
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> (b) when it was provisionally registered in 1968, or;
>
> (c) when the 1965 Act entered into force.
>
> (3) Whether the presence of unlawful fencing around the 80 Acres can impact the Court's assessment of whether the 80 Acres meets the description of manorial waste in *Hanmer*, and, if so, how.

5. The third area of dispute is procedural. Mrs Comber contends that the Council acted unfairly in not giving her an opportunity to respond during the course of the application, and moreover, that the role of counsel in that process and the Council's interests in nearby land gave rise to an appearance of bias.

6. The jurisdictional issue does not depend strongly on the factual background. The essential question is whether the statutory scheme which applies in Hampshire is capable of admitting an application to register the 80 acres as common? Alternatively, should the court provide relief to ensure that such an application may be determined? I address this issue at the outset because jurisdiction is the obvious starting point, and because it is the most convenient means of setting out the legal framework.

7. I then turn to the facts and history in more detail in the context of the second issue (waste land of the manor) and then lastly to the procedural issue. However, to appreciate the depth of the background facts, it is worthwhile to provide an outline at this stage.

Factual Overview

8. The Council instructed Dr L.E. Tavener to survey *The Common Lands of Hampshire* which resulted in his book of that title, published in 1957. It supported the Council's evidence to the Royal Commission on Common Lands which reported in July 1958. Dr Tavener noted Broxhead Common. The 80 acres formed part of the historic Broxhead Common and were recognised as such in two decisions in 1974 by the Chief Commons Commissioner ('CCC'), Mr Squibb QC:

> "…I am satisfied that there was a right of common in the soil and a right of common of pasture over the whole of the common attached to all the tenements [of the manor], whether freehold, copyhold, or leasehold, mentioned in the survey of the still unpartitioned manor of 1636."

9. In *Whitfield v Connell and Cooke* (reported as *Re Broxhead Common* (1977) 33 P.&C.R.451) Mr Whitfield, the Interested Party in this claim, challenged the decision of the CCC. Brightman J found that Mrs Cooke had no rights, but Mr Connell did.

10. Mr Whitfield appealed that part of Brightman J's judgment which held that there remained one commoner, Mr Connell, who had rights over the 80 acres. That appeal was dismissed on 24th May 1978 by a consent order in the Court of Appeal on the terms of a settlement contained in the Schedule to the order. Mr Whitfield and Mr Connell agreed by deed that Mr Connell's commoner's rights over the 80 acres should be released on payment to him of £10,000 from Mr Whitfield.

11. The parties to the Schedule were the three before Brightman J, with the addition of the Council. Clauses 3 and 4 of the Schedule *inter alia* provided that:

    i) The Council would not pursue the provisional registration of the 80 acres to final registration under the 1965 Act;

ii) The Council would support any application by Mr Whitfield to the Secretary of State under s. 194 of the Law of Property Act 1925 regarding the fences surrounding the 80 acres which had been erected in 1963/64 by Mr Whitfield's predecessor-in-title;

iii) Mr Whitfield would let the balance of Broxhead Common owned by him (amounting to some 100 acres) to the Council for a term of 20 years from 24th May 1978 at a yearly rent of £200 with upwards-only rent reviews at five-yearly intervals thereafter, so as to allow the Council to manage the land to conserve its scientific and landscape qualities while permitting reasonable access to Mr Whitfield and members of the public;

iv) By a further lease made around the same time, the Council rented from Mr Whitfield some five acres of land which it sub-leased to the Lindford Cricket Club.

Legal Overview

Common law basis

12. The court had the welcome assistance of Mr Cousins, an author of the leading text *Gadsden & Cousins on Commons and Greens* (3rd edition). I hope that the authors will allow me to adopt their learning to summarise the common law basis for the rights which came to be subject of the modern statutory schemes of registration.

13. Common lands have their origins in the manorial system of land tenure. Land used in common for agricultural and domestic purposes was widespread, if not universal, before the Norman conquest. The common law system commenced after the conquest when William I imposed a feudal structure in England and, later, Wales. As the common law began its development, so did the law relating to the common lands. Grazing rights were vital and disputes required the development of the law in the King's court. The rules governing common land today represent centuries of the gradual absorption of manorial custom into a standardised common law.

14. In the early stages of the development of the common law the ground rules were few and the aim was mainly to prevent the customary law of the manor from being abused. By the late 16th century the reported cases indicate a tendency of the courts to explain and justify the facts before them on the basis that all manors were similarly constituted and subject to similar rules. It is clear from some of the comments made that the institutions within the manor were not all that well understood, but, nevertheless, the manor described by Elizabethan lawyers was the one which became accepted as the legal truth.

15. Such maintenance of a legal truth is what is found in *Corpus Christi College, Oxford v Gloucestershire County Council* [1983] QB 360 per Lord Denning [at 365 B-H] who described the manor and its legal basis in this way:

> "In mediaeval times the manor was the nucleus of English rural life. It was an administrative unit of an extensive area of land. The whole of it was owned originally by the Lord of the Manor. He lived in the big house called the Manor House. Attached to it

> were many acres of grassland and woodlands called the Park. These were the "demesne lands" which were for the personal use of the Lord of the Manor. Dotted all round were the enclosed homes and land occupied by the "tenants of the manor". They held them by copyhold tenure. Their titles were entered in the court rolls of the manor. They were nearly equivalent to freehold, but described as "tenants of the manor". The rest of the manorial lands were the "waste lands of the manor". The "tenants of the manor" had the right to graze their animals on the waste lands of the manor. Although the "demesne land" was personal to the Lord of the Manor, nevertheless he sometimes granted to the "tenants of the manor" the right to graze their animals on it, or they acquired it by custom. In such case their right to graze on the "demesne land" was indistinguishable from their right to graze on the "waste lands of the manor", so long as it remained open to them and uncultivated, although there might be hedges and gates to keep the cattle from straying. So much so that their rights over it became known as a "right of common" and the land became known as "common land".
>
> In the course of time, however, the Lordship of the Manor became severed from the lands of the manor. This was where the Lord of the Manor sold off parcels of the land to purchasers. He might, for instance, sell off the demesne lands and convey them as a distinct property. Thenceforward the land ceased to form part of the manor and was held by a freeholder, see *Delacherois v. Delacherois* (1864) 11 H.L. Cas. 62 at pages 102-103 by Lord St. Leonards. But no such conveyance could adversely affect the rights of common of those who were entitled to them as "tenants of the manor" or otherwise. No Lord of the Manor could, by alienation, deprive those entitled to their rights over it or in respect of it, see *Swayne's case* 8 Coke's Reports 63 and *The Queen v. Duchess of Buccleugh* (1704) 1 Salkeld 358.
>
> Nowadays there are few, if any, manors left intact. The Lords of the Manor have sold off the house and lands to strangers. Nothing remains in the lordship except the title of "Lord of the Manor" and the right to hold the manorial documents. This bare title and right is sometimes put on the market and sold for a nominal figure of £200 or £300.
>
> The one point of principle of all this is that no Lord of the Manor could, by selling the manorial lands, deprive the tenants of the manor of their rights of common over them, no matter whether those lands were originally part of the "demesne lands" or the "waste land of the manor"."

