APPENDIX 4

COMMONS ACT 2006, SCHEDULE 3

APPLICATIONS TO AMEND THE REGISTER TO RECORD AN HISTORIC EVENT

CA14/3 – CL26 MURTON FELL

CA14/4 – CL27 HILTON FELL

CA14/5 – CL122 BURTON FELL AND WARCOP FELL

REPORT

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CONTENTS

	RECOMMENDATIONS	4
1	**INTRODUCTION**	4
2	**BACKGROUND**	7
2.1	The Warcop Training Area	7
2.2	The 2001 Public Inquiry	8
2.3	The Common Land Undertakings	10
2.4	The Vesting Deeds	11
2.5	The Grazing Licences	12
2.6	The 2006 Register Amendment Recording Extinguishment of the Rights of Common	12
2.7	The Re-structuring of the Common Land Undertakings	12
2.8	The Applications to De-register under the Commons Registration Act 1965	16
3	**THE STATUTORY FRAMEWORK**	16
3.1	Schedule 3 to the Commons Act 2006	16
3.2	The Commons Registration (England) Regulations 2014	17
3.3	The Commons Registration Act 1965	20
4	**THE MAIN ISSUES**	20
5	**THE POWER ISSUE**	21
5.1	Introduction	21
5.2	The MoD's Opening Submissions on the Power Issue	21
5.3	The OSS's Submissions on the Power Issue	23
5.3.1	*Introduction*	23
5.3.2	*Sub-issue (1): Qualifying Event Already Registered Under the 1965 Act*	24
5.3.3	*Sub-issue (2): Amendment Only Able to Reflect Extinguishment of Rights of Common and not De-Registration of Land*	27
5.4	The Submissions of the MoD in Reply	31
5.4.1	*General*	31
5.4.2	*Sub-issue (1): Qualifying Event Already Registered Under the 1965 Act*	33
5.4.3	*Sub-issue (2): Amendment Only Able to Reflect Extinguishment of Rights of Common and not De-Registration of Land*	34
5.5	Analysis of the Power Issue	37
5.5.1	*General*	37
5.5.2	*Sub-issue (1): Qualifying Event Already Registered Under the 1965 Act*	37
5.5.3	*Sub-issue (2): Amendment Only Able to Reflect Extinguishment of Rights of Common and not De-Registration of Land*	40
5.5.4	*Conclusion on the Power Issue*	43
6	**THE WASTE LAND OF A MANOR ISSUE**	43
6.1	Introduction	43
6.2	The MoD's Initial Submissions on the Waste Land of a Manor Issue	46
6.3	The Evidence of Clare Hetherington	52

6.4	The Evidence and Submissions of Objecting Parties on the Waste Land of a Manor Issue	58
6.4.1	*Introduction*	58
6.4.2	*Councillor Connell*	58
6.4.3	*The Friends of the Lake District*	58
6.4.4	*The Foundation for Common Land*	60
6.4.5	*Hilton Commoners*	63
6.5	The OSS's Submissions on the Waste Land of a Manor Issue	64
6.5.1	*Section 13(a) of the Commons Registration Act 1965*	64
6.5.2	*Approach to "Unoccupied" in the Hanmer Definition*	65
6.5.3	*Application of Law to Facts*	67
6.5.4	*The Relevance of Events after 31st March 2003 and the Grazing Licences*	72
6.6	The MoD's Response and Final Submissions	77
6.6.1	*Legal Issues*	77
6.6.2	*General Points*	80
6.6.3	*Occupation of the Commons*	84
6.6.4	*The Danger Area*	89
6.6.5	*The Grazing Licences*	91
6.6.6	*Summary*	95
6.7	Analysis of the Waste Land of a Manor Issue	96
6.7.1	*Milburn*	96
6.7.2	*Approach to "Unoccupied" in the Hanmer Definition*	98
6.7.3	*General Matters of Approach to the Evidence*	103
6.7.4	*Consistency of the MoD's Use of the Commons with the Status of Land as Waste Land of a Manor*	106
6.7.5	*Assessment of Whether the Commons were "Unoccupied" on 31st March 2003*	108
6.7.6	*The Grazing Licences*	113
6.7.7	*Post 2003 Intensification of Activity*	119
6.7.8	*Conclusions on the Waste Land of a Manor Issue*	119
7	**OVERALL CONCLUSIONS AND RECOMMENDATIONS**	120

APPENDICES

Appendix 1	List of Appearances at the Inquiry	122
Appendix 2	Site Inspection Details	123

RECOMMENDATIONS

(1) Application CA14/4 (CL 27 Hilton Fell) and Application CA14/5 (CL122 Burton Fell and Warcop Fell) are granted.

(2) Application CA14/3 (CL26 Murton Fell) is granted in respect of that part of CL26 which lies to the east of the boundary of the Danger Area as that boundary is shown on "Plan of the Danger Area of the Warcop Principal Training Area" annexed to The Warcop Principal Training Area Byelaws 1981 but otherwise (in respect of that part of it known as Area Victor) refused.

1. INTRODUCTION

1.1 The subject of this report is three related applications ("the Applications") made by the Secretary of State for Defence to Cumbria County Council ("the Council") as the registration authority for commons in its administrative area. Although the applicant is the Secretary of State for Defence, I will, for convenience, use the abbreviation "MoD" (Ministry of Defence) adopted on his behalf in the course of the Applications.

1.2 Each Application is made to amend the register to record an historic event under Schedule 3 to the Commons Act 2006 ("the 2006 Act"). The amendment sought in each case is the removal from the register of the registered common land unit in question. In other words, the Applications are for de-registration of the land as common land.

1.3 The Applications relate respectively to register unit CL26 Murton Fell (Application CA14/3), register unit CL27 Hilton Fell (Application CA14/4) and register unit CL122 Burton and Warcop Fell (Application CA14/5). I will refer to the three commons collectively as "the Commons" and, individually, as Murton Common, Hilton Common and Warcop Common. Murton Common is the westernmost common and Warcop Common the easternmost, with Hilton Common lying between the two. The Council is the commons registration authority for the Commons.

1.4 The Commons are situated in the North Pennines in the eastern part of Cumbria to the east of Appleby. They rise from lower ground fringing the Eden Valley up to the high fells. Collectively the Commons cover an area of over 4,200 hectares. They are subject to a number of environmental designations, lying within the North Pennines Area of Outstanding Natural Beauty and falling within the Appleby Fells Site of Special Scientific Interest ("the SSSI") as well as forming part of a Special Area of Conservation and Special Protection Area.

1.5 The Applications, made under paragraph 21 of Schedule 4 to the Commons Registration (England) Regulations 2014 ("the 2014 Regulations"), were originally received by the Council on 11th February 2015 but were not publicised under regulation 21 of the 2014 Regulations until 21st March 2017. While there was a considerable delay in publicising the Applications, nothing turns on the matter. A significant body of representations was received by the Council after the Applications were publicised, the large majority of the representations taking the form of objection to the Applications.

1.6 A response to the representations on behalf of the MoD was provided to the Council on 4th July 2017. On 18th January 2018 the Council re-publicised the Applications because the response had made reference to a covering letter which had accompanied the Applications when first submitted but that letter had not been made available to the public by the Council. The letter was thus made available to the public by the Council at this point, as part of the supporting documentation for the Applications, through the process of their re-publication.

1.7 Further representations were received (again largely by way of objection) to the Applications during the second publicity period. On 19th March 2018 the MoD indicated that, following the further representations, it did not wish to add anything to its previous response of 4th July 2017.

1.8 In due course the Council decided that a public inquiry should be held in accordance with the power to do so under regulation 27(2) of the 2014 Regulations. I was appointed by the Council as the Inspector. Notice of the Inquiry was given on 18th July 2018 and directions issued. My role is to report, and make a recommendation, to the Council. The Council is the determining authority.

1.9 The Inquiry was originally scheduled to sit on 13th and 14th September 2018 and conclude on the latter of those two dates. I opened the Inquiry in Kendal at the County Hall, Busher Walk on 13th September 2018. By this time it had become apparent from the material that had been submitted by the participants in the immediate run-up to the Inquiry that it would not be possible to properly consider the issues in the space of only two days. Accordingly, the Inquiry proceeded on 13th and 14th September 2018 but restricted its focus on those days by concentrating on consideration of the first main issue in the case, namely, whether there was power to make the Applications.

1.10 The Inquiry was then adjourned to 30th October 2018 to consider the second main issue which was whether, in all the circumstances of the case, the Commons had ceased to be common land by virtue of no longer being *"waste land of a manor"* as referred to in the statutory definition of common land found in section 22(1)(b) of the Commons Registration Act 1965 ("the 1965 Act"). In adjourning the Inquiry on 14th September 2018 I gave directions for the second part of the Inquiry. That duly took place on 30th and 31st October 2018, again at County Hall, Busher Walk in Kendal.

1.11 A full list of all those who appeared and spoke at the two parts of the Inquiry is contained in Appendix 1 to this report.

1.12 In writing this report I have taken account of all the evidence and submissions at the Inquiry and all the written material which has been placed before me, including the representations received during the two publicity periods.

1.13 Regulation 33(1) of the 2014 Regulations provides that I must inspect the land affected by the Applications before producing my report. I made a preliminary inspection of the Commons on 27th October 2018 and indicated at the Inquiry on 31st October 2018 that I would be making a second, more detailed inspection. No party expressed a wish to be present at that inspection and its scope was left to my discretion. I carried out a detailed site inspection on 3rd November 2018. Details of my site inspections are set out in Appendix 2 to this report. I am entirely satisfied that my inspections were proportionate and sufficient for the purposes of this report

2. BACKGROUND

2.1 The Warcop Training Area

2.1.1 The Commons form part of a larger area known as the Warcop Training Area ("the WTA"). The WTA extends to some 9,550 hectares, of which some two thirds (6,350 hectares) is within the freehold ownership (acquired in the 1950s) of the MoD. The rest of the WTA (3,200 hectares), which lies to the east of the freehold land, is available to the MoD under licence from third parties ("the Licensed Area"). The Commons lie entirely within the land at the WTA which is owned freehold by the MoD.

2.1.2 The WTA is used by the MoD for the purposes of military training. Modern use began in 1942 when ranges were developed for tank training. The main use of the WTA is now, and has been for some time, for infantry training. In broad terms the WTA consists of three parts. First, there are firing ranges and an impact area which together are called the Range Impact Area in the set of byelaws, the Warcop Principal Training Area Byelaws 1981 ("the Byelaws), which apply at the WTA. The Range Impact Area is situated on the lower ground of the WTA and beyond it lies an extensive area rising up to the high fells into which ammunition may travel, fragment or ricochet. This latter area forms the second part of the WTA and it is convenient to refer to it as the Danger Area. I will so refer to it in this report although it is to be noted that the Byelaws define the Danger Area to include the Range Impact Area. Warcop Common, Hilton Common and the eastern section of Murton Common run from east to west across, and are contained within, the Danger Area. The Commons do not overlap the Range Impact Area. The Licensed Area also falls into the Danger Area (and is licensed to the MoD for that purpose). The third part of the WTA is the western section of Murton Common. This is used for "dry training" (that is, not involving the firing of live ammunition), lies outside the Danger Area, is not subject to the Byelaws, and is known as Area Victor.

2.1.3 Prior to the events I go on to describe, each of the Commons was subject to a large number of rights of common conferring on parties other than the MoD ("the Commoners") the entitlement to graze animals on the Commons. The rights were exercised by way of the grazing of sheep. The Byelaws contain prohibitions on entry into the Danger Area and, in practice, were, and are, applied to prevent access at times of live firing in the Range Impact Area. However, under section 14(1) of the Military

Lands Act 1892 the Byelaws were not able to take away or prejudicially affect any right of common. Thus there arose conflict between the rights of the Commoners to access the Commons and the need of the MoD to conduct live firing exercises at the WTA.

2.1.4 Historically, this conflict was resolved by the parties' entering into Firing Licence Agreements ("FLAs"). Under the FLAs the Commoners agreed to accept significant restrictions on the times when they could access the Commons so that the MoD's live firing would be unimpeded on such occasions. The reverse side of the same coin was that, to allow sufficient (albeit restricted) access for the Commoners, there was to be no firing by the MoD on all Mondays, before 9am and after 5pm on each day and on five short periods in the course of a year corresponding with the particular demands of shepherding at such times (lambing, clipping, dipping and gathering). The FLAs provided for compensation in the form of an annual licence fee to be paid by the MoD to the Commoners for the restrictions placed on the latter's access rights. In practice public access (to rights of way on the Commons) was allowed by the MoD on those days when firing was not taking place (including the periods when the Commoners had access under the FLAs).

