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Restrictions on the use of land under Inclosure Awards: how can they be modified or avoided?

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Answer: with some difficulty.

Introduction

This article aims to explain:

i. Briefly, the background to Inclosure Awards;
ii. How such awards they might give rise to restrictions on the use of land; and
iii. How those restrictions might be modified or discharged/avoided, if a different use is desired for the land by its owner. Particular focus is given to 'common' land and town/village greens used for recreational purposes, as to which rights of common may have arisen under an inclosure award, which have the indirect effect of restricting or preventing many other uses (such as development).

The system of inclosure

The system of inclosure (sometimes called 'enclosure') of common land has existed for many hundreds of years, but the system was gradually formalised by numerous Acts of Parliament from the Inclosure Act 1773 through to the Acts of the 1860s, but particularly by the Inclosure Act 1845. Prior to the 1845 Act, inclosure of commons was generally carried out under common law, by custom or by private Inclosure Act (of which there were nearly 4,000 in the period 1745 to 1845).

The purpose of inclosure was to regulate the rights of the owners (the lords of the local manors) and non-owner users of parcels of land which under the feudal system had been used by such non-owners, for example, as pasture or for growing crops, or simply for recreational purposes. Inclosure Commissioners were appointed to oversee widescale inclosures, though the drawing of inclosure maps and drafting of awards was delegated to local surveyors and valuers who would prepare reports for the commissioners.

As *Halsbury's Laws of England* notes (at volume 13 para. 319):

"*In consequence of the altered attitude of Parliament and the country towards the inclosure of commons (as shown by the fact that no inclosures had been sanctioned by Parliament during the preceding ten years), the Commons Act 1876 was passed. That Act made provision for much fuller information to be given to the Inclosure Commissioners in any application relating to a common with reference to the land proposed to be dealt with, its situation and characteristics, and the circumstances of the neighbourhood; inclosure was only to be approved if it was for the benefit of the neighbourhood4. It also provided for a method of regulation under which, while the common remained in its natural state, the rights of common and other rights of the commoners and of the lord of the manor or other owner of the soil could be ascertained and put under proper regulation, and the common itself could be improved by drainage, manuring and planting, and put under the management of a body of conservators with byelaws and regulations for the prevention of nuisances and for keeping order on the common*."

The Commons Act 1876 partly superseded the Inclosure Act 1845; and the 1876 Act has been largely superseded by the Commons Registration Act 1965 and the Commons Act 2006 (not all of the latter yet being in force, and the position being different as between the English and the Welsh parts of the jurisdiction). The 1965 and 2006 Acts relate in particular to the establishment and registration of 'town and village greens', the modern-

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day statutory version of the lands which feudal barons and lords of the manor once allowed their subjects to use for recreational purposes.

However, many provisions of the Inclosure Act 1845 and the Commons Act 1876 remain in force and relevant to the question this article addresses, in that they continue to affect some existing titles to land and be relevant to disputed registrations under the 1965 and 2006 Acts: and, for example, section 12 of the Inclosure Act 1857 and s29 Commons Act 1876 retain relevance because they provide that, in certain circumstances, interference with the exercise of commons rights is a criminal offence, a point discussed e.g. in *Oxfordshire County Council v Oxfordshire City Council* [2006] UKHL 25.

Restrictions on use: for example, for exercise and recreation

A single inclosure award might well cover numerous parcels of land and set out differing purposes and restrictions on use (e.g. for pasture; as allotments for growing vegetables/crops) for some parcels as compared to others, as well as e.g. setting out roads and ways for the use of persons interested in the land. One common restriction on use was that imposed under s15 Inclosure Act 1845, which provided that:

"…*in every case in which an inclosure of lands in the parish in which* [a] *town green or village green may be situate…it shall be lawful for the commissioners, if they shall think fit, to direct that such town green or village green, provided such green be of equal or greater extent, be allotted to the church-wardens and overseers of the poor of such parish, in trust to allow the same to be used for the purposes of exercise and recreation, and the same shall be allotted and awarded accordingly, in like manner, and with the like provisions for* [fencing, preserving the surface thereof, draining and levelling]…*as herein-after directed concerning the allotments to be made for the purposes of exercise and recreation; and such green may be so allotted in addition to other land which may be allotted for the purposes of exercise and recreation, or, if the commissioners shall think it sufficient, may be allotted in substitution for other land which might have been required to be allotted for such purposes*…"

Thus, under an inclosure award land might become held in trust by the 'church wardens and overseers of the poor' for exercise and recreation purposes. Typically, many such areas of land have continued to be used for sports pitches and/or as local parks, up until the present day.

Why might modification or discharge of such restrictions be sought?

Over time, such land may often have come into the ownership of local authorities given the reduced role of the Church; and given rearrangements of local government over time, may not even be in the hands of Parish or Community councils as at the present day, but may now be held by County Councils or unitary authorities which are rather more remote from the locations in question.

Given the pressure on local government budgets, on housing stock and even on schools in terms of accommodating growing numbers of pupils, it is not hard to imagine that many parcels of land subject to inclosure restrictions are now wanted for purposes other than, for example, 'exercise and recreation'. Such land may be required for housing or even commercial (or mixed use) developments and/or as a site for a new or relocated school.

How might such restrictions be modified or discharged/avoided?

Section 149 Inclosure Act 1845 allowed (and, being still in force, still allows) the commissioners (and, presumably therefore, their statutory successors) to exchange *'inconvenient allotments for the poor and for public purposes* [including allotments for the purposes of exercise and recreation] … *for land more convenient'*, on joint application by the trustees of the recreational land and the owners of the substitute land *if* '*the*

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commissioners … be of opinion that such exchange would be beneficial to the poor inhabitants or other persons for whose benefit or more suitable to the purposes for which [the original] *allotment was made*'.