16. That expression of the common law principle explains the practical and legal relationship between common land and the waste. That was picked up by Parliament, to which I now turn.

Modern statutes and registration

17. Parliament has engaged with the eight hundred years of evolution of practice and usage of common land, and the common law which developed alongside it. Statutory schemes have also long affected rights and areal extent of common land: Commons Act 1285 (repealed); Inclosure Act 1773 (in force). Another statutory intervention was the protection of commons in areas of urban development during the nineteenth century: Metropolitan Commons Act 1866 and the Commons Act 1876.

18. However, the registration of commons has only been on a statutory basis and was never a feature of the common law. Registration was brought about by the 1965 Act and regulations made under it.

19. Lord Templeman, in *Hampshire County Council v Milburn* [1991] 1 AC 325 [at 340 C-D], recorded the purpose of the 1965 Act by reference to the report of the Royal Commission on Common Land presented in July 1958 (Cmnd. 462). It concluded that waste land and other common land needed to be identified and registered, that the names of the owners of common land should also be identified and registered and that the rights of the commoners, if any, should be proved and registered. The commissioners considered: "(404) … that, as the last reserve of uncommitted land in England and Wales, common land ought to be preserved in the public interest." There should be a commons registration authority which would register common land within its area, and invite the registration by the owners of common land of claims to title and by commoners of claims to rights in or over the land.

20. A significant result from the Royal Commission and the 1965 Act was that s. 22(1) provided a statutory definition of 'common land', namely:

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

21. Much of the 1965 Act has now been repealed (at least in certain areas) by s. 53 of and Sch. 6 to the 2006 Act. Land which is common land, and the rights and ownership of such, was to be registered with the registration authority (here the county council): ss. 1 and 2 of the 1965 Act.

22. S. 1(2) provided for a time limit for registration such that an existing right of common was extinguished if it was not registered by the prescribed date: *Central Electricity Generating Board v Clwyd County Council* [1976] 1 WLR 151; *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 at [18]; *R (Littlejohns) v Devon County Council* [2015] EWHC 730 (Admin); [2015] QB 869 per Lang J at [21].

23. *Littlejohns* was upheld on appeal: [2016] EWCA Civ 446; [2016] QB 1092, Tomlinson and Lewison LLJ, Sir Terence Etherton C dissenting. I return to those judgments when considering the jurisdiction issue, below.

24. The registration authority is to maintain the register: s. 3 of the 1965 Act and ss. 1 to 3 of the 2006 Act.

25. Section 13 made provision for amendments of the register, so far as relevant to common land:

> "Regulations under this Act shall provide for the amendment of the registers maintained under this Act where: (a) any land registered under this Act ceases to be common land or a town or village green; or (b) any land becomes common land or a town or village green; or (c) any rights registered under this Act are apportioned, extinguished or released, or are varied or transferred in such circumstances as may be prescribed …"

26. In *Milburn*, Sir Anthony Milburn successfully separated the manor and the waste that had been registered as common under s. 22(1)(b), i.e. waste land of the manor. He applied under s. 13 to de-register the land as common. The argument was that the land was no longer waste of a manor so it ceased to be common under s. 22(1)(b), and so should be de-registered. That argument was rejected at [343H-344B]:

> "The Royal Commission clearly thought that common land should be preserved for the benefit of the public and registration was the first step to that end. Parliament cannot have intended that every identifiable piece of waste land which was required to be registered under the Act should cease to be affected by the Act by the voluntary act of the owner for the time being. In the appellants' case it is submitted that in section 22(1) of the Act of 1965 "waste land of a manor" means "waste land now or formerly of a manor" or "waste land of manorial origin." I agree with this submission and with the reasoning of Slade J. in *In re Chewton Common* [1977] 1 W.L.R. 1242. I would allow this appeal and disapprove the decision of the Court of Appeal in *In re Box Hill Common* [1980] Ch. 109."

27. The impact of *Milburn* was to alter the existing understanding of the law, based on *Re Box Hill Common* [1980] 1 Ch 109, that land which had previously been severed from the manor could not be registered under s. 22(1)(b). Decisions of Commons Commissioners made before *Milburn* were made on a wrong understanding of s. 22(1)(b) and it was too late to appeal them because the permitted period for bringing an appeal had expired.

28. The Government's *Common Land Policy Statement – 2002* contained a section (at paras 9 to 11) dealing with fresh registrations of common land. Views expressed in response to a consultation persuaded the Government that it would introduce primary legislation 'to make it possible to register … land that was removed from provisional registration without justification or as a result of legal views concerning continued ownership by the Lord of the Manor which were later overturned'.

29. Under the 2006 Act, there is a power to amend the register in s. 19:

> "(1) A commons registration authority may amend its register of common land or town or village greens for any purpose referred to in subsection (2).

> (2) Those purposes are—
>
> (a) correcting a mistake made by the commons registration authority in making or amending an entry in the register;
>
> (b) correcting any other mistake, where the amendment would not affect—
>
> (i) the extent of any land registered as common land or as a town or village green; or
>
> (ii) what can be done by virtue of a right of common;
>
> (c) removing a duplicate entry from the register;
>
> (d) updating the details of any name or address referred to in an entry;
>
> (e) updating any entry in the register relating to land registered as common land or as a town or village green to take account of accretion or diluvion.
>
> (3) References in this section to a mistake include—
>
> (a) a mistaken omission, and
>
> (b) an unclear or ambiguous description,
>
> and it is immaterial for the purposes of this section whether a mistake was made before or after the commencement of this section.
>
> (4) An amendment may be made by a commons registration authority—
>
> (a) on its own initiative; or
>
> (b) on the application of any person."