2.2 The 2001 Public Inquiry

2.2.1 Over time the MoD found that the existence of the rights of common was placing unsatisfactory restrictions on military training needs at the WTA and that the compromise embodied in the FLAs was no longer a practical way of accommodating the army's requirements. Matters came to head in 1995 when the Infantry Training Centre was opened in Catterick and it became clear that the live field-firing part of infantry training which was carried out at Warcop could not operate properly under the constraints of the FLAs. In 2000 it was therefore proposed that the rights of common should be compulsorily extinguished. This was to be accomplished under section 1 of the Defence Act 1854 which empowers the principal officers of Her Majesty's Ordnance to use the provisions of the Lands Clauses Consolidation Act 1845 ("the 1845 Act") for the purpose of extinguishing, upon payment of compensation, rights of common over land acquired under The Defence Act 1842[1] and, for that purpose, deems the principal officers of Her Majesty's Ordnance to be the promoters of an undertaking

[1] As the Commons were so acquired in this case: see paragraph 2.6 of the report of 8th November 2001 by the Inspector who held the 2001 Public Inquiry.

within the meaning of the 1845 Act. The powers under section 1 of The Defence Act 1854 came in due course to be vested in the Secretary of State for Defence[2].

2.2.2 As for the 1845 Act, section 99 provides for the extinguishment of rights of common (or commonable rights) upon the payment of compensation to commoners and section 107 supplies the mechanism for doing this in the form of the execution of a deed poll whereupon the lands in respect of which compensation has been paid vest in the promoters of the undertaking freed and discharged from all commonable or other rights.

2.2.3 The proposal to extinguish the rights of common was the subject of a public inquiry which was held in 2001 ("the 2001 Public Inquiry"). The Inspector produced his report on 8th November 2001 ("the Inspector's Report") and concluded that the national need for compulsory extinguishment on military training grounds was established and that there was no other factor of sufficient weight to outweigh the need for such extinguishment. He therefore recommended that the Secretary of State for Defence should proceed with the proposal compulsorily to extinguish all rights of common on Murton, Hilton and Warcop Commons. The Inspector's conclusion was made in the context of a number of undertakings having been given by the MoD. I will return below to those which are pertinent to the present account of background matters.

2.2.4 On 3rd July 2002 the Secretary of State, having considered the Inspector's Report, issued a decision letter in which he stated that he was minded to proceed with the extinguishment proposal subject to two additional undertakings (in relation to the timing of certain firing operations) which the Inspector had recommended. The MoD agreed to give the additional undertakings and, on 20th September 2002, the Secretary of State for Defence issued a final decision letter approving the compulsory extinguishment of the rights of common over Murton, Hilton and Warcop Commons.

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[2] Via section 1 of the Ordnance Board Transfer Act 1855 which transferred the powers of the principal officers of Her Majesty's Ordnance to the Secretary of State for War and then (a) section 1 of the Defence (Transfer of Functions) Act 1964 which transferred the powers of the Secretary of State for War to the Secretary of State for Defence and (b) The Defence (Transfer of Functions) (No. 1) Order 1964 which substituted reference to the Secretary of State for Defence instead of the Secretary of State for War in section 1 of the Ordnance Board Transfer Act 1855.

2.3 The Common Land Undertakings

2.3.1 As part of the 2001 Public Inquiry process two of the undertakings given by the MoD were specifically relevant to commons issues ("the Common Land Undertakings"). These undertakings were:

(1) not to apply to de-register the land comprising the Commons as common land; and
(2) to grant six new, limited rights of common (to graze one sheep on the land on Christmas Day) to local farmers together with a right in gross (i.e., not attached to any land) to a national amenity society.

2.3.2 The purpose of the Common Land Undertakings was to secure the status of the Commons as common land in the long term in the light of the law as it then stood in the 1965 Act. The undertakings were given in the context of a concern expressed by the Countryside Agency that, once the rights of common were extinguished, it would be possible for the MoD, or any subsequent owner were the MoD to dispose of its land, to de-register the Commons as common land. So it was that the MoD undertook not to apply to de-register the Commons as common land and, as a back-up measure, gave a second undertaking to create the new rights of common.

2.3.3 In 2012 the MoD proposed a re-structuring of the Common Land Undertakings. I will deal with this in due course. I mention the re-structuring at this point because the account I next provide of the MoD's position in relation to the Common Land Undertakings at the time they were given is derived from what it said about that in 2012 in consultation documents issued at that time. The MoD said that it was content to give the first undertaking because it considered that the continued registration of the Commons as common land would not affect the fact that they would not actually be common land. The view said to be taken was that the continued registration of the Commons as common land under the 1965 Act would not be determinative of their status and that the Commons would, without more, lose their status as common land upon the extinguishment of the rights of common. As for the second undertaking, the MoD said that it did not consider that the creation of new rights of common would impact on military operations at the WTA. This was because the 1965 Act did not provide for the registration of new rights of common over land while the land remained registered as common land (which it would do given the undertaking not to de-register) but did provide that rights of common were not exercisable unless registered (section

1(2)(b)). The new rights were thus not intended to be exercised during the continuance of the MoD's ownership but were a protection mechanism to guard against de-registration of the Commons as common land at the behest of a future owner who would not be bound by the MoD's undertaking. In that eventuality, the Commons could be re-registered as common land on the basis of the rights of common created by the MoD and the rights themselves could also then be registered (under section 13 of the 1965 Act and regulation 3 of the Commons Registration (New Land) Regulations 1969).

2.3.4 I will (as already indicated) deal below with the re-structuring of the Common Land Undertakings in 2012 but continue at this point with my account of the background in chronological order.

2.4 The Vesting Deeds

2.4.1 In order to effect the compulsory extinguishment of the rights of common, as approved by the Secretary of State for Defence, it was necessary for the MoD to negotiate the requisite compensation. A committee was appointed by the Commoners of each of the Commons to act on their behalf in this respect and in due course the compensation was agreed for the extinguishment of the rights of common over each of the Commons.

2.4.2 Thereafter, the Secretary of State for Defence made Vesting Deeds for each of the Commons on 31st March 2003 ("the Vesting Deeds"). Each Vesting Deed provides that, in exercise of the powers given to him by the 1845 Act (as applied by the Defence Acts 1842 to 1935[3] and the Defence (Transfer of Functions) Act 1964, the Secretary of State for Defence declares that the deed is intended to operate and take effect so as to vest the common in question in the Secretary of State and that the same vests in him freed and discharged from all rights of common, commonable and other rights in, over or affecting the common or any part thereof so as to enable the Secretary of State to immediate possession of the common and every part thereof. The language of the Vesting Deeds closely reflects the language of section 107 of the 1845 Act.

[3] The Defence Act 1854 which contains the relevant power enabling the use of the provisions of the 1845 Act forms part of The Defence Acts 1842 to 1935: see the Short Titles Act 1896 (which lists The Defence Act 1854 as part of The Defence Acts 1842 to 1873) and the Defence Barracks Act 1935 (which provides that it and The Defence Acts 1842 to 1873 may be cited together as the Defence Acts, 1842 to 1935).

2.4.3 There is no issue but that the Vesting Deeds were effective to extinguish the rights of common over Murton, Hilton and Warcop Commons.

2.5 The Grazing Licences

2.5.1 On 27th March 2003 the MoD entered into grazing licences in respect of five hefts on the Commons ("the Grazing Licences"). The five licences are in identical terms [4] save for stock numbers. In each case the licence period was from 1st April 2003 to 31st October 2005. The grazing rights conferred on the graziers were granted in respect of the Commons as a whole (that is, the combined area of the three commons of Murton, Hilton and Warcop) but on the basis of an expressed intention that grazing would be concentrated predominantly, but not exclusively, on the relevant heft.

2.5.2 Grazing has continued to date under the same basic licensing regime and has been the subject of further agreements. I will need to come back later to the Grazing Licences.

2.6 The 2006 Register Amendment Recording Extinguishment of the Rights of Common

2.6.1 In May 2006 the MoD applied to the Council under the 1965 Act to amend the commons registers for the Commons so as to record the extinguishment of the rights of common which had been effected by the Vesting Deeds.

2.6.2 The registers were amended accordingly in July 2006. This factual matter is accepted by all concerned.

2.7 The Re-structuring of the Common Land Undertakings

2.7.1 After the 2006 Act was enacted the MoD became concerned about the effect of the Common Land Undertakings in the light of changes in the law which would come about when the new legislation came into force. It therefore proposed in 2012 to re-structure the Common Land Undertakings. The re-structuring was intended to achieve, so far as possible, the same outcome as the original Common Land Undertakings and to provide

[4] The licence entered into on 27th March 2003 in respect of heft 2 is missing but it was proved at the Inquiry that there was indeed such a licence in identical terms to all of the others.

an equivalent degree of protection for the future of the Commons but to do so in the context of the new statutory framework.

2.7.2 The MoD explained its position in consultation documents which were published in 2012. In these, it stated that, if the 2006 Act had been in force at the time of the 2001 Public Inquiry, no undertaking to de-register would have been given because the position under the new act and regulations made thereunder would have been that loss of common land status would not have been effective until registration requirements were complied with. The MoD identified three particular concerns which would arise if the Commons were to remain registered as common land. All three were considered to pose potential difficulties for the fulfilment of military training objectives. First, there would be the possibility of a commons council being established to manage the Commons in that the precondition for the establishment of the same – that the land in question was registered common land (section 26(2)(a) of the 2006 Act) - would be satisfied. Secondly, section 38 of the 2006 Act, which prohibits works on land registered as common land without the consent of the appropriate authority, would come into play. The former control over works on common land in section 194 of the Law of Property Act 1925 had ceased to apply in the present case upon the extinguishment of the rights of common under the Vesting Deeds on 31st March 2003 (by virtue of section 194(3)(a) of the Law of Property Act 1925). The fact that section 43(5) of the 2006 Act would enable an order to be made providing that section 38 was not to apply in these circumstances was not sufficient to assuage the MoD's concern. Thirdly, the MoD considered that damaging uncertainty would obtain if the Commons were to remain registered as common land when there were no rights of common and (in the MoD's view) the Commons were no longer actually common land in any event.

2.7.3 As for the undertaking to create new rights of common, the MoD explained that, contrary to the position under the 1965 Act, new rights could (save for the right in gross) now be registered under the 2006 Act (under section 6) and then be exercised. Notwithstanding the limitations on the new rights, it was nevertheless thought that they could cause difficulties for the MoD's training requirements. The undertaking to create a right in gross had been overtaken by the 2006 Act in that new rights of common now had to be attached to land (under section 6(3)(b) of the 2006 Act).

2.7.4 In the light of the difficulties which the MoD thought would arise it was therefore proposed to re-structure the Common Land Undertakings in the following way. First, the undertaking not to apply to de-register the Commons as common land was to be cancelled and an application was to be made for de-registration. Secondly, the undertaking to create new rights of common would not be one to create them with present effect but to create them in the future immediately prior to any disposal of the WTA in the event of its becoming surplus to requirements. The six rights of common to be granted to local farmers would be the same limited rights which had been the subject of the original undertaking whereas, as it was not possible to create a right of common in gross, the amenity society's right would be attached to a token piece of the WTA which, immediately prior to any disposal of the WTA, would be transferred to the society at no cost. Thus it was that the MoD considered that the overall effect of the new arrangements would ensure, so far as possible, a level of long term protection for the Commons under the new statutory regime equivalent to that secured by the original Common Land Undertakings in the context of the 1965 Act.

2.7.5 The consultation exercise which was carried out by the MoD in 2012 was the subject of some criticism by two participants at the first part of the Inquiry (Mr McDarren on behalf of Hilton Commoners and Mrs Govan on behalf of Murton Parish Council). However, it is no part of the remit of this Inquiry to consider the adequacy of that consultation exercise nor is this a matter for the Council to consider in determining the present Applications. The Applications as made stand or fall on their legal and factual merits. The process followed prior to the making of the Applications is relevant simply as background material and is only set out in this report as such.

2.7.6 The consultation exercise generated a number of responses. These were considered by the MoD and its response to them was published in November 2012. At the same time the MoD decided to proceed with the re-structuring of the Common Land Undertakings in the manner which had been set out in the proposals. The undertaking not to apply for de-registration was cancelled and a revised undertaking to grant new rights of common was given. The Inquiry has been provided with evidence of both the published cancellation decision and (in the form of an email of 3rd November 2012 from the private office of the Defence Minister to the relevant Parliamentary Secretary) the fact that the decision to do so was taken at ministerial level.