Section 27 of the Commons Act 1876 provides an alternative to s149 IA 1845:

"*The trustees of any recreation ground and the allotment wardens of any field gardens may, with the approval of the Inclosure Commissioners, sell all or any part of the allotment vested in them, and out of the proceeds of such sale purchase any fit and suitable land in the same parish or neighbourhood:*
Provided, that the land so purchased shall be held in trust for the purposes for which the allotment so sold as aforesaid was allotted, and for no others; and provided, that the Inclosure Commissioners shall not sanction any such sale as aforesaid unless and until it shall be proved to their satisfaction that land ***more*** *suitable for the purposes for which the allotment proposed to be sold was allotted may and will be forthwith purchased; and the proceeds of any such sale shall be paid to the Inclosure Commissioners, and shall remain in their hands until such purchase of other land as aforesaid*." (emphasis in bold supplied)

There appears to be only one reported case touching on s27 CA 1876, namely *Snelling v Burstow Parish Council* [2013] EWCA Civ 1411, though that case did not deal with this point and in fact concerned the council in question's apparently wider powers of sale under the Small Holdings and Allotments Act 1908, s32.

Nor does there appear to be a reported case which confirms whether the provisions of an Inclosure Award, and the 1845 Act (and any other relevant legislation) continue to apply to any land substituted for land originally subject to an inclosure award restriction. S27 CA 1876 does provide that "*the land so purchased shall be held in trust for the purposes for which the allotment so sold as aforesaid was allotted".* That statutory 'trust' would appear to be for the benefit of the public at large (or, at least, for the 'p*oor inhabitants of* [the] *parish'* as noted in s149 IA 1845). Alternatively, insofar as the exchange should in fact have been effected (and may be deemed to have been effected) under s149 1845 Act, then the wording of the latter provision may also suggest that the substitute land is subject to the same conditions.

As mentioned above, there have been a series of further relevant Acts including the Commons Registration Act 1965 and more recently the Commons Act 2006 (with common land now being subject to a system of registration). Sections 16(1), (2) and (3) and (5) CA 2006 provide the ability to apply for land registered as a town or village green to be deregistered provided that, if the land is more than 200 square metres in size, alternative land is proposed in exchange. It would not, of course, apply to land which is subject to inclosure award restrictions but which has not yet been registered as a town or village green (assuming that the failure to so register has not led to extinguishment of rights; see next section, below).

The criteria to be considered on an application, under s16(6), are:

a) the interests of persons having rights in relation to, or occupying, the release land (and in particular persons exercising rights of common over it;
b) the interests of the neighbourhood;
c) the public interest;
d) any other matter considered to be relevant.

If the land is 200 square metres or less in size, then an application to de-register entirely (without proposed alternative land) can be made, though pursuant to s16(7) particular regard to the extent to which the absence of proposed alternative land is prejudicial to the interests specified in paragraphs (a) to (c) above. It is therefore likely to be very difficult to obtain such de-registration:

Any application must be made to the '*appropriate national authority'* under s16 2006 Act. As to the very few reported cases in which the criteria under s16 2006 Act (or its predecessor provisions) have been considered, see in particular the following cases, which suggest that the Court will interpret 'exercise and recreational use' quite widely and will lean against deregistration generally in the absence of a compelling counter-argument:

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1. *TW Logistics Ltd v Essex CC* [2017] EWHC 185 (Ch);
2. *R. (on the application of Tadworth and Walton Residents' Association) v Secretary of State for the Environment, Food and Rural Affairs* [2015] EWHC 972 (Admin).

Possible sources of discharge other than in the course of exchange and substitution

In certain circumstances, it may be possible for pre-existing rights of common to be have been lost through non-registration by the end of July 1970: see s1(2) Commons Registration Act 1965, the *Oxfordshire County Council* case (above) and *Littlejohns v Devon County Council* [2016] EWCA Civ 446. However, if (i) the title register refers to the rights (s1(2)(b)) or (ii) if the rights have arisen by statute or prescription *after* 1970 anyway (which would, of course, not be under an inclosure award anyway) then s1(2) CRA 1965 will not have that effect.

Section 13 CA 2006 provides that common rights may be capable of surrender in accordance with requirements prescribed by regulations, but those regulations have not yet been created and the section is only in force simply for the purpose of making regulations in Wales and in pilot areas in England.

Section 13 CA 2006 also provides that rights of common registered in a register of common land or town or village greens cannot be extinguished by operation of common law. Nevertheless, that leaves open the possibility that such prohibition may not be retrospective i.e. extinguishment may have happened prior to the coming into force of s13 CA 2006. Nor does that prohibition apply to land *not* actually so registered. Such extinguishment was rare anyway, but it may for instance have resulted from adverse possession or possibly by release or abandonment (at least for certain types of rights of common which have ascertainable owners).

Aside from the above provisions, there would appear to be no way of simply discharging a restriction placed under an inclosure award, at least without further legislation specific to that piece of land.

For completeness, it should be noted that it remains unclear whether a restriction on use in an inclosure award would qualify as a restrictive covenant capable of being modified or discharged by an application under s84 Law of Property Act 1925, but that seems doubtful.

Conclusion

The law in this area remains a complex patchwork of common law and moreover of Victorian and modern statutes, many parts of which have still not been directly considered in reported caselaw. Subject to the precise status of the land in question (i.e. when and how common rights are said to have been created; whether registered by 1970 or preserved on the title register or otherwise created since then; whether subject to the 2006 Act yet) and what the proposal for the land is, it is likely to be difficult to obtain a discharge or modification of restrictions on use (whether a direct restriction, or an indirect one by reason of the grant of rights e.g. of recreation) arising under an inclosure award- unless suitable alternative land is proposed in exchange for the originally inclosed land.

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