30. S. 22 and Sch. 2 are concerned with non-registration or mistaken registration under the 1965 Act. Paragraph 4 of Sch. 2 gives a power to the registration authority to register common land if (among other situations) it is satisfied that the Commons Commissioner determined that the land was not subject to rights of common and did not consider whether the land was waste land of a manor. The purpose of this provision is to correct the position post-*Milburn*. It is explained in the Explanatory Notes to the 2006 Act as follows (at paragraphs 120 to 122):

> "The Court of Appeal decided in 1978 in the *Box Hill* case that 'waste land of a manor' — the second limb of the definition of common land for the purposes of registration under section 22(1)(b) of the 1965 Act — must still be in the ownership of the lord of the manor, but the court's decision was subsequently

> overruled in 1990 by the House of Lords in the *Hazeley Heath* case [*Milburn*]. Between 1978 and 1990, many provisional registrations of common land were cancelled by the Commons Commissioner solely on the grounds of the *Box Hill* judgment, or were withdrawn by the applicant for registration in anticipation of cancellation, and were out of time or ineligible for appeal following the decision in *Hazeley Heath*. Sub-paragraphs (3) and (5) enable such cases meeting the criteria specified to be the subject of a fresh application for registration.
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> …
>
> Sub-paragraph (4) enables cases to be reviewed where the Commons Commissioner concluded, on an objection to the registration of land as common land, that the land was not subject to rights of common, but did not consider whether the land might qualify for registration as waste land of the manor. Where none of the parties appearing before the Commissioner argued that the land might also qualify as waste land, the Commissioner often concluded that the registration should fail without further consideration. However, there is some authority to support the view that the Commissioner ought to have examined the evidence before coming to a decision in such cases, since there is a public interest aspect to the registration of common land and whether land should or should not be registered should not be treated solely as a matter of dispute between the parties to the application."

31. The parties agree that s. 19, s. 22 (in relevant part) and paragraph 4 of Sch. 2 are not in force in Hampshire (save for s. 19(1) and (2)(a)). They are in force in the seven 'pilot' (or 'pioneer') authorities listed in the Commons Act 2006 (Commencement No. 4 and Savings) (England) Order 2008, and also in the two '2014 pilot areas' set out in the Commons Act 2006 (Commencement No. 7, Transitional and Savings Provisions) (England) Order 2014.

[B] JURISDICTION

What the Claimant Wishes to Achieve

32. Mrs Comber lived close to Broxhead Common and the 80 acres. She had a close interest in it and made three applications to the Council to register the 80 acres as common. Those applications were unsuccessful.

33. The first application under s. 19(2)(a) of the 2006 Act was to correct what Mrs Comber contended was a mistake in removing the 80 acres from the register of common land. The application was determined against Mrs Comber by the Planning Inspectorate on 29th November 2019. Thornton J refused Mrs Comber permission to apply to judicially review that decision on 5th May 2020, as did Lieven J on renewal on 23rd July 2020.

34. The second and third applications resulted in two decisions from the same Inspector, both issued on 4th July 2023.

35. With that experience in mind, Mrs Comber took a different approach in 2024 and instructed a new legal team to make an application to register the 80 acres under ss. 1 to 3 of the 1965 Act. That application commenced by drawing attention to the two 1974 decisions of the CCC. It pointed out that, as the law stood in 1974, s. 22(1)(b) of the 1965 Act required ownership of the lordship and ownership of the waste to be united at the time of application under the Act for registration of land as common. If the owner of the waste was not the lord of the manor, then the land was not 'waste of the manor', which was the requirement for registration as common under s. 22(1)(b). The application explained that the findings of fact and law in those two decisions are now subject to the order of the High Court in 1977 and the order of the Court of Appeal in 1978 but also to subsequent developments in the law, which were explained as follows:

> "The first of the developments referred to above was the decision of the House of Lords in *Hampshire County Council v Milburn* [1991] 1 AC 325. This decision changed the old law as stated in *Re Box Hill Common* [1980] Ch 109, where the Court of Appeal had upheld a 1979 decision by Mr Squibb QC in the Box Hill Common case that, to qualify for registration as common land, manorial waste had to be waste at the time of the application for registration under the 1965 Act. Land which was no longer connected with a manor was excluded, with the result that it could not be registered as common land under s 1(1)(b) of the Act.
>
> …
>
> The second development in the law was the Commons Act 2006 ('the 2006 Act') which sought to remedy this problem. Schedule 2, paragraph 4 made express provision for registration of land that had been waste of a manor and was provisionally but not finally registered because of a determination by a Commons Commissioner that although the land had been waste land of a manor at some earlier time, it was not such land at the time of the determination because it had ceased to be connected with the manor and for that reason only the Commissioner had refused to confirm the provisional registration.
>
> The 2006 Act expressly repeals the 1965 Act, which was the law at the time of the 1970s' inquiry and proceedings, but the current extent of the repeal is only partial in the sense that the 2006 Act is fully in force only in fourteen [*sic*] so-called 'pioneer areas' of commons registration authorities. Hampshire is not a pioneer area and central government through Defra has given no indication when the 2006 Act will extend beyond the existing pioneer areas to the rest of England. Parts of the 2006 Act apply to Hampshire but others do not, including Schedule 2, paragraph 4. This means that if the Commons Commissioner's decisions of

> November 1974 which resulted in the non-registration of parts of Broxhead Common were based on what the House of Lords decided in *Milburn* was a wrong interpretation of s 22 of the 1965 Act, there is no route under the 2006 Act to remedy that situation. That is to be contrasted with the position in pioneer areas where registration can now be applied for under Schedule 2, paragraph 4 of the 2006 Act to address circumstances of non-registration or mistaken registration under the 1965 Act. If left unaddressed, the anomaly arising from the partial implementation of the 2006 Act would create inconsistency in the substance and application of the law affecting commons registration across those different local authorities who have responsibility for it."