2.7.7 It is not surprising that many objectors regard the MoD, in making the Applications, to be acting, in effect, in breach of its undertaking not to apply to de-register the Commons. At the first part of the Inquiry, Mr McDarren, the Secretary of Hilton Commoners questioned the lawfulness of the cancellation and, at the second part of the Inquiry, Mr Patterson, the Chairman of Hilton Commoners, said that they did not believe that the MoD had the right to cancel the undertaking. In her closing remarks at the second part of the Inquiry, Dr Aglionby on behalf of the Foundation for Common Land expressed the view that the MoD was reneging on its undertaking without any overriding public interest justification for doing so. However, while I fully understand the concern of objectors at the MoD's change of position, this is not a matter for the Inquiry or for the Council in determining the Applications. The undertaking not to apply to de-register the Commons was, in fact, cancelled in 2012 and matters must now be approached on the basis of that fact. It is not for me or the Council to inquire into the lawfulness of the cancellation. Any challenge to its lawfulness would have had to have been made in legal proceedings instituted against the MoD at the time. The only basis on which I (and the Council) can consider whether the MoD was empowered to make the Applications is whether it was able to do so within the terms of the relevant statutory framework. Moreover, it is not a requirement of that framework that the Applications must satisfy a public interest test.

2.7.8 Objectors have also raised the related question of whether the MoD's concerns for military training, were the Commons to remain registered as common land, are justified and have expressed suspicion about the purpose of the Applications. Many objectors have argued, for example, that the prospect of a commons council being established is extremely remote, if not non-existent, and that section 38 of the 2006 Act would not pose any real threat to military training given that an exemption from its application would be available by the making of an order under section 43(5). The MoD's justification on the basis of the uncertainty which it is said would obtain were de-registration not to occur is questioned. Again, these issues are beyond the scope of the Inquiry. The MoD did not have to give any reasons for making the Applications. Whether the reasons it has chosen to give are good, bad or indifferent (and I express no view), the relevant task of the MoD is to satisfy me (and the Council) that the Applications may be made in accordance with powers under the 2006 Act and the 2014 Regulations and that they should succeed under those powers. The reasons for making the Applications do not bear on those questions and the decision-making which they

require. The success or failure of the Applications stands apart from the reasons which prompted them. And, I should say that I have no reason to doubt the assurance given by Mr Elvin QC on behalf of the MoD at the Inquiry that it has no ulterior purpose and that its motivation is only to avoid what it regards as potential interference with military training.

2.8 The Applications to De-register under the Commons Registration Act 1965

2.8.1 In November 2014 the MoD applied to the Council to de-register the Commons as common land under section 13(a) of the 1965 Act on the basis that they had ceased to be common land. The repeal of section 13(a) of the 1965 Act by the 2006 Act came into effect on 1st October 2006 under article 2(h)(i) of the Commons Act 2006 (Commencement No. 1, Transitional Provisions and Savings) (England) Order 2006 but article 3(3) thereof provided that section 13(a) of the 1965 Act and regulations made under it should, until the coming into force of section 14 of the 2006 Act in relation to the relevant area, continue to have effect insofar as they related to land which ceased to be common land by virtue of any instrument made under or pursuant to an enactment.

2.8.2 Section 14 of the 2006 Act came into force in Cumbria on 15th December 2014 (under article 3(1)(c) of The Commons Act 2006 (Commencement No. 7, Transitional and Savings Provisions) (England) Order 2014) and thus the November 2014 applications lapsed at that point. Hence it was that the Applications came to be made in February 2015 under paragraph 21 of Schedule 4 to the 2014 Regulations in reliance on Schedule 3 to the 2006 Act, which I next consider.

3. THE STATUTORY FRAMEWORK

3.1 Schedule 3 to the Commons Act 2006

3.1.1 I have already indicated that each Application is made to record an historic event under Schedule 3 to the 2006 Act. The 2006 Act was enacted with a view to the repeal and replacement of the 1965 Act over a period of time. Schedule 3 to the 2006 Act (and section 23 thereof which gives Schedule 3 effect) came into force in Cumbria on 15th December 2014: see article 3(1)(f) of The Commons Act 2006 (Commencement No. 7, Transitional and Savings Provisions) (England) Order 2014.

3.1.2 Schedule 3 contains provisions for the transition from the 1965 Act to the 2006 Act. In particular, it enables regulations to be made which make provision for the updating of registers of common land during a transitional period. Paragraph 2(1) of Schedule 3 is of particular importance in this regard. It 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 ... in consequence of qualifying events which were not registered under the 1965 Act."*

3.1.3 Paragraph 2(2) of Schedule 3 then specifies four categories of *"qualifying event"* for the purposes of Schedule 3. The relevant *"qualifying event"* in the present case is that specified in paragraph 2(2)(c), namely, *"a disposition occurring before the commencement of this paragraph by virtue of any relevant instrument in relation to land which at the time of the disposition was registered as common land ... under the 1965 Act"*.

3.1.4 Paragraph 2(4) defines *"relevant instrument"*. It provides that: *"'relevant instrument' means-*
(a) any order, deed or other instrument made under or pursuant to the Acquisition of Land Act 1981 (c. 67);
(b) a conveyance made for the purposes of section 13 of the New Parishes Measure 1943 (No. 1);
(c) any other instrument made under or pursuant to any enactment."
It is sub-paragraph (c) which is relevant in the present case.

3.2 The Commons Registration (England) Regulations 2014

3.2.1 It is next necessary to turn to the 2014 Regulations. Regulation 38(1) defines the *"transitional period"* (as referred to in paragraph 2(1) of Schedule 3 to the 2006 Act) for Cumbria (which is identified as a *"2014 registration authority"* in the 2014 Regulations[5]) as the period from 15th December 2014 to 14th December 2018. Regulation 38 also provides for a *"transitional application period"* being the period in

[5] See regulation 2(1). It was in 2014 that Cumbria County Council was (together with North Yorkshire County Council) added by The Commons Act 2006 (Commencement No. 7, Transitional and Savings Provisions) (England) Order 2014 to the original list of registration authorities to which certain provisions of the 2006 Act had first been applied as pilot areas (under The Commons Act 2006 (Commencement No. 4 and Savings) (England) Order 2008).

which applications may be made to a 2014 registration authority for the purposes of paragraph 2 of Schedule 3 to the 2006 Act, without payment of a fee, for its registers to be amended during the transitional period: regulation 38(2). The transitional application period is the period from 15th December 2014 to 14th December 2017: regulation 38(3). The Applications in the present case were made during the transitional application period.

3.2.2 The effect of regulation 41 of the 2014 Regulations is that the Applications in this case must be determined by the Council by the end of the transitional period – that is, by 14th December 2018 - and any amendment to the registers which is required in consequence thereof must also be made by the same time (although there is also a qualified power in regulation 42 to amend the registers after the end of the transitional period).

3.2.3 The next provision which is of particular importance for present purposes is paragraph 21 of Schedule 4 to the 2014 Regulations. Schedule 4 is introduced by regulation 16(2) which provides that it is this schedule which *"contains provisions which apply in relation to specific types of applications as to—*
(a) the circumstances in which an application is permitted or required to be made;
(b) who may make the application; and
(c) the matters which must be included in or which ... must accompany the application."

3.2.4 Paragraph 21 of Schedule 4 applies to *"applications for the purposes of Schedule 3: statutory dispositions"*. Paragraph 21(1) provides, so far as presently relevant, that *"an application may be made by any person to amend a register in consequence of— (a) a disposition by virtue of any relevant instrument, which is a qualifying event by virtue of paragraph 2(2)(c) of Schedule 3 to the 2006 Act"*.

3.2.5 Paragraph 21(3) provides that:
"(a) 'disposition' means a disposition made under or pursuant to an enactment listed in column 1 of the table in paragraph 8 ..., which is described in the corresponding entry in column 2 of that table; and

(b) 'relevant instrument' means any such instrument (as defined in paragraph 2(4) of Schedule 3 to the 2006 Act) made under or pursuant to an enactment listed in column 1 of the table …, which is described in the corresponding entry in column 3."

3.2.6 The relevant entry in the table in paragraph 8 of Schedule 4 is as follows:

Column 1 – Enactment	***Column 2 – Dispositions***	***Column 3 – Relevant Instrument***	***Column 4 – Applicant***
Lands Clauses Consolidation Act 1845, sections 99 and 107 (as incorporated into any other Act by virtue of section 1)	The freeing and discharge under the Act of 1845 of all commonable or other such rights from land, upon the vesting of the land (after payment of compensation) in the promoters of the undertaking (as defined in section 2 of that Act)	The conveyance or deed poll by which (where applicable with the consent of the Secretary of State under section 22(1)(c) of the Commons Act 1899) that disposition is effected	The promoters of the undertaking (as defined in section 2 of the Act of 1845)

3.2.7 I have already explained sections 99 and 107 of the 1845 Act above as well as the route by which the Secretary of State for Defence was able to avail himself of the power contained therein to extinguish the rights of common in this case, as he did by the Vesting Deeds. No one disputes that.

3.2.8 Paragraph 21(2) of Schedule 4 to the 2014 Regulations provides, so far as relevant, that:
"*the application must include—*
(a) a copy of—
(i) the relevant instrument effecting the disposition … ; and
(ii) any consent, authorisation, approval or certificate given for the purposes of that relevant instrument;
(b) if applicable, the numbers of—
(i) the register unit; and
(ii) the entry in the rights section of that register unit,
which are to be amended; and
(c) a description of the amendment to be made to the register."

3.3 The Commons Registration Act 1965

3.3.1 It is finally necessary to refer to two provisions of the 1965 Act. Section 22(1) of the 1965 Act defined *"common land"*, providing that it *"means -*
(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;
but does not include a town or village green or any land which forms part of a highway".

3.3.2 Section 13 of the 1965 Act provided that regulations should provide for the amendment of the registers maintained under the Act *"where—*
(a) any land registered under this Act ceases to be common land ...; or
(b) any land becomes common land ...; 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".

3.3.3 Provision for the amendment of registers under section 13 of the 1965 Act (including the case where any land registered under the 1965 Act had ceased to be common land) was made in Part V of The Commons Registration (General) Regulations 1966.

4. THE MAIN ISSUES

4.1 There are two main issues in this case. They are:
(1) whether there is power to make the Applications ("the Power Issue");
(2) if there is, whether the common land units which are the subject of the Applications nevertheless remained common land notwithstanding the extinguishment of rights of common, by virtue of their being *"waste land of a manor not subject to rights of common"* ("the Waste Land of a Manor Issue").

4.2 Other issues have been sufficiently covered in the background section above.

5. THE POWER ISSUE

5.1 Introduction

5.1.1 The question of whether there is power to make the Applications was put in issue by the representation of the Open Spaces Society ("the OSS") of 22nd May 2017 made during the first publicity period. The OSS's arguments were then supplemented in an email to the Council of 15th February 2018 during the second publicity period. In very brief summary, the argument of the OSS in this correspondence was that the disposition effected by the Vesting Deeds had already been the subject of amendment by recording the extinguishment of the rights of common and that the relevant qualifying events had thereby already been registered under the 1965 Act so that there was nothing left to register. I need not go into more detail in respect of what the OSS contended in the correspondence because, in due course, the question of whether there was power to make the Applications was taken up by George Laurence QC and Ross Crail in their skeleton arguments on behalf of the OSS, and Mr Laurence developed the submissions orally at the Inquiry.

5.1.2 For the MoD, David Elvin QC and Heather Sargent addressed the Power Issue in their skeleton argument prior to the Inquiry and Mr Elvin put the MoD's case on it succinctly in his opening before responding in more detail in his reply to the arguments on behalf of the OSS and their elaboration at the Inquiry by Mr Laurence. The most convenient way to record matters in this report is to set out the submissions as they were made at the Inquiry in the order in which they were made before turning to my analysis.

5.1.3 I should also say that, insofar as parties other than the OSS also contended that there was no power to make the Applications, their arguments are encompassed in the arguments developed on behalf of the OSS and do not require separate treatment. I turn therefore to the submissions made on behalf of the MoD and the OSS.