36. Mrs Comber sought to impress on the Council that if *Milburn* had been decided before the 1974 inquiry was held, then, on the basis of the facts which he found, the CCC would have decided that the 80 acres were common land under s. 22(1)(b) of the 1965 Act. However, as the law then stood, the finding that the land was formerly manorial waste was insufficient to bring the land within s. 22(1)(b) of the 1965 Act. This was because, as the law then stood, the manorial waste had to be within the manor at the time of the application to register it as common land.

37. Mrs Comber relied on the Guidance for Commons Registration Authorities produced by the Department for Environment, Food and Rural Affairs ('DEFRA') dated December 2014 ('the DEFRA Guidance'), particularly at its paragraph 5.15.4:

> "Exceptionally, Defra takes the view that, where an application was made under the 1965 Act, which was determined and refused, it is open to the applicant to make a fresh application for the same purpose under the Act, if the applicant believes that the new application would be successful because the statutory criteria have changed. The registration authority will need to consider whether the new statutory criteria would permit a different outcome when applied to the known facts (as decided upon by any hearing or inquiry held by the registration authority into the previous application). Unless the new application asserts that the facts have materially changed, it should not be necessary for the registration authority to hold a fresh hearing or inquiry into the evidence tested in the original application." [emphasis added]

38. However, the DEFRA Guidance also explains (in its paragraph 1.1.10) that for 1965 Act authorities, such as Hampshire, Part 1 of the 2006 Act has been implemented for only five types of application to correct the register. These are corrections of mistakes, not to make amendments. The DEFRA Guidance explains that its advice is directed to those authorities to whom Part 1 of the 2006 Act does apply in full, not to 1965 Act authorities (paragraphs 1.1.10 to 1.1.13).

39. Mrs Comber identified what she contended was now regarded as a mistake in the decision of the CCC. The law has changed and a different decision would have been

made by the CCC. Mrs Comber asked the Council to correct the error under powers which she contended existed in the 1965 Act.

40. Mr Stafford submitted on behalf of Mrs Comber that Schedule 2, paragraph 4, to the 2006 Act is a power to register land which was not registered under s. 1(2) of the 1965 Act, within the prescribed time limit of 31 July 1970. The relevant part of the 2006 Act is not in force in Hampshire because it is not a 'pioneer authority' or '2014 authority'. There is therefore a legislative gap. Mr Stafford made cogent and forceful submissions as to the serious nature of the legislative gap and that the court should remedy that by reading words into the legislation. I turn to those after setting out the Council's position.

The Council's Position on the Application

41. The Council responded to the application by letter dated 14th March 2025 which concluded that there was no lawful basis for the application, setting out the reasoning in a Decision Report by Mr Jonathan Woods (Strategic Manager (Access and Wellbeing)). The key paragraphs of his Decision are:

> "As some of the provisions of the Commons Act 2006 have yet to be enacted in all parts of England and Wales, there exists a three-tiered system under which different parts of the legislation are in force in different areas. In England, it has been implemented differently for seven 'pioneer authorities', two '2014 authorities', and the rest of the country (so-called 1965 authorities). Hampshire County Council is a 1965 authority, and so is one of many authorities for which significant parts of the 2006 Act are not operational. This includes the ability to apply to add previously unregistered common land (Schedule 2, Paragraph 2) and manorial waste (Schedule 2, Paragraph 4) to the register – such applications cannot be processed in Hampshire. As a result, in Hampshire only applications which seek to correct historic mistakes (under the provisions of Section 19(2)a and Schedule 2, Paragraphs 6-9) are permitted.
>
> …
>
> The current Application seeks to register the 80 Acres as common land pursuant to sections 1 to 3 of the 1965 Act. The accompanying letter from the Applicant's solicitors asserts that *"in the light of its unusual circumstances we believe that this registration can be effected without undue delay or expense"*. The letter adds that the conclusion that the 80 Acres are common land *"is based on developments in the law since 1990 and, crucially, on current DEFRA practice which may not be widely appreciated"* and that *"This conclusion is not affected by the determinations made in 2023 by a planning inspector or by the litigation history between [the Applicant]and HCC … and which do not effect or prevent this application or its consideration as they were made on a different basis"*.
>
> …

> Section 4 of the 1965 Act, which governed the submission of applications to register land as common land, was repealed by the Commons Act 2006, and as a consequence it is unclear which part of the 1965 Act could permit the current application to be made. In any event, even if section 4 of the 1965 Act was still in force (which it is not), the strict time period specified for making an application for registration of land as common land under the 1965 Act has long since expired. Section 4(6) of the 1965 Act provided that: *"An application for registration under this section shall not be entertained if made after such date, not less than three years from the commencement of this Act, as the Minister may by order specify …"* The period for making an application for registration ended on 2 January 1970, more than half a century ago.
>
> Applications under Section 4 of the 1965 Act were required to be made on 'Form 7', signed by every applicant who was an individual, and supported by a statutory declaration. The current application is not made in this format, which is understandable since the relevant Regulations which governed the submission of applications no longer apply. This further illustrates the lack of clarity regarding the statutory basis for the application.
>
> The effect of section 1(2)(a) of the 1965 Act is that, after the expiry of the specified time period (which has long since expired), no land capable of being registered under this Act as common land was or is common land unless it was so registered. As the 80 Acres were not so registered, it follows that they are statutorily deemed not to be common land, regardless of what their status might or might not have been in earlier years.
>
> Whilst sections 1 to 3 of the 1965 are still in force in relation to 1965 authorities, these sections are general sections which do not expressly contemplate an application being made."

42. The Decision concluded that the 1965 Act no longer provided a lawful basis on which to process the application. The application was rejected.

The Jurisdictional Issue and its Analysis

43. The parties agreed the jurisdictional issues as:

> "Whether HCC as a commons registration authority (which is not a pioneer authority) has the statutory jurisdiction to accept a fresh application for the registration of the 80 Acres under ss. 1–3 of the Commons Registration Act 1965 (the "1965 Act"), and, if so, whether that jurisdiction should be exercised here.
>
> Whether the intention of Parliament in passing the Commons Act 2006 requires the Courts to apply a rectifying construction to the 1965 Act, by way of application of the Golden Rule or

> otherwise, in circumstances where the relevant provisions for dealing with non-registration or mistaken registration under the Commons Act 2006 have not been introduced in Hampshire."

44. Put another way, what is the impact on the 1965 Act of the House of Lords decision in *Milburn*, the 2006 Act, and the DEFRA Guidance?

45. Mr Stafford relied on the technique of statutory interpretation that where a later Act deals with the same matter as an earlier Act, provisions of the later Act may be used to aid the construction of the earlier Act. The 2006 Act was passed, amongst other purposes, to remedy the shortcomings identified in the registration provisions of the 1965 Act and to address their consequences as recorded in the Explanatory Notes.

46. Since there has been no announcement from Government to indicate when the 2006 Act will be applied beyond the pioneer authorities and 2014 authorities to the rest of England, 1965 authorities are faced with the task of maintaining their registers without the machinery available under much of Schedule 2 to the 2006 Act. Where the courts accept that legislation creates inconvenience or absurdity, they can apply the golden rule as described by Lord Blackburn in *River Wear Commissioners v Adamson* (1877) 2 App Cas 743 at 764-765, applied in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592 per Lord Nicholls. In its interpretative function the court can add words, and it is submitted that it should do so here by adding the *italicised* words into the preamble of s. 1(2) of the 1965 Act so that the sub-section reads:

> "(2) After the end of such period, not being less than three years from the commencement of this Act, *and renewing annually from [1 January 2026] until such date* as the Minister may by order determine—
>
> > (a) no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered; and
> >
> > (b) no rights of common shall be exercisable over any such land unless they are registered either under this Act or in the register of title."

47. Mr Stafford advanced these submissions orally by reference to the disparity which the present statutory regime creates. For twenty years, people in the areas of the 1965 authorities have not enjoyed the same opportunity to apply to correct mistakes as those in the areas of the pioneer authorities. The court should be slow to conclude that Parliament intended to discriminate so that those in Hampshire are not equal to those in the pioneer authorities. Rather, Parliament intended its Act to be brought into force within a reasonable time. The result is unfair and it is irrational.

48. I accept that Mrs Comber has a prima facie case that the CCC would have addressed the status of the 80 acres differently if the law which the CCC had to apply at the time was that which was subsequently stated in *Milburn.* She would therefore also have a prima facie case to at least apply under Schedule 2 paragraph 4 to the 2006 Act, if it were in force in Hampshire. The resolution of this issue therefore depends on whether this court is able to provide a remedy to Mrs Comber such that her application may be

considered on its merits. Despite the force of Mr Stafford's submissions to persuade this court to intervene, I am unable to accept them for the following reasons.

Lack of enabling provisions and mechanism

49. Mr Adamyk submitted that ss. 1-3 of the 1965 Act do not provide for the registration of common land. They are provisions which are concerned with the maintenance of existing registers. He supports this submission by reference to the revocation of s. 4 of the 1965 Act. S. 4 is the former power by which a registration authority could register common land, either on application or of its own initiative. There is therefore no provision to enable a 1965 Authority to do that which the former s. 4 provided. Indeed, that was so from 2nd June 1970 when the time limit for the making of applications for registration expired.

50. When s. 4 of the 1965 Act was in force, and in-time applications could be made, there was a standard form of application. The same formality now applies for an application under the 2006 Act. I accept Mr Adamyk's submission that the absence of any formal mechanism by which to make an application under the 1965 Act tells against the existence of any jurisdiction. The position under both the 1965 and 2006 schemes include the formalities which would be expected where rights in land are in issue. The forms were to be signed by every applicant, subject to a statutory declaration.

51. There is now therefore neither a statutory provision to provide the necessary power to the Council to accept and decide Mrs Comber's application nor a formal or recognised mechanism to do so.

The effect of the statutory provisions

52. What is the effect of the arguably relevant statutory provisions in the 1965 and 2006 Acts, applying the normal principles of statutory construction? Those principles have been set out in detail by Lord Sales and Lord Stephens, with whom the other Justices of the Supreme Court agreed in *R (N3) v Secretary of State for the Home Department* [2025] UKSC 6; [2025] AC 1473 at [61-68], which in short summary are:

    i) The task is to ascertain the meaning of the words in the light of their context and the purpose of the provision;

    ii) To give effect to the purpose of a provision, regard is to be had to the state of affairs known to Parliament and what its intention was;

    iii) The principle of legality requires a court to be slow to interpret a provision as overriding an established right unless it is clearly spelt out, but unambiguous expression of Parliament's intention may not be disregarded;

    iv) A phrase or passage must be read in the context of the section as a whole and the relevant group of sections;

    v) The intention is for the citizen to rely on what they read so that they can regulate their conduct accordingly, and that is an important constitutional reason for having regard primarily to the statutory context;

vi) External aids such as Explanatory Notes must play a secondary role, which may assist, but cannot displace the meanings conveyed by the words of a statute that are clear, in their context.

53. The scheme of provisions in ss. 1 to 4 of the 1965 Act operated to enable applications to be made to register common land (and also town or village greens, but which is not relevant here). The provisions as enacted were described by Lord Hoffmann in *Oxfordshire County Council v Oxford City Council* at [17-19]. There was a process of formal application, provisional registration which became final in the absence of objection, and determination by the commons commissioner if there was a dispute. Applications were to be made by 2nd January 1970 by reason of the regulations made under the Act, as fully set out by Sir Terence Etherton C in *Littlejohns* at [25 to 28]. After 31st July 1970, no land capable of being registered was to be deemed to be common land unless it was registered: s. 1(2). After that date, rights were extinguished unless registered and so the register was definitive. S. 1(2) was no longer of any practical application from that date.

54. S. 1(2) was at issue in *Littlejohns* in which the Court of Appeal decided whether the local authority was right to refuse the claimants' application on the ground that a right of common could not be created by prescription after 2nd January 1970 over land that had been registered as common land under the 1965 Act. As it was put in ground 1 of that appeal, it was argued by the appellants that s. 1(2)(b) of the 1965 Act was limited to rights which were in existence before 31st July 1970. The Chancellor said at [73] that the '[r]esolution of the issue in dispute depends on the answer to two questions: in relation to common land registered under the 1965 Act on or prior to 31st July 1970, (1) did the 1965 Act abolish the right of the owner of the common land after that date to grant and another to acquire, whether by express grant or by prescription, a right of common over the land; if not, (2) was any such right immediately extinguished upon its creation?' From these ways in which the issues were expressed, it can be seen that *Littlejohns* was focussed firstly on continued creation of rights in common land at times after the expiry of the registration period in the 1965 Act, and secondly on the impact of registration on such a new right.