5.2 The MoD's Opening Submissions on the Power Issue

5.2.1 Mr Elvin said that the position of the MoD was, in short, that the ability to make the Applications arose because the power under paragraph 21 of Schedule 4 to the 2014 Regulations allowed amendments to be made to the register which reflected the legal

consequences of the disposition in question. Paragraph 21 enabled an application to be made by any person to amend a register *"in consequence"* of a disposition. It was plain as a matter of both language and intention that applications could be made to reflect the consequences of dispositions. And if the consequences of a disposition had only been partially reflected in previous amendments, there was nevertheless still a power to apply to make a further amendment because the intention of the provisions in question was to give full effect to the consequences. The OSS was not reading the statutory provisions correctly nor was it following the statutory intention. It was to be noted that the purpose of the table in paragraph 8 of Schedule 4 to the 2014 Regulations was to define the disposition in question and not to tell one what the consequences of the disposition were.

5.2.2 Mr Elvin said that some assistance was to be gained from the first instance judgment of Lang J in *Littlejohns v Devon County Council*[6]. There Lang J said (in *dicta*) that *"the purpose of Schedule 3 was to provide a brief window within which the commons register could be updated and corrected by incorporating any registrations which could have been, but were not, made under the CRA 1965."*[7] [Underlining added]. The Court of Appeal[8] had not criticised what Lang J said.

5.2.3 Mr Elvin said that the purpose of the provisions in issue was set out in the Explanatory Notes to the 2006 Act. Paragraph 18 explained that *"although the 1965 Act made provision for amendments to be made to the registers consequent on events which occurred after 1970, there was no obligation on persons interested in any entry in the register to seek such an amendment. Many events which in principle affected entries in the registers have not been registered, and the registers have become significantly out-of-date since 1970."* Paragraphs 135-137 showed that Schedule 3 to the 2006 Act was enacted to make transitional provision for updating the commons registers in the light of the fact that many instruments and other events affecting entries in the register (or calling for new entries) had had effect since the registers were compiled under the 1965 Act but had not been captured in consequential amendments to the registers. Schedule 3 made provision for updating the registers during a transitional period to capture these events.

[6] [2015] EWHC 730 (Admin).
[7] At paragraph 49.
[8] [2016] EWCA Civ 446, upholding the judgment of Lang J but not touching on the remarks in question.

5.2.4 The guidance issued by DEFRA in December 2014 – *"Part 1 of the Commons Act 2006: Guidance to commons registration authorities and the Planning Inspectorate"* ("the DEFRA Guidance") was to similar effect. Paragraph 4.2.1 provided that registration authorities should consider whether proposals should be brought forward to amend the register to reflect qualifying events which should be recorded in the public interest and gave as an example of such an event *"a compulsory purchase order which had caused land to cease to be common land ... (and therefore eligible* for *deregistration), in exchange for other land which has become common land ..."* This, according to Mr Elvin, showed that qualifying events could give rise to de-registration of common land. Paragraph 4.2.2 provided that, where an authority made a proposal to amend the register to reflect a qualifying event that affected the extent of registered land (and thus was to be regarded as affecting the public interest), it should ensure *"that full effect is given to the event"*. The statutory purpose was to reflect the full effect of the qualifying event.

5.2.5 Mr Elvin said that the OSS's position failed to allow for a full reflection of the effect of the disposition. For that to occur, it was not sufficient simply to de-register rights if, as the MoD submitted, the disposition had additional consequences which had not been registered. That would be contrary to the public interest. What the consequences of a disposition were needed to be considered in the light of the circumstances of the case. The "once and for all'' approach of the OSS based on the proposition that amendment to de-register the rights would prevent any further amendment to the register would mean that the full consequences of the disposition could not be reflected in the register. That was contrary to the purpose of the relevant provisions.

5.2.6 It was thus submitted that there was power to make the Applications.

5.3 <u>The OSS's Submissions on the Power Issue</u>

5.3.1 *Introduction*

5.3.1.1 In the following paragraphs I have combined into a single narrative my account of the submissions made in writing in Mr Laurence's and Miss Crail's skeleton arguments and those made orally by Mr Laurence in developing the same at the inquiry.

5.3.1.2 Mr Laurence's submissions divided the Power Issue into two sub-issues. The first sub-issue focused on paragraph 2(1) of Schedule 3 to the 2006 Act. The submission made in this respect was that the relevant qualifying event had already been registered under the 1965 Act. The second sub-issue focused on paragraphs 8 and 21 of Schedule 4 to the 2014 Regulations. The submission made in this respect was that the only amendment that could be made thereunder was one in respect of the extinguishment of the rights of common and not one to de-register the land.

5.3.1.3 Each sub-issue raises matters of statutory construction.

5.3.2 *Sub-issue (1): Qualifying Event Already Registered under the 1965 Act*

5.3.2.1 As to the first sub-issue, Mr Laurence recognised that the Vesting Deeds were *"qualifying events"* within paragraph 2(1) of Schedule 3 to the 2006 Act. The Vesting Deeds, he accepted, effected *"disposition[s] occurring before the commencement of this paragraph by virtue of any relevant instrument in relation to land which at the time of the disposition was registered as common land ... under the 1965 Act"* within paragraph 2(2)(c) of Schedule 3. These points are undoubtedly correct and there is no disagreement on them from any quarters.

5.3.2.2 However, Mr Laurence's submission was that the concluding words of paragraph 2(1), which stipulate that the *"qualifying events"* are to be ones *"which were not registered under the 1965 Act"*, were not satisfied in the present case. This was because the *"qualifying events"* had already been registered under the 1965 Act when the registers were amended thereunder in July 2006 to record the extinguishment of the rights of common which the Vesting Deeds had effected. Thus, Mr Laurence argued that the Applications fell at the first hurdle without even getting to the 2014 Regulations (which were, by definition, concerned only with qualifying events *"which were not registered under the 1965 Act"*).

5.3.2.3 Mr Laurence submitted that, in the present case, given that the MoD had chosen in 2006 to pursue applications that resulted in the registers being amended to record the extinguishment of the rights of common, the closing words of paragraph 2(1) of Schedule 3 to the 2006 Act were engaged. It was not possible to say that the qualifying events were *"not registered"* under the 1965 Act. The qualifying events were registered

in July 2006 when the registers were amended at that point. There was, in the case of each common, only one *"qualifying event"* to be considered. It was an analytically singular concept as paragraph 2(2) of Schedule 3 made clear. If a qualifying event was to be divided up in some way, the draftsman of paragraph 2(1) would have used clear words to provide for that.

5.3.2.4 Mr Laurence suggested that the fact that a landowner, such as the MoD, could, upon or following the amendment of the registers to record the extinguishment of rights of common, have then applied under the 1965 Act to de-register land as common land was relevant to the interpretative task of the decision-maker in respect of paragraph 2(1) of Schedule 3. The fact that an opportunity was not taken to do what could have been done under the 1965 Act was a matter that should be taken into account in coming to a view on whether paragraph 2(1) was to be read in such a way that precluded a later opportunity to do the same thing under the 2006 Act and whether to do so would cause any injustice to a landowner. Mr Laurence pointed out that, in the present case, there was a period of some eight years available to the MoD between the amendment of the registers to record the extinguishment of the rights of common in 2006 and the coming into force of the relevant parts of the 2006 Act in Cumbria in 2014. The 1965 Act would have allowed two bites of the cherry (in respect of amending to reflect extinguishment of the rights of common and, subsequently, de-registration of the land) but paragraph 2(1) did not allow a second bite when the first had been taken under the 1965 Act but the chance to take the second had not. Paragraph 2(1) only allowed amendment where nothing had been done to make any amendment under the 1965 Act.

5.3.2.5 Mr Laurence argued that it was no part of the operation of the 2006 Act to diminish the stock of common land registered in this country and that paragraph 2(1) of Schedule 3 to the 2006 Act should also be approached with that in mind. It was not to be read as enabling regulations to be made which would allow to be done under Schedule 3 everything which could have been done under the 1965 Act.

5.3.2.6 Mr Laurence accepted, and, indeed, argued that paragraph 2(1) of Schedule 3 to the 2006 Act was inelegantly drafted in that it was not *"qualifying events"* as such which were registered but, rather, amendments were made to the registers in consequence of qualifying events. His eventual formulation of how the OSS contended that paragraph 2(1) of Schedule 3 to the 2006 Act should be read was 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 ... if a qualifying event occurred while the 1965 Act was in force and none of the amendments which could have been made under that Act consequential on that event was so made".

5.3.2.7 In the particular circumstances of the present case, given that the qualifying events were Vesting Deeds (which it was accepted were *"relevant instruments"* effecting *"dispositions"*), the interpretation of paragraph 2(1) which he urged as correct was: *"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 ... if a vesting deed was executed while the 1965 Act was in force and none of the amendments which could have been made under that Act consequential on that vesting deed was so made."*

5.3.2.8 By contrast, Mr Laurence said that, if the MoD's case on paragraph 2(1) were to be formulated in the same manner, its formulation of that paragraph would contain the words *"none or not all of the amendments"* in place of the words *"none of the amendments"*.

5.3.2.9 On his formulation of the position, Mr Laurence said that an amendment to the registers consequential on the Vesting Deeds was made under the 1965 Act (when the registers were amended to record the extinguishment of the rights of common) and thus the requirement that none of the amendments which could have been made was made was not satisfied.

5.3.2.10 As to the Explanatory Notes to the 2006 Act (in particular, paragraphs 137-139 dealing with paragraph 2 of Schedule 3), Mr Laurence argued that there was nothing in them which was inconsistent with the OSS's case on sub-issue (1). Paragraph 138 correctly characterised paragraph 2 of Schedule 3 as an enabling provision, and there was nothing in the text to support a contention that the regulations made pursuant to it must be read as permitting any and every amendment that could have been made under the 1965 Act regardless of what the regulations actually said.

5.3.2.11 Finally, it was argued by Mr Laurence that the remarks of Lang J in the case of *Littlejohns* carried little weight in the present circumstances. It was submitted that what

she said had to be read in the context of the issues and arguments that she was considering. Her remarks were her response to the submission of the claimants in that case that *"the purpose of the transitional provisions in Schedule 3 was to address the deficiencies of the previous registration scheme, and to give a final opportunity to register rights of common acquired by prescription* [sc. which were not registrable under the 1965 Act]."[9] Her focus was on the scope of permitted additions to the register and not deletions from it. To deduce that she intended to make a generalised statement to the effect that the intention behind Schedule 3 was to enable every registration or de-registration that could have been made under the 1965 Act to be reflected in the register under the 2006 Act was to read too much into what Lang J had said and to place too much weight upon it. There was no such statement in judgments given in the Court of Appeal.

5.3.3 *Sub-issue (2): Amendment Only Able To Reflect Extinguishment of Rights of Common and Not De-registration of Land*

5.3.3.1 The argument made by Mr Laurence in respect of the second sub-issue was that, even if nothing had been done under the 1965 Act to amend the register in consequence of the Vesting Deeds, nevertheless the only amendments which could lawfully be made under paragraph 21 of Schedule 4 to the 2014 Regulations would be the cancellation of the former entries relating to rights of common. That paragraph, it was submitted, permitted an amendment to record the extinguishment of rights of common but did not allow an amendment which de-registered common land.

5.3.3.2 While it was clear from the terms of paragraph 2(1) of Schedule 3 to the 2006 Act that it did not authorise the making of regulations permitting commons registration authorities to make amendments to the registers that could not have been made under the 1965 Act, Mr Laurence submitted that the converse did not follow. In other words, it did not follow that paragraph 2(1) of Schedule 3 did authorise or require the making of regulations permitting registration authorities to make all or any of the amendments that could have been made under the 1965 Act. The only way to find out which amendments were permitted was by construing the regulations which were made.

[9] At paragraph 46.

5.3.3.3 In the present case, paragraph 21(3)(a) of Schedule 4 to the 2014 Regulations provided that *"'disposition' means a disposition made under or pursuant to an enactment listed in column 1 of the table in paragraph 8 ... which is described in the corresponding entry in column 2 of that table"*.

5.3.3.4 In the case of the relevant third entry in the table in paragraph 8 of Schedule 4 (where the reference in column 1 was to the mechanism for extinguishing rights of common provided by sections 99 and 107 of the 1845 Act) the extinguishment of the rights was the disposition as defined in column 2. The cancellation of the entry (or entries) relating to the rights was thus, Mr Laurence argued, the only amendment to the register that was permitted to be made – no more and no less. Had it been intended that an amendment could be made to allow de-registration of land as common land following an extinguishment of rights, express provision would have been made to that effect.