55. Mr Stafford drew attention to *Littlejohns*, the purpose of the 1965 Act and the dissenting judgment of Sir Terence Etherton C at [89], including as to the impact of s. 13 on the interpretation of s. 1(2):

> "The purpose of the 1965 Act was registration of common land and common rights. More particularly, it was the registration of such common land and rights of common as existed at the date of applications for registration under section 4 of the 1965 Act prior to the date fixed under section 4(5) but with express provision for (1) variation of registered common rights, including (consistently with the recommendations of the Royal Commission) increasing grazing rights in accordance with regulations to be made under section 13 and (2) provision for future rights of common over new common land. There is quite simply no discernible reason why Parliament should have intended that one category of common land alone, namely that which could have been or was registered prior to 31 July 1970,

> should have been subject to a complete bar on the creation or exercise of future rights of common, while permitting enlargement of the registered rights on such a common and the grant of new rights of common over new common land without limit of time, type or extent."

56. There was no mechanism in the 1965 Act to keep registers up to date. The powers of amendment under s. 13 are now still more limited in Hampshire because, as Mr Cousins emphasised, s. 13 has been repealed but transitional provisions save it if land becomes or ceases to be common land by virtue of any instrument.

57. The purpose of the 1965 Act, as found by the majority in *Littlejohns*, was to produce a register which was definitive of land and rights which were capable of being registered and had been so registered. That conclusion is not in conflict with s. 13 which is concerned with land which becomes common land after the operative period and which therefore was not registrable: Tomlinson LJ at [101 and 105]. The concept is a definitive 'once and for all' register, accepting that the s. 13 amendment process means that the register shows the maximum burden on the common land: Lewison LJ at [127, 139 and 142]. The result is captured in the pithy and purposive rhetorical question: 'why did Parliament prohibit registration of new rights of common over common land registered under the 1965 Act if it did not intend that they should no longer be capable of acquisition?'

58. The conclusion of the majority in *Littlejohns* points away from any facility in the 1965 Act to enable Mrs Comber to achieve what she wishes to achieve by her application to the Council.

59. I would also interpose there to note that the 2006 Act also produces a definitive result because the deadline for making an application to a pioneer authority under Sch. 2, paragraphs (3), (4) and (5) expired on 31st December 2020, as provided for in Sch. 4, paragraph 14(1)(a) to the Commons Registration (England) Regulations 2014. It is therefore evident that Parliament has consistently sought to bring finality to the questions of commons registration, even in the seven pioneer authorities and the two 2014 authorities, of which the Council in this case is not one.

60. The repeal of s. 4 of the 1965 Act by the 2006 Act, and the concurrent enactment of a scheme in the 2006 Act which addressed the *Milburn* problem, is a set of circumstances which is to be understood as achieving the Parliamentary purpose. That purpose is clear in that the scope to make applications under the 1965 Act had ceased and could not be re-activated because s. 4 was repealed. Paragraph 4 of Sch. 2 to the 2006 Act created a means of correcting the register in those cases which would have been decided differently if the law had been understood as it was stated in *Milburn* (see paragraph 29 above). The measure in paragraph 4 of Sch. 2 to the 2006 Act was brought into force in seven pilot authorities and two 2014 authorities, and not in the remainder.

61. In my judgment, the provisions in the two statutes to which I have referred, including the fact of the repeals, mean that applications to register common land are no longer possible under the 1965 Act. There is no longer any provision for the making of an application, and in any event s. 4 was a time-limited provision which has long expired. Per the majority in *Littlejohns,* the intention of that legislation was to produce a

definitive result with attendant certainty as to which land was and was not common land, along with registration of rights and ownership. S. 13 of the 1965 Act does not change that position.

62. A limited carve-out of the definitive position in the 1965 Act was provided for in the scheme of the 2006 Act. This is clear from: (1) the words of paragraph 4 of Sch. 2 to the 2006 Act read in context; (2) the well-known effect of the decision of the House of Lords in *Milburn* which Parliament can be taken to have considered and addressed; and (3) the Explanatory Notes.

63. The DEFRA Guidance could not, in my judgment, displace this interpretation because the meaning is clear from the words of the two statutes, read in context. Guidance cannot change that. However, I do not read the DEFRA Guidance as inconsistent with this interpretation. The passage relied upon by Mr Stafford (paragraph 39 above) is a reference to the 2006 Act, not to the 1965 Act, consistently with the DEFRA Guidance which sets out its scope clearly at the outset. As Mr Adamyk submitted, the reference to 'the Act' in 'Exceptionally, Defra takes the view that, where an application was made under the 1965 Act, which was determined and refused, it is open to the applicant to make a fresh application for the same purpose under the Act,…' is a reference to the 2006 Act.

64. DEFRA had been invited by the parties to apply to intervene but has not taken up that invitation with a view to explaining why the rollout of the provisions has taken twenty years. If DEFRA had applied to intervene I would have given permission because the Claimant raises questions which only DEFRA may answer directly. However, I have been provided with excellent assistance by counsel and their instructing solicitors and I regard the determinative issues as clear cut.

Impermissible legislating

65. As *N3* explains the relevant principles, the enactment of legislation is a matter for Parliament, and implementation via the commencement and repeal of statutory provisions is for Ministers using such statutory instruments as the primary legislation provides for. As Mr Stafford recognised, the court's jurisdiction to declare that words have been omitted from or should be removed from legislation is very limited and is confined, essentially, to plain cases of drafting mistakes. The court interprets; it does not legislate. To obtain the result which Mr Stafford seeks would be to do that which neither Parliament nor the Government has decided to bring about. That would be an obvious and impermissible interference in the respective roles of the court, Parliament and Government.

66. This objection to the course which has been suggested on behalf of the Claimant is so fundamental that it is unnecessary to go further because to follow the Claimant's invitation would be contrary to principle. However, the principle is supported by practical reasons which illustrate its importance.

67. The decision to implement the relevant 2006 Act powers in only seven pioneer authorities and two 2014 authorities is one which will have taken place after consultation with those and with other authorities. It was an informed decision. Further, the result of that implementation will have produced information and experience which will be relevant to whether, and if so to what extent, it is appropriate to extend the

implementation of the 2006 Act provisions. The court has none of this information and so is not equipped for such a decision, whereas the Government may obtain such information as it considers necessary.

Conclusion on Jurisdiction

68. In conclusion on the issue of jurisdiction, the Council was correct to decide that it was without a power or a duty to decide the Claimant's application, for the reasons which it gave. The answers to both of the two questions posed in paragraph 43 above is 'no': the Council did not have jurisdiction and this court should not read words into the legislation to fill the so-called legislative gap. For the reasons which I have set out, this court may not and will not intervene in a matter which is outside its proper role.

69. This leaves the Claimant in the position that she could not correct the position to that which the CCC may have arrived at under the law as it came to be understood, as opposed to the law as it was at the time of the CCC's decisions.

[C] MANORIAL WASTE

The Issue of Fact

70. The Claimant contends via her Statement of Facts and Grounds that the Council was wrong to conclude that the 80 acres were not 'open, uncultivated and unoccupied' and so not within the definition of waste land of the manor in s. 22(1)(b) of the 1965 Act. The essential reason for that ground of challenge is that the fencing which enclosed the 80 acres was unlawfully erected.

71. The Council reviewed its position on the Claimant's invitation to do so. By letter dated 23rd December 2025 to the Claimant's solicitors, the Council agreed that the fencing was erected unlawfully. To that extent, the Council's reasoning on this point was agreed to be in error. I was nevertheless taken through the factual and legal background to the point by Mr Stafford. I am satisfied that the Council's concession is correct.

72. However, the Council's decision was also based on its position that the 80 acres were not waste land of the manor as a matter of law.

The Issue of Law

73. In *A-G v Hanmer* (1858) 27 LJ Ch 837 at 840, Watson B stated that the true meaning of 'wastes', or 'waste land', or 'waste ground of the manor' is the open, uncultivated and unoccupied lands parcel of the manor, or open lands parcel of the manor other than the demesne lands of the manor.

74. The issue of law arises from the definition of common land in s. 22(1) of the 1965 Act which I set out again given its central importance to this issue, namely:

> "(a) land subject to rights of common (as defined in this Act) whether those rights are exercisable at all times or only during

> limited periods; (b) waste land of a manor not subject to rights of common; …"

75. As Mr Stafford put it in his skeleton argument, the land was common because it was subject to rights of common, but once rights of common over it ceased to exist, it then became manorial waste. All common is waste, but not all waste is common.

76. Mr Adamyk explained the position in this way. If land falls within s. 22(1)(a) because it is subject to rights of common, it cannot fall within s. 22(1)(b) as that requires it not to be subject to rights of common.

77. These ways of putting the relationship are consistent with authority. The land could not simultaneously be subject to rights of common and waste land of the manor because of the meaning of waste land of the manor under the definition in *A-G v Hanmer* (see *Corpus Christi* as cited at paragraph 15 above per Lord Denning; *Corpus Christi* per Lord Oliver at [370 E]), and because common land is defined as two mutually exclusive types of land, namely land subject to rights of common, and waste land of the manor not subject to rights of common.

78. As Mr Adamyk submitted, when considering the provisional registration of the 80 acres, the CCC did find that they were subject to rights of common, in favour of Mrs Cooke and Mr Connell. Consequently the 80 acres did not (and could not) fall within the definition in s. 22(1)(b) regardless of the points discussed in *Box Hill* and *Milburn*, because they were subject to rights of common and therefore fell within s. 22(1)(a).

79. The litigation on the CCC's decisions resulted in the voluntary release of any remaining rights of common. The CCC's final disposal notice No. 1 of 18th December 1978 therefore directed the Council to de-register the land, consistently with the fact that nobody was then contending that the 80 acres were common land. In my judgment, this is the crucial feature of this part of the case. The parties before the CCC had established that the land was subject to rights of common, not manorial waste. Through subsequent litigation and settlement, they agreed that the rights of common should be released and the land should not be registered. Nobody contended before the CCC that the 80 acres were waste of the manor.

80. I can see no basis on which to reach a different conclusion now, approaching this half a century later, and the apparently complex series of questions posed by the parties under this issue may be answered relatively simply both as to the facts of this case and generally.

81. The registration of land, rights and ownership was the result of a process of application, objection and fact finding which was intended to be definitive and subject to limited subsequent correction. The relevant time, therefore, to decide which limb of s. 22(1) applied was at the time of registration. If it was apparent to the CCC that land was waste land of the manor, within the long-established meaning given in *AG v Hanmer*, then registration would follow accordingly. In respect of the 80 acres, nobody made that case and it is now too late to do so.

82. The same reasoning applies to circumstances in which land is registered as common but the rights fall away either by agreement or otherwise: see the majority in *Littlejohns*. But that is not this case because the parties agreed that the rights of common would cease on the basis of a detailed settlement agreement and so they invited the CCC not to register the land. The rights had gone before the registration opportunity had passed.

83. Accordingly, there was and there is no basis on which the 80 acres may fall within the second limb of the definition in s. 22(1).

[D] PROCEDURAL GROUNDS

84. The procedural grounds are twofold. The first question is whether the Council should have provided Mrs Comber the opportunity to respond to the representations made by the Interested Party before the Council made its decision. The second question is whether there is an appearance of bias including because the Council instructed the same counsel to advise on the application as had appeared to oppose Mrs Comber's previous applications.

The Opportunity to Respond

85. Mr Stafford submits that for the purpose of making its decision on the application, the Council was required to act fairly and in accordance with principles of natural justice. The Council invited Mr Whitfield as Interested Party to make representations or otherwise object to the application but did not send his objection to Mrs Comber to allow her to reply before the Council made its Decision. The objection included documentary evidence that Mrs Comber had not seen before and was unaware of.

86. The problem which this caused for Mrs Comber is that she was not able to point out the issues which she said that the Council needed to address in the Interested Party's representations. She would have pointed to Mr Whitfield's failure to formulate a proposal about future use of the 80 acres to put to the Secretary of State for him to hold the same inquiries as directed by s. 10 (3), (4) and (5) of the Commons Act 1876, which make particular requirements for land use where common is waste land of a manor.