5.3.3.5 In support of that argument it was contended that there was nothing in the terms of paragraph 21 of Schedule 4 to the 2014 Regulations to suggest that amendments could be sought pursuant to it which would necessitate the production of factual evidence which was extrinsic to the instrument on which reliance was placed. The backdrop to this point was regulation 16(2)(c) of the 2014 Regulations which provided that Schedule 4 contained provisions as to *"the matters which must be included in or which ... must accompany the application."* Paragraph 21(2) of Schedule 4 envisaged that the only documents which would need to be produced by the applicant were the relevant instrument which effected the disposition and any consent, authorisation, approval or certificate given for its purposes. Thus Mr Laurence submitted that the scope of any amendment made in consequence of a disposition in the paragraph 8 table was confined by the scope of the instrument and that the terms of the amendment were dictated by what was found in the four corners of the instrument.

5.3.3.6 Mr Laurence contrasted the position above under paragraph 21 with that under other paragraphs of Schedule 4 dealing with categories of qualifying event other than those in paragraph 2(2)(c) of Schedule 3 to the 2006 Act. By way of example, in the case of an application to amend a register in consequence of the creation of a right of common, which was a qualifying event by virtue of paragraph 2(2)(a) of Schedule 3 to the 2006 Act, paragraph 15(3)(b) of Schedule 4 to the 2014 Regulations provided that, in any case other than one where the right of common was created by an instrument in writing,

the application had to be accompanied by evidence of the creation of the right. Also, by way of further example, in the case of an application to amend a register in consequence of extinguishment of a right of common, which was a qualifying event by virtue of paragraph 2(2)(b) of Schedule 3 to the 2006 Act, paragraph 16(3)(b) of Schedule 4 to the 2014 Regulations provided that, in any case other than one where the extinguishment was by an instrument in writing, the application had to be accompanied by evidence of the extinguishment of the right.

5.3.3.7 Mr Laurence submitted that it was not the legislative intention behind the enactment of paragraph 21 of Schedule 4 to the 2006 Act that its operation might give rise to complex factual disputes extraneous to the instruments being given effect. The potential for such disputes in circumstances such as the present arose because, while it would have been understood to be the case at the time of the 1845 Act that the extinguishment of rights of common over land would have caused the land to cease to be common land, that was not necessarily the case with land registered as common land under the 1965 Act. In this latter case it would also be necessary to show that, notwithstanding the extinguishment of the rights of common, the land was not *"waste land of a manor not subject to rights of common"* and thus common land within section 22(1)(b) of the 1965 Act. Had it been intended that an application under paragraph 21 might open up such a line of inquiry, provision would have been made for the production of evidence going beyond the relevant instrument and ancillary consents. The omission to do so, which was to be taken to be deliberate, supported the OSS's case. Paragraph 21 of Schedule 4 to the 2014 Regulations and the third entry in the paragraph 8 table did not permit an application to be made for land to be de-registered upon the extinguishment of rights of common over it regardless of whether or not the land had the status of waste land of a manor.

5.3.3.8 Mr Laurence sought to distinguish the position above with that which he said would obtain in respect of a disposition effected under an instrument made under or pursuant not to the 1845 Act but section 19 of the Acquisition of Land Act 1981 ("the 1981 Act"). This is the subject of the pre-penultimate entry in the table in paragraph 8 of Schedule 4 to the 2014 Regulations. Section 19 of the 1981 Act enables a compulsory purchase order to authorise the purchase of land forming part of a common provided exchange land is given and the Secretary of State certifies accordingly. Mr Laurence pointed to the fact that, in the case of this entry, column 3 of table 8 (describing the

relevant instrument) referred to the compulsory purchase order effecting the disposition (the purchase of registered common land), and any vesting declaration, and any deed made under the authority of that order, *"by which, as a consequence of the disposition, any right, trust or incident was discharged or any right acquired."* Mr Laurence's point was that the words *"or incident"* would cover the cessation of the status of the land in question as common land, irrespective of the question of its status as waste land of a manor. The instrument in and of itself would have the effect of causing the land to cease to be common land and that effect would be found within its four corners so that no recourse to extrinsic evidence would be necessary.

5.3.3.9 The argument that all that the third entry in the table in paragraph 8 permitted to be registered by way of amendment was the extinguishment of the rights of common was further supported in another respect by the contrast with the position where a compulsory purchase of registered common land was authorised under section 19 of the 1981 Act. This was that, in the latter case, the proper effect of the overall arrangement would only be achieved if the taken land was de-registered so that the exchange land could then be registered in its place. In the case of extinguishment of rights of common under the 1845 Act, there was no need for any further effect beyond that to be reflected in an amendment to the register.

5.3.3.10 Mr Laurence argued that the DEFRA Guidance was, although it made no specific reference to the particular circumstances of the present case, consistent with the approach taken by the OSS. Mr Laurence referred me to the following passages.

5.3.3.11 First, he took me to the example of a *"qualifying event"* given in paragraph 4.2.1, namely, *"a compulsory purchase order which has caused land to cease to be common land ... (and therefore eligible for deregistration), in exchange for other land which has become common land ... (and therefore eligible for registration)."* Secondly, my attention was drawn to paragraph 4.2.2 which provides that *"qualifying events"* which affect the extent of registered land should be regarded as affecting the public interest. It continues by stating that, where a registration authority makes a proposal to amend the registers to reflect such an event, *"it should ensure that full effect is given to the event – so that if, for example, a compulsory purchase order made provision both for the extinguishment of rights of common and for land to cease to be common land, a proposal should be made to record the full effect of the order, including the deletion of*

rights from the register, notwithstanding that the extinguishment of rights in isolation might be regarded as a matter only of private interest." Mr Laurence argued that each of the paragraphs mentioned so far should be read subject to the qualification that the effect of the compulsory purchase order was to be understood as causing the land to cease to be common land notwithstanding that any question of whether the land was waste land of a manor would have been resolved against the landowner.

5.3.3.12 Thirdly, Mr Laurence referred to paragraph 4.4.9 and, in particular, so much of it that states where a certificate is granted under section 19(1)(b) of the 1981 Act[10], *"no replacement land is provided, but the effect of the [compulsory purchase] order is that the taken land nevertheless ceases to be common land ..."* Fourthly, Mr Laurence noted paragraph 8.1.3 which deals with evidential requirements in the case of applications based on qualifying events and states that, *"generally, an application to register a qualifying event will be supported by documentary evidence of the event."* Finally, Mr Laurence turned to paragraph 8.1.4. This states that *"there is no provision in Schedule 3 allowing for the deregistration of land other than in consequence of a statutory disposition (such as a compulsory purchase order), and therefore, in Defra's view, an application for the purposes of Schedule 3 cannot secure the deregistration of any registered land, even where an application causes the deregistration of all rights of common over that land, unless the application is consequential to a statutory disposition. For example, an application to register the extinguishment of all rights of common exercisable over a common, in recognition of deeds of surrender previously executed, could properly result in the deregistration of those rights of common, but could not result in the deregistration of that common."*

5.4 <u>The Submissions of the MoD in Reply</u>

5.4.1 *General*

5.4.1.1 Mr Elvin argued that it was apparent from Mr Laurence's oral submissions that the approach being advocated on behalf of the OSS required significant reading in of words to both the statutory language and the DEFRA Guidance while not focusing on

[10] Where the land does not exceed 250 square yards in extent or is required for certain highway purposes and the giving of exchange land is unnecessary.

construction in the light of the purpose of the provisions in question. It was the latter approach that was correct. The OSS's approach was unmeritorious and ignored both the purpose of the 2006 Act and the language used in the statutory provisions read as a whole. The Explanatory Notes to the 2006 Act explained that the purpose of Schedule 3 was to update the registers during a transitional period to capture events which had not been captured in amendments to the registers under the 1965 Act (paragraph 137). And, as paragraph 4.2.2 of the DEFRA Guidance stated, *"where a registration authority makes a proposal to amend the registers to reflect such an event, it should ensure that full effect is given to the event"*.

5.4.1.2 Mr Laurence had relied on the compulsory purchase order example given in the DEFRA Guidance as well as the compulsory purchase order entry in the paragraph 8 table but:

(1) those were not the circumstances of the present case; and

(2) what DEFRA had to say was given only as an example and was not exhaustive of the issue of the consequences of the qualifying event under consideration.

5.4.1.3 Indeed, under section 19 of the 1981 Act which dealt with the compulsory purchase of commons, open spaces, allotments etc., a compulsory purchase order of common land could not be made without exchange land unless special parliamentary procedure was used (or the land was a small area to be used for highway purposes). There, specific power was given to override the rights and incidents attaching to the land and subjecting the exchange land required to the same rights and incidents:

"(3) A compulsory purchase order may provide for—

(a) vesting land given in exchange as mentioned in sub. (1) above in the persons, and subject to the rights, trusts and incidents, therein mentioned, and

(b) discharging the land purchased from all rights, trusts and incidents to which it was previously subject".

5.4.1.4 However, the present case was an extinguishment under the Defence Acts (see section 1 of the Defence Act 1854) and not an exchange land/compulsory purchase order case under the 1981 Act.

5.4.2 *Sub-issue (1): Qualifying Event Already Registered under the 1965 Act*

5.4.2.1 Mr Elvin said that, given its undertaking, the MoD could not act inconsistently with it and proceed until the consultation process had concluded. The Applications were made within two months of the 2014 Regulations coming into force.

5.4.2.2 The whole submissions on behalf of the MoD proceeded on the basis that the construction of the 2006 Act and the 2014 Regulations should be approached having regard to the purpose of the Act and the transitional provisions in particular. The submissions on behalf of the OSS did not give effect to that purpose.

5.4.2.3 With respect to the submission that the MoD could have applied to de-register under the 1965 Act, that was irrelevant:

(1) on the OSS's case the fact that the MoD had made an application was enough to preclude it from using the 2006 Act procedure whether or not it could have applied to de-register before the 2006 Act came into force; and

(2) on the MoD's case, the proper construction of paragraph 2(1) of Schedule 3 to the 2006 Act focused on whether the consequences of the qualifying event were properly and fully reflected in the amendments to the register.

5.4.2.4 Mr Elvin submitted that the inquiry was not about fairness, as appeared to be suggested at one stage, but was about statutory purpose and construction of the provisions, taken with their natural meaning, in the light of that purpose.

5.4.2.5 Moreover, if as was submitted on behalf of the MoD (considering the language of the 2006 Act, the Explanatory Notes and the DEFRA Guidance in identifying the mischief or purpose of the 2006 Act) the statutory purpose (within the scope of the defined qualifying events) was to bring the registers up to date and to reflect qualifying events which took place prior to the coming into force of the 2006 Act, it was necessary to consider whether the submissions on behalf of the OSS were in accordance with that purpose. They were not and (assuming the Commons were not waste land of a manor) the OSS's position was that, on its approach, the registers remained inaccurate and not up to date because they showed as common land that which should not be common land applying the definition in section 22(1) of the 1965 Act.

5.4.2.6 Mr Elvin submitted that it was all the more important to give effect to the statutory purpose where, as here, it was common ground that the final words of paragraph 2(1) of Schedule 3 to the 2006 Act did not reflect what was possible under the 1965 Act and it was necessary to interpret the provision.

5.4.2.7 It was apparent that the redrafted version of paragraph 2(1) advanced by Mr Laurence ignored the purpose of the 2006 Act and assumed that which needed to be demonstrated by interpolating *"none of the amendments which could have been made under"* the 1965 Act consequential on the qualifying event *"was so made"*. The complexity of the exercise simply assumed the conclusion and demonstrated nothing. The MoD's case would be made out if *"none of the amendments"* was replaced by *"not all of the amendments"*.

5.4.2.8 Mr Elvin argued that the submissions made on behalf of the OSS also assumed what they sought to prove and assumed that the draftsman sought to reflect only one opportunity to amend. There was no basis for that in the statutory materials and it was not consistent with the purpose of amending the registers to reflect the full effect of qualifying dispositions made before the 2006 Act came into force.

5.4.2.9 The focus of paragraph 2(1) of Schedule 3 to the 2006 Act was on whether the consequences of a qualifying event were reflected in an amendment to the register under the 1965 Act. It was submitted that, consistent with the purpose of the provisions, the closing words of paragraph 2(1) should be construed as referring to whether the consequences of the qualifying event were reflected in the amendment made under the 1965 Act – i.e., given *"full effect"* as described by the DEFRA Guidance.

5.4.2.10 Mr Elvin submitted that sub-issue (1) should be resolved in favour of the MoD and it should be found that the Applications were not precluded from being considered under the 2014 Regulations.

5.4.3 *Sub-issue (2): Amendment Only Able To Reflect Extinguishment of Rights of Common and Not De-registration of Land*

5.4.3.1 Mr Elvin argued that the submissions made on behalf of the OSS ignored the express terms of paragraph 21(1)(a) of Schedule 4 to the 2014 Regulations, i.e., that they

referred to an application *"to amend a register in consequence of ... a disposition by virtue of any relevant instrument"* [underlining added]. Therefore, it was necessary:

(1) to consider what the disposition was and whether it fell into a paragraph 8 table category; and

(2) if it did, to consider what its legal consequences were.

And, by implication, it was then necessary to determine whether the register properly or fully reflected those legal consequences.

5.4.3.2 No answer had been provided on behalf of the OSS to the opening submission on behalf of the MoD that paragraph 21 of Schedule 4 focused on the consequences of a disposition and the role of the table in paragraph 8 was to define the qualifying dispositions and not to prescribe the consequences of them. This point was plainly correct and wholly undermined the elaborate series of submissions made on behalf of the OSS which turned on the proposition that the disposition was only an extinguishment of rights of common. The same failure to understand the function of the paragraph 8 table was also apparent in the OSS's letter of 22nd May 2017.

5.4.3.3 Mr Elvin further submitted that the OSS's case on sub-issue (2) was also predicated on the erroneous basis that in paragraph 21 applications it was not permitted to adduce evidence other than the documents specified in paragraph 21(2). A contrast was drawn with the provisions of paragraphs 15 and 16 of Schedule 4. However, the register could be amended in a number of ways and was not restricted to cancelling rights of common. Amending the register included de-registering the land if that was the legal consequence of the disposition. De-registration was as much an amendment to the register as the cancellation of specific rights. Indeed, the OSS's case was that an application to do this could have been made under the 1965 Act as a consequence of the Vesting Deeds and that the MoD should have done so earlier. It was necessary, as was submitted in opening, to consider what the legal consequences of the dispositions were. The legal consequences were not simply the cancellation of the registered rights of common but also that the land was no longer common land (subject to the Waste Land of a Manor Issue). It appeared to be conceded that (subject to the Waste Land of a Manor Issue) this was the effect of the Vesting Deeds and that that effect could have been reflected by de-registration under the 1965 Act but was not. It would be wrong, in the light of the fact that paragraph 21(2) says that *"the application must include"* [underlining added] but does not seek to limit the material that may be submitted in addition to that

required, to suggest that an inquiry into the consequences of the disposition cannot be permitted. Paragraph 21(2) merely sets out the minimum requirements for the application. It seemed impossible to construe paragraph 21 as reasonably confining the material to be submitted and it had to be construed sensibly as allowing anything relevant to inform the registration authority as to the consequences of the qualifying event. In some cases this might be apparent from the documents but, in others, further inquiry and evidence might be necessary. This would depend on the qualifying event and the circumstances.

5.4.3.4 Paragraphs 15 and 16 of Schedule 4 to the 2014 Regulations were nothing to the point since they were dealing with different applications. Paragraphs 15 and 16 set out the minimum requirements for those specific cases where it was considered that certain types of evidence were always required. However, they did underline that the registration process could include evidence and that an application under the 2014 Regulations was not determined only on the documents and the law.

5.4.3.5 It had also been submitted on behalf of the OSS, Mr Elvin said, that paragraph 21 of Schedule 4 to the 2014 Regulations taken with entry 3 in the paragraph 8 table was to be read as meaning that a qualifying deed that only extinguished rights of common could not lead to de-registration. A convoluted example had been given by reference to powers of compulsory purchase under the 1981 Act but the present case was not such a case and did not involve the provision of exchange land. The example did not assist and was a red herring to avoid grappling with the fact that the paragraph 8 table was only defining the qualifying event and not prescribing its consequences.

5.4.3.6 Mr Elvin submitted overall that the phrase *"in consequence of"* in paragraph 21 of Schedule 4 to the 2014 Regulations must include consideration of whether the land remained common land within section 22 of the 1965 Act (including resolution of the Waste Land of a Manor Issue). It had only become an issue whether that could be done because the OSS wrongly read paragraph 21 applications as excluding the ability to adduce evidence of consequences. It said nothing of the sort but only set the minimum requirements for an application to de-register. It followed that sub-issue (2) should be determined against the OSS and the parties supporting them and that the Inquiry was able, and had, to consider whether the land did cease to be common land or whether it remained common land because it was waste land of a manor.

5.5 <u>Analysis of the Power Issue</u>

5.5.1 *General*

5.5.1.1 Overall, I prefer the submissions of Mr Elvin to those of Mr Laurence. It seems to me that it is appropriate to start with the statutory purpose of the transitional provisions in Schedule 3 to the 2006 Act. I agree generally with Mr Elvin that the submissions on behalf of the OSS have had little regard to the statutory purpose of Schedule 3 and propose an approach which would yield an outcome in conflict with it. The statutory purpose of Schedule 3 is evident from paragraph 2(1): to amend (and thereby bring up to date) common land registers in order to capture events which were not reflected in the registers under the 1965 Act. If any confirmation of this were needed from the Explanatory Notes, it is clearly provided in the paragraphs (18 and 135-137) on which Mr Elvin relied.

5.5.1.2 Given this purpose, it is difficult to see how, in principle, it would properly be served by any approach which did not allow for capturing the full effects of an event. The view put forward in the DEFRA Guidance (paragraph 4.2.2) that registration authorities should ensure that *"full effect"* is given to the event, while expressed in the case of a proposal by a registration authority rather than in the context of an application, seems to me to be entirely consistent with the overall statutory purpose. Giving partial effect to an event would, to a greater or lesser extent, fail to bring the register up to date. It is impossible to discern what might be the purpose of such a partial updating and it seems to me that it would require clear words to result in such an outcome. While I agree with Mr Laurence that the dictum of Lang J in *Littlejohns*, expressed in the very different factual context of that case, cannot bear too much weight, it does seem to me nevertheless that the view that the purpose of Schedule 3 was to provide for the updating and correction of registers by incorporating *"any"* registrations which could have been, but were not, made under the 1965 Act is correct in principle.

5.5.2 *Sub-issue (1): Qualifying Event Already Registered under the 1965 Act*

5.5.2.1 As I have already pointed out, Mr Laurence accepted, and, indeed, argued that paragraph 2(1) of Schedule 3 to the 2006 Act was inelegantly drafted in that it was not *"qualifying events"* as such which were registered but, rather, amendments were made

to the registers *"in consequence of"* qualifying events. It seems to me that this correctly recognises that the focus of paragraph 2(1) should be on the consequences of qualifying events. I agree with Mr Elvin that it is consistent with the statutory purpose to read the closing words of paragraph 2(1) - *"which were not registered under the 1965 Act"* - as referring to whether the consequences of the qualifying event were reflected in an amendment to the register under the 1965 Act. Given that the drafting of paragraph 2(1) is somewhat elliptical, a purposive approach to interpretation is appropriate.

5.5.2.2 I have referred to *"consequences"* in the plural because a qualifying event may have more than one consequence. It is common ground that an event which extinguished rights of common over land could also, in principle, produce the consequence that the land ceased to be common land under the 1965 Act (subject to resolution of any issue about the land's waste land status). Mr Laurence's eventual formulation of how the OSS said paragraph 2(1) was to be construed was: *"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 ... if a qualifying event occurred while the 1965 Act was in force and none of the amendments which could have been made under that Act consequential on that event was so made".* This formulation itself recognises, correctly, that a qualifying event may have more than one consequence giving rise to more than one potential amendment. As a matter of ordinary language, the phrase *"in consequence of"* found in paragraph 2(1) embraces the situation where a qualifying event produces more than one consequence.

5.5.2.3 Given that a qualifying event may produce more than one consequence giving rise to more than one potential amendment, I see no justification for confining the meaning of paragraph 2(1) in the way suggested by Mr Laurence. Once it is recognised that a qualifying event may have more than one consequence, it seems to me that it is nothing to the point to argue that *"qualifying event"* is an analytically singular concept. The focus is on the consequences of the event. It is also not correct, in my view, to say that, if a qualifying event was to be divided up in some way, the draftsman of paragraph 2(1) would have used clear words to provide for that. The words *"in consequence of"* themselves allow consideration of whether the event was productive of one or more than one consequence. Far from it being the case that clear words would be needed to gainsay Mr Laurence's interpretation of paragraph 2(1), clear words would be needed

to support it, and the words actually used in paragraph 2(1) point to the opposite of what Mr Laurence contends.

5.5.2.4 I agree with Mr Elvin that there is no warrant for Mr Laurence's approach of reading into paragraph 2(1) words which restrict its operation to situations where *"none of the amendments which could have been made under"* the 1965 Act consequential on the event in question *"was so made"*. The statutory language does not support this. There is nothing in it which suggests that the draftsman was seeking to limit the regulation-making power such that it was not to apply where, in the case of an event productive of more than one consequence, the register (pursuant to an application made under the 1965 Act) was amended to record one consequence thereof but no application was made to amend the register to record the other(s). I cannot see how it takes matters further forward to argue that the MoD had the opportunity under the 1965 Act to apply to de-register the Commons as common land but did not avail themselves of it[11]. The argument appears to be that it would not be unjust or unfair to a landowner to read paragraph 2(1) in the way contended for by the OSS given the time that a landowner had available under the 1965 Act to achieve what he was now seeking to achieve under the 2006 Act. But, as Mr Elvin pointed out, this assumes that paragraph 2(1) is to be read in the way contended for; it does not assist in reaching a conclusion whether it is to be read in that way. Contrary to Mr Laurence's submission, I consider that paragraph 2(1) is to be construed as enabling regulations to be made which would allow to be done under Schedule 3 everything which could have been done under the 1965 Act and thereby to provide for amendments recording the full consequences of qualifying events.

5.5.2.5 The interpretation of paragraph 2(1) which is urged by Mr Laurence on behalf of the OSS would conflict with the statutory purpose of the transitional provisions. There is, echoing what I have said above, no discernible reason why paragraph 2(1) should be construed (by constraining the scope of regulations which could be made) to allow an amendment of the register to reflect but one consequence of a qualifying event rather than the full, or all, consequences thereof and thus result in only a partial updating of the register. In a case where land indubitably ceased to be common land under the 1965 Act on extinguishment, via a statutory disposition, of rights of common (on the

[11] At least timeously, in that an application was made under the 1965 Act but was overtaken by the coming into force of the relevant provisions of the 2006 Act in Cumbria as I have explained in paragraphs 2.8.1-2.8.2 above.

assumption that the land was not waste land of a manor not subject to rights of common) the register would, on the OSS's case, have to remain inaccurate simply because an amendment to the register had been made under the 1965 Act to record only the extinguishment of the rights of common. However, had no such application been made under the 1965 Act then paragraph 2(1) would, on the OSS's case as I understand it, allow (subject to the regulations providing for that) an application under the transitional provisions to amend both to record the extinguishment of the rights of common and to de-register the land as common land. This is an unprincipled distinction. The landowner who did something under the 1965 Act (applied to amend the register to record the extinguishment of the rights of common) is worse off than the landowner who did nothing.

5.5.2.6 The general point made on behalf of the OSS (and others) that it was no part of the purpose of the 2006 Act to diminish the stock of common land does not assist their case on sub-issue (1). If the consequence of the Vesting Deeds under the 1965 Act was to cause the land to cease to be common land, that consequence is within the transitional provisions under the 2006 Act. It would, even on the OSS's case, be permitted under paragraph 2(1) of Schedule 3 (subject to what the regulations actually say) if no previous amendment had been made to reflect the extinguishment of the rights of common.

5.5.2.7 I thus reject the submissions on behalf of the OSS on sub-issue (1) and find in favour of the MoD.

5.5.3 *Sub-issue (2): Amendment Only Able To Reflect Extinguishment of Rights of Common and Not De-registration of Land*

5.5.3.1 The argument of Mr Laurence on behalf of the OSS under sub-issue (2) that the only amendment able to be made to the register was to record the extinguishment of the rights of common effected by the Vesting Deeds and not to de-register the Commons is based on paragraph 21 of Schedule 4 to the 2014 Regulations and its definition (in paragraph 21(3)(a)) of *"disposition"* by way of cross reference to the table in paragraph 8 of the Schedule. Thus, so the submission went, in the case of the relevant third entry in the table in paragraph 8 of Schedule 4 to the 2014 Regulations the extinguishment of the rights was the disposition as defined in column 2. The cancellation of the entry

(or entries) relating to the rights was accordingly the only amendment to the register that was permitted to be made – no more and no less.