87. Mrs Comber would have made submissions about the exclusion of the 80 acres from the operation of the restrictions on enclosure of commons provisions in s. 194(3)(b) of the Law of Property Act 1925 and she would have questioned the Council's approach to enforcement.

88. The legal principles are very well known and have been expressed in the context of applications to register common land as requiring that every person who might have an interest has a fair opportunity to consider and make representations on the materials (*Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 per Lady Hale at [144]).

89. The Council's Summary Grounds of Defence on this topic, which stand as its Detailed Grounds of Defence, are confirmed in a signed witness statement from Caroline Stickland, who is a solicitor employed by the Council and who was involved in the decision-making process. The Council explains that before it invited comments from

the Interested Party, it had taken legal advice and was minded to reject the application. When those comments were received, the Council took the view that those comments raised additional grounds for rejecting the application.

90. Having heard from both Mrs Comber and from the Interested Party, the Council took the view that there was nothing to be gained from a further round of submissions.

91. In my judgment, the Council ought to have given Mrs Comber an opportunity to respond to the Interested Party's submissions. Firstly, the Interested Party's material included new and different points to those which were addressed by the application. The issue of enclosure was prominent in the Interested Party's representations and it was factually and legally intricate. The interaction between the definition of registrable land under s. 22(1) of the 1965 Act and the enforcement provisions in the Law of Property Act 1925 was not straightforward. Secondly, it ultimately transpired that the Council reviewed its appreciation of the facts in respect of enclosure, as I set out at paragraph 71 above.

92. Thirdly, the Council is candid in saying that the Interested Party's material provided an additional reason for it to reject the application. In this circumstance it was unfair not to go back to the applicant to ask for comment on a point which seemed to the Council to have a role to play in its decision. This is not simply a matter of form so that the decision appears to be fair, though that is important. Rather, it is a still more basic and substantial requirement for the decision-maker to maintain an open mind and to always appreciate that even the apparently unanswerable point sometimes has an answer. This is not to suggest that the number of opportunities for the parties to respond to each other needs to be a burden on the process. That is avoided by making it clear that only a response is sought, not further new material. The failing here was to take account of new material which a party had not had any opportunity to address.

The Allegation of Apparent Bias

93. As I have indicated, the Council took advice from counsel, who was Mr Adamyk. Did his involvement and the totality of the circumstances amount to apparent bias?

94. The law is well-known and established at the highest level: *Porter v Magill* [2002] 2 AC 357. It is the fair-minded and informed observer who is the fictional person who is called upon to decide whether there has been apparent bias. That observer has attributes which many of us might struggle to attain, as Lord Hope of Craighead explained in *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416 at [1] to [3]. He or she always reserves judgment on every point until both sides of the argument are fully understood and is not unduly sensitive or suspicious. The fair-minded observer does not adopt the complainant's assumptions unless they are objectively justified, but is not complacent either and so will not shrink from a conclusion that things said and done may make it difficult for a person to judge things impartially. In reaching a conclusion either way, the informed observer will take the trouble to read the totality of the material, in its overall context, which will be an important part of that material.

95. Factors which may or may not give rise to a real possibility of bias depend on the nature of the issue to be decided: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 per Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C at [25]. There may

be a real possibility of bias if there were a personal friendship or animosity between the judge or decision-maker and a person involved in the case, or if there were real grounds for doubting the ability of the decision-maker to ignore extraneous considerations, prejudices and predilections and bring objective judgment to bear. In most cases, the answer, one way or the other, will be obvious.

96. The whole circumstances in this case took place over an extended period. It started in 1968 when the Council itself proposed the registration of the 80 acres as common land, as the CCC found it to be, though ultimately it was not registered by reasons of the commoner coming to a settlement with the owner. The Council went to some considerable lengths to have the 80 acres registered.

97. Mrs Comber's efforts to have the 80 acres registered have been tenacious and unyielding. Her previous applications have been resisted by the Council, including the instruction of Mr Adamyk.

98. It was suggested that the Council's interest as a tenant of some 100 acres of the Broxhead Common, owned by the Interested Party and for which a rent of £23 per acre per annum is paid, is a relevant matter as to the relationship between the Council, the Interested Party and Mrs Comber. The land is used as a nature reserve and amenity space.

99. Applying the test which I have set out, I find that the Council has performed its functions consistently in a responsible and even-handed manner. There is no apparent bias. The long history of the contest in respect of the 80 acres necessarily involved the Council throughout. It could not avoid playing the roles which the law and the parties required it to play. I see nothing in the facts to indicate that the Council wished to achieve a result which was contrary to that which Mrs Comber sought. Rather, the Council was applying a difficult statutory scheme to a long-running issue and undertaking its proper role as a public body which was charged with these tasks.

100. The Council took a lease of some of the land on Broxhead Common in the public interest, for nature conservation and public access. It took legal advice from a specialist barrister and was under no obligation to change the source of that legal advice. Indeed, it would have been in some senses unfair to all to make a change away from the barrister who had the history and dynamics in mind.

101. The failure to go back to Mrs Comber to obtain a response to the Interested Party's representations was a misstep, but not such as would, in context, give rise to an appearance of bias. Rather, the Council had reached the correct conclusion on jurisdiction and so was minded to bring matters to a close.

102. In conclusion, there was no apparent bias in the consideration and determination of the application.

Relief

103. The failure to obtain a response to the Interested Party's submissions is not a matter which can lead to the grant of any relief in this case. There is no jurisdiction and so the result would inevitably be the same: *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [2017] PTSR 1041 at 1060G per Purchas LJ. It follows that the 'highly

likely' test in s. 31(2A) Senior Courts Act 1981 is also satisfied. If I were to be wrong on jurisdiction, the outcome would still be highly likely to be the same for the reasons which I have given in respect of the manorial waste issue.

104. There is no exceptional reason to depart from the general rule and to apply s. 31(2B) and (2C).

[E] CONCLUSION

105. The Council reached the correct conclusion on its jurisdiction to determine Mrs Comber's application. I detect that it was always appreciated that the application was an imaginative one, and all that was left to try. As much as could be done to advance that argument has been done. However, the argument has met cogent and comprehensive responses which leave no doubt as to the legal status of the application and of the land. Unless and until there are new and different powers for the Council to exercise, the 80 acres remain absent from the register.

106. The claim is dismissed.