5.5.3.2 However, I agree with Mr Elvin that the above ignores the express terms of paragraph 21(1)(a) of Schedule 4 to the 2014 Regulations which provides that an application may be made *"to amend a register in consequence of ... a disposition by virtue of any relevant instrument"* [underlining added]. I accept Mr Elvin's submission that the role of the paragraph 8 table is to define the qualifying dispositions and not to prescribe the consequences of them. As Mr Elvin said, when the paragraph 8 table is considered in that way, it wholly undermines Mr Laurence's submissions. I agree with Mr Elvin that, if the disposition falls into a category in the paragraph 8 table, it then becomes necessary to consider what its consequence are. I consider that the phrase *"in consequence of"* as used in paragraph 21(1)(a) of Schedule 4 must be approached in the same way as the same phrase is used in paragraph 2(1) of Schedule 3 to the 2006 Act. The statutory purpose under paragraph 21(1)(a) is the same statutory purpose carried forward from paragraph 2(1) of Schedule 3 to the 2006 Act, to record in amendments to the register the full consequences of the disposition in question.

5.5.3.3 I am unable to accept Mr Laurence's argument that the scope of any amendment made in consequence of a disposition in the paragraph 8 table is confined by the scope of the instrument and that the terms of the amendment are dictated by what is found in the four corners of the instrument. The words of paragraph 21(2) of Schedule 4, which prescribe what an application must *"include"* are not words of limitation and they do not justify the conclusion that paragraph 21 excludes amendments which would necessitate the production of factual evidence extrinsic to the instrument in question. Likewise, I do not consider that the fact that certain paragraphs of Schedule 4 (such as those referred to as examples by Mr Laurence – paragraphs 15(3)(b) and 16(3)(b)) prescribe the production of (extrinsic) evidence in circumstances where a written instrument is not relied on compels the conclusion that the absence of any reference to evidence in paragraph 21 means that the registration authority cannot look beyond the written instrument in question. I consider that it would take clear exclusionary words to produce this outcome. There are none.

5.5.3.4 It seems to me that it is also pertinent to consider what the point would be of excluding evidence. It might be said that the task of the registration authority would be simplified

and made quicker were it not permitted to consider evidence extrinsic to the instrument in question. However, that would produce tension with the statutory purpose of the transitional provisions to update the registers to record the full consequences of qualifying events or dispositions. Consideration of those consequences may require evidence. Moreover, regulations 15(3)(b) and 16(3)(b) show that evidential issues can, in principle, be considered under the transitional provisions of Schedule 3 to the 2006 Act and the 2014 Regulations dealing with applications thereunder. I do not see why a line should be drawn between some applications which can give rise to consideration of evidential matters and others which cannot. Further, the public inquiry mechanism which is available generally in respect of applications under the 2014 Regulations can be used to give directions for the production of evidence while also providing a forum for the resolution of evidential disputes. That is the case however complex any factual disputes might be.

5.5.3.5 I do not find persuasive Mr Laurence's reliance on a disposition effected under a compulsory purchase order of common land under section 19 of the 1981 Act. That case is not the present case, as Mr Elvin submitted. Further, if it be the case that the full consequences of a disposition in such a compulsory purchase case (including the cessation of the common land status of the taken land regardless of the question of waste land of a manor) could be found in the four corners of the compulsory purchase order, negating the need for recourse to extrinsic evidence to identify the same, that would not justify a general "four corners" approach to all instruments within the paragraph 8 table. It is one thing to say that the full consequences of a disposition may be identified from the four corners of one instrument but another to say that, in the case of all instruments, the only consequences which can be considered are those so identified.

5.5.3.6 I do not think that it adds anything to the argument to make the point that de-registration is necessary in a compulsory purchase case under section 19 of the 1981 Act in order that exchange land can then be registered in place of the taken land whereas there is no equivalent need under the 1845 Act where rights of common are extinguished. If that extinguishment caused the land to cease to be common land under the 1965 Act that outcome can, for the reasons already given, now be recorded in an amendment to the register on an application made under paragraph 21 of Schedule 4 to the 2014 Regulations.

5.5.3.7 I reject the OSS's case on sub-issue (2) and find in favour of the MoD.

5.5.3.8 I have carefully considered the DEFRA Guidance. I am not deflected from any of my reasoning above by anything contained in it. It does not appear to me that any passages in the DEFRA Guidance are specifically addressed to the particular circumstances of the present case. Further, to the extent that the DEFRA Guidance contemplates (paragraph 8.1.4) de-registration of common land in consequence of a statutory disposition, my conclusions are not out of line with it.

5.5.4 *Conclusion on the Power Issue*

5.5.4.1 I conclude that there was power for the Applications to be made and that the MoD succeeds on the Power Issue.

6. THE WASTE LAND OF A MANOR ISSUE

6.1 Introduction

6.1.1 The MoD accepts that the Commons can be taken to be land which is of manorial origin and was at some point waste land of a manor. It therefore also accepts that, in order to justify de-registration under section 13(a) of the 1965 Act on the basis that the Commons had ceased to be common land as defined in section 22(1) of the 1965 Act (a necessary precondition of paragraph 2(1) of Schedule 3 to the 2006 Act), the extinguishment of the rights of common would not be sufficient on its own to satisfy that test. On extinguishment of the rights of common, the Commons would no longer be common land within section 22(1)(a) of the 1965 Act but, in order to justify de-registration, it would also have to be demonstrated that the Commons were not *"waste land of a manor not subject to rights of common"* within section 22(1)(b). The MoD must therefore succeed on both the Power Issue and Waste Land of a Manor Issue.

6.1.2 The parties who appeared at the Inquiry were agreed that the meaning of the phrase *"waste land of a manor"* within section 22(1)(b) of the 1965 Act was to be approached by reference to the judgment in the case of *Attorney-General v Hanmer*[12]. In that case

[12] (1858) 27 LJ Ch 837.

Baron Watson said, in words which have achieved the status of a classic exposition of the topic, that *"[t]he true meaning of 'wastes' or 'waste lands' or 'waste grounds of the manor,' is the open, uncultivated and unoccupied lands parcel of the manor, or open lands parcel of the manor other than the desmesne lands of the manor."*[13] Mr Elvin and Mr Laurence were in agreement at the Inquiry that, when Parliament enacted the 1965 Act containing the phrase *"waste land of a manor"*, it would have done so in the context of Baron Watson's well-known words. I do not disagree.

6.1.3 There is further acceptance on the part of the MoD that, in the present case, the Commons were, and remain, both *"open"* and *"uncultivated"*. The battle lines are thus drawn between the MoD and objectors by reference to the question of whether the Commons were "*unoccupied"*. In that sense the issue between the MoD and the objectors might appear relatively narrow. However, the issue of what is meant by *"unoccupied"* and how it applies in the context of the facts of the present case has given rise to disagreement amongst the parties over a wide spectrum of sub-issues.

6.1.4 Moreover, there is also a divergence in view as to the point in time at which the matter falls to be tested. The MoD's primary case is that the Commons were occupied at the time of the Vesting Deeds on 31st March 2003 (and had long been so occupied prior thereto) but that, in the alternative if that were not so, the Commons became occupied immediately after the Vesting Deeds by reason of the commencement of the Grazing Licences on 1st April 2003 or, in the further alternative, had become occupied by the time that the relevant provisions of the 1965 Act ceased to have effect (on 15th December 2014[14]). The OSS (and others) argue that the MoD have never occupied the Commons and anything occurring after 31st March 2003 is irrelevant in any event.

6.1.5 At this point I should mention the submissions of Mr Steve Byrne. Mr Byrne did not appear at the inquiry but has made written submissions following his initial objection to the Applications. Mr Byrne argued, *inter alia*, that the (legal) definition of waste land of a manor put forward in *Hanmer* was irrelevant given that it was formulated in the context of the manorial system which had met its demise in the early part of the last century. He contended that the decision of the House of Lords in *Hampshire County*

[13] At 840.

[14] See paragraphs 2.8.1-2.8.2 above.

Council v Milburn[15] supported that position and submitted that the question whether land was *"waste land"* was a factual judgment to be made simply by reference to the physical characteristics of the land, unaffected by considerations of occupation.

6.1.6 I am not able to accept Mr Byrne's reasoning. In *Milburn* Lord Templeman described the commons there in question as having been for at least 700 years *"as they are now, 'open, uncultivated and unoccupied,' in the words of the legal phrase which described common land."*[16] He also later specifically quoted Baron Watson's words[17]. The case was not concerned with the question of whether the land remained *"waste land"* but with whether, as such, it was *"of a manor"*. The point which I make for present purposes is that the continuing applicability of Baron Watson's words in *Hanmer* was endorsed in *Milburn*. There is no suggestion that they had become redundant notwithstanding the demise of the manorial system.

6.1.7 A later House of Lords decision, *Mid-Glamorgan County Council v Ogwr Borough Council*[18], similarly confirms the continuing applicability of the *Hanmer* definition. Lord Jauncey held that the common land there (which had been acquired for a reservoir construction project which had been subsequently abandoned) had remained as it had always been, *"open, uncultivated and unoccupied"* so that it was still waste land of a manor and therefore common land within section 22(1)(b) of the 1965 Act as waste land of a manor not subject to rights of common (which had been compulsorily extinguished)[19]. For his part, Lord Templeman said, in the same case, that *"the most important feature of common land is that it is 'open, uncultivated and unoccupied'"*[20] and he described the common there in question as a large *"open uncultivated and unoccupied area"*[21]. Lord Browne-Wilkinson said that it was *"established that 'waste land' means 'open, uncultivated and unoccupied lands parcel of the manor, or open lands parcel of the manor other than the demesne lands of the manor:' Attorney-General v Hanmer (1858) 27 L.J. 837, 840, per Watson B."*[22]

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[15] [1991] 1 AC 325.
[16] At 337H.
[17] At 338G-H.
[18] [1995] 1 WLR 313.
[19] At 321E-F.
[20] At 324H-325A.
[21] At 325B-C.
[22] At 328B.

6.1.8 The present relevance of Baron Watson's words in *Hanmer* to the question of what is meant by *"waste land of a manor"* in section 22(1)(b) of the 1965 Act is, accordingly, endorsed by the highest judicial authority.

6.2 The MoD's Initial Submissions on the Waste Land of a Manor Issue

6.2.1 It is convenient next to record the MoD's initial submissions on the Waste Land of a Manor Issue as set out in the skeleton argument of Mr Elvin and Miss Sargent of 2nd October 2018. As stated above, the MoD's position was that it could be assumed that the Commons were at some time waste land of a manor. Originally, in arguing that the Commons had ceased to be waste land of a manor, the MoD had placed some reliance on the Warcop Inclosure Award of 1831 but (correctly) did not pursue this point any further when, upon inspection of the award, it became clear that none of the Commons had been subject to inclosure under it. However, it was the MoD's case that the entirety of the Commons had been continuously occupied by the MoD since long before 31st March 2003. It followed that the Commons were not waste land of a manor on that date and did not, therefore, become *"waste land of a manor not subject to rights of common"* upon the extinguishment of the rights of common. On the contrary, once the rights of common over the Commons were extinguished on 31st March 2003, the Commons no longer fell within the definition of *"common land"* in the 1965 Act and could have been de-registered under the latter. On that basis, it followed that, if the MoD's submissions on the Power Issue were accepted, the Applications should be accepted and the Commons de-registered.

6.2.2 In order for the Commons to be waste land of a manor (and thus common land as defined by section 22(1) of the 1965 Act) they had to satisfy the *Hanmer* criteria of being *"open, uncultivated and unoccupied"*. There was little authority on the circumstances in which land would be *"unoccupied"* so as to satisfy the third limb of the *Hanmer* criteria. In *Re Arden Great Moor*[23] the Chief Commons Commissioner had reasoned as follows in respect of the requirement that the land be *"unoccupied"*: *"[a]t all material times the only use which has been made of .. [the land] .. has been for the grazing of sheep belonging to the tenants of other land of the owner by virtue of specific provisions in their tenancy agreements. Land which is used for grazing cannot ipso*

[23] Reference No. 268/D/209.

facto be regarded as being occupied in the sense in which Watson B. used that word in his definition of waste land, for the waste land of manors was frequently used for grazing by manorial tenants who had rights of common. Here, however, the grazing is not the exercise of rights of common. It is the exercise of the contractual rights enjoyed by the tenants under their tenancy agreements. Rights held for a term of years or from year to year are specifically excluded from the definition of 'rights of common' in section 22(1) of the Act of 1965. Indeed, quite apart from the statutory definition, such rights are fundamentally different from rights of common, which are a burden on the land. Here, to the extent to which the rents paid under the agreements are greater than the rents which could have been obtained for the farms without any right to graze on Arden Moor, the owner is in receipt of money from the Moor and is thereby enjoying a benefit from it. The owner is using the land by taking in the sheep of other people to graze on it, it being immaterial that the owners of the sheep are also tenants of other land belonging to the same owner. In my view, such a use of land is sufficient to make it occupied and thus to take it out of the category of 'waste land'."

6.2.3 More broadly, as Lord Nicholls observed in *Graysim Holdings Ltd v P&O Property Holdings Ltd*[24]: *"the concept of occupation is not a legal term of art, with one single and precise legal meaning applicable in all circumstances. Its meaning varies according to the subject matter. Like most ordinary English words 'occupied', and corresponding expressions such as occupier and occupation, have different shades of meaning according to the context in which they are being used. Their meaning in the context of the Rent Acts, for instance, is not in all respects the same as in the context of the Occupiers' Liability Act 1957."*[25]

6.2.4 It was submitted that, while the use of the word *"occupation"* found in a range of property law cases was context specific, nevertheless assistance could be derived from them. The cases supported the following points:

(1) The core concept of occupation had been said to be physical presence[26] or a sufficient measure of control over land to prevent strangers from interfering. See *Newcastle City Council v Royal Newcastle Hospital*[27] (a rating case) where Lord Denning (giving the judgment) said that *"[o]ccupation is matter of fact and only*

[24] [1966] 1 AC 329.
[25] At 334G-H.
[26] Wonnacott *Possession of Land* (2006) at page 6.
[27] [1959] AC 248.

exists where there is sufficient measure of control to prevent strangers from interfering, see Pollock and Wright on Possession in the Common Law, pp. 12, 13. There must be something actually done on the land, not necessarily on the whole, but on part in respect of the whole. No one would describe a bombed site or an empty unlocked house as 'occupied' by anyone: but everyone would say that a farmer 'occupies' the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another."[28]

(2) In the context of business tenancies, the word *"occupied"* similarly connoted *"an element of control and user, and [involves] the notion of physical occupation. That does not mean physical occupation every minute of the day, provided the right to occupy continues. But it is necessary for the judge trying the case to assess the whole situation where the element of control and use may exist in varying degrees. At the end of the day it is a question of fact for the tribunal to decide*" *per* Eveleigh LJ in *Hancock & Willis v GMS Syndicate Ltd*[29]. Matters that were usually treated as relevant in the business tenancy context were physical presence or absence, the exercise of control over those using the premises, the provision of services by the alleged occupier and the time devoted to carrying on an activity[30].

(3) A minimum sufficiency of physical presence or control could only be determined by reference to the facts of the particular case: *Wandsworth LBC v Singh*[31]. This was a business tenancy case where the subject land was a 500 square metre parcel of open space that Wandsworth had leased from the Greater London Council and had subsequently improved and maintained. Ralph Gibson LJ said that *"[t]hat which is a minimum sufficiency of physical presence or control cannot, in my view, be determined by the court independently of the facts of a particular case by reference to the number of visits per day or per week or per month."*[32] On the particular facts he concluded that Wandsworth was "*physically present upon and exercised control over the piece of land by their servants or agents at least as much as would in my judgment be reasonably expected by the parties to the lease when it was made. If the ordinary man, knowing the facts, were asked 'Who is in occupation of this open space?' I have no doubt whatever that, applying the ordinary and popular meaning of the word, he would answer 'The council is.' No*

[28] At 255.
[29] (1982) 265 EG 473 at 475.
[30] Reynolds & Clark *Renewal of Business Tenancies* 5th ed. at paragraph 1-45.
[31] (1991) 62 P & CR 219.
[32] At 230.

one else is. The council is there, as necessary, to do all that is required to maintain the place in decent order for use by the public."[33]

(4) The Rent Act 1977 conferred protections on a tenant who *"occupies the dwelling house as his residence"*[34]. Temporary absences would not deprive the tenant of his protection, provided he had an intention to return to live in the premises, left in the house visible evidence thereof, and could show a practical or real possibility of returning within a reasonable time[35]. What was reasonable depended on the circumstances.

(5) The Land Registration Act 2002 included the concept of being in *"actual occupation"* of the subject property[36]. Whether intermittent physical presence should be regarded as continuous occupation marked (but not interrupted) by occasional absences or as a pattern of alternating periods of presence and absence *"is a matter of perception which defies deep analysis"*: *Stockholm Finance Ltd v Garden Holdings Inc*[37] *per* Robert Walker J.

(6) Even where there was an adverse possession claim, there was no requirement to demonstrate continuous use. There might be long intervals where the land was possessed but was not used: see e.g., *Bligh v Martin*[38] in which Pennycuick J gave the example of arable farmland in winter months[39].

6.2.5 In the present case, the MoD's occupation and use of the Commons post-1981 was explained in the witness statement of Clare Hetherington and was also evidenced by other documents before the Inquiry, including, notably, the Inspector's Report following the 2001 Public Inquiry. Having regard to that evidence and assessing *"the whole situation"* (*Hancock & Willis*, above), it was plain that as at 31st March 2003, the physical presence of the MoD on the Commons and the control exercised by the MoD over them were sufficient for the MoD to be occupying the Commons for the purpose of applying the *Hanmer* criteria. Indeed, the MoD had been occupying the Commons for decades, continued to do so following 31st March 2003 and remained in occupation today.

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[33] Ibid.

[34] See section 2.

[35] Woodfall *Landlord and Tenant* volume 3, part 9 at paragraph 23.048.

[36] See, for example, paragraph 2 of Schedule 3.

[37] [1995] NPC 162.

[38] [1968] 1 WLR 804.

[39] At 811G-812A.

6.2.6 Warcop and Hilton Commons and the eastern section of Murton Common formed part of the Danger Area. The western section of Murton Common was known as Area Victor and was used for "dry training" i.e., training not involving the firing of live ammunition. The Commons were acquired by the MoD in the 1950s. The FLAs restricting the exercise of rights of common and enabling military training to take place were first agreed in 1959 and were backdated to 1956. The MoD's occupation and use of the Commons as at 31st March 2003 could be summarised in the following way.

(1) On firing days (which accounted for over two thirds of the year), if the relevant ranges were in use ammunition would ricochet over the Danger Area, resulting in a severe risk of death or injury consequent to which (for safety reasons) no one was permitted to access the Danger Area. Access to the Danger Area was prohibited on firing days by the Byelaws. The Byelaws provided a significant degree of control over the Commons to the MoD.

(2) The MoD operated and maintained a system of red flags, red lights and Danger Area signs.

(3) The MoD used Area Victor for dry training; it was also used as a thoroughfare.

(4) The MoD undertook boundary maintenance and also addressed issues affecting public rights of way on the Commons by, *inter alia*, removing ordnance from the immediate vicinity of public rights of way.

(5) The MoD as freehold owner of the WTA was required to comply with national and international environmental legislation. In accordance with MoD policy, there was an active MoD conservation group that regularly undertook projects on the Commons.

(6) The MoD undertook *ad hoc* work to meet its legal obligations as the freehold owner of scheduled monument sites.

(7) The MoD licensed sporting rights to the Warcop Military Shoot, which resulted in about ten days of shooting each season. The MoD also undertook limited, related maintenance tasks.

(8) The MoD undertook *ad hoc* maintenance work to Scordale Mines and also carried out extensive work to repair the Scordale bridleway following damage sustained in August 2002.

(9) The MoD had, on 27th March 2003, entered into the Grazing Licences, the term of each of which would commence on 1st April 2003, in respect of five hefts on the Commons.

6.2.7 Adopting the approach of the Court of Appeal in *Wandsworth*, if the ordinary person, knowing the facts as summarised above, had been asked on 31st March 2003 who was in occupation of the Commons, they would have answered "the MOD is".

6.2.8 The MoD's use and control of the Commons following the extinguishment of the rights of common on 31st March 2003 became more extensive in the following ways.

(1) The new firing regime resulted in access to the Commons being prohibited under the Byelaws for longer periods of time.

(2) The majority of the undertakings that had resulted from the 2001 Public Inquiry were implemented.

(3) The MoD's general estate management work intensified as a result. The MoD was, for example, required to introduce a programme for the removal of unexploded ordnance. The Integrated Land Management Plan (now the Integrated Rural Management Plan) was also introduced.

6.2.9 As for the Grazing Licences, their terms began on 1st April 2003 immediately following the extinguishment of the rights of common on 31st March 2003. Each Grazing Licence gave the grazier the right to graze sheep on *"the Land"* which was defined as *"[t]he land at Warcop Training Area known as Warcop, Murton and Hilton Commons ... shown for the purpose of identification edged red on the attached plan"*. In other words, each of the Grazing Licences granted the right to graze sheep over the entirety of the Commons, albeit that the stated intention was *"that the grazing will be concentrated predominantly – but not exclusively – on the [relevant] Heft"*. A licence fee was payable under each Grazing Licence for the total licence period. The MoD had received over £40,000 in fees pursuant to the five Grazing Licences since March 2003.

6.2.10 It was submitted that the use of the Commons pursuant to the Grazing Licences was plainly *"sufficient to make it occupied and thus to take it out of the category of 'waste land'"* adopting the approach in *Re Arden Great Moor* (from which the italicised words are taken). Grazing under the Grazing Licences was, as in *Re Arden Great Moor*, under the exercise of contractual rights, not the exercise of rights of common. The MoD was in receipt of fees from the Commons pursuant to the terms of the Grazing Licences and was thereby enjoying a benefit from them, again as in *Re Arden Great Moor*.

6.2.11 Therefore, if (contrary to the MOD's primary submissions) the conclusion reached was that the MoD's use and control of the Commons prior to 1st April 2003 did not amount to occupation for the purpose of applying the *Hanmer* criteria, it was submitted that it was clear that the MoD was in occupation of the Commons as of the commencement of the term of the Grazing Licences on 1st April 2003. The term of the Grazing Licences commenced immediately upon the extinguishment of the rights of common. There was thus no point in time after 31st March 2003 at which the Commons were *"waste land of a manor not subject to rights of common"*.

6.2.12 In summary, the MoD's submissions were as follows. The primary submission was that the Commons were occupied on 31st March 2003, had been occupied for many years prior thereto and had remained occupied ever since. If that primary submission was rejected, it was submitted that the MoD occupied the Commons from the commencement of the term of the Grazing Licences on 1st April 2003. If that was correct, there was no point in time following 31st March 2003 at which the Commons were *"waste land of a manor not subject to rights of common"* and the Commons had therefore ceased to satisfy the 1965 Act definition of *"common land"* upon the extinguishment of the rights of common on 31st March 2003. If that alternative submission was also rejected, then having regard (i) to the increased use and control of the Commons by the MoD for military purposes that occurred from 1st April 2003 onwards and (ii) to the use of the Commons for grazing that took place pursuant to the Grazing Licences, it was submitted that it was nevertheless clear that the MoD occupied the Commons prior to the relevant provisions of the 1965 Act ceasing to have effect. The Commons thus ceased to be *"waste land of a manor"* and ceased to satisfy the 1965 Act definition of *"common land"* prior to the advent of the 2006 Act in Cumbria. They could therefore have been de-registered under the 1965 Act.

6.3 The evidence of Clare Hetherington

6.3.1 In order to support its case on the Waste Land of a Manor Issue the MoD called Mrs Clare Hetherington as a witness. Mrs Hetherington is Rural Practice Surveyor who qualified as a member of the Royal Institution of Chartered Surveyors in 1998. She is employed by the Defence Infrastructure Organisation (formerly Defence Estates) which is the part of the MoD which is charged with the management and maintenance of the military estate. Since June 2017 Mrs Hetherington has been the Principal Estates

Surveyor for the North of England and oversees the management of the WTA in that capacity. Her personal involvement with the management of the WTA had begun in September 1999 when she was an Estates Surveyor dealing with the day to day management of the site. Mrs Hetherington gave evidence at the 2001 Public Inquiry on behalf of the MoD and was involved in the implementation after 2003 of the estate management undertakings given at the 2001 Public Inquiry. Her present evidence, drawing on historic files and personal involvement, looked back over the period since 1981 when the current Byelaws came into effect, but its focus was on the position from 1999 onwards[40].

6.3.2 A summary of the evidence provided by Mrs Hetherington in her proof is contained in paragraph 6.2.6 above. I will next provide an expanded account of some matters dealt with by Mrs Hetherington, particularly (although not exclusively) by reference to her oral evidence. In recording oral evidence, I do not distinguish between evidence given in chief, under cross examination or through re-examination[41]. No objector suggested that Mrs Hetherington's evidence was other than a truthful and accurate account of the matters she spoke to; and I proceed on that basis also. The issues in the case concern how the evidence bears on the *Hanmer* criterion of *"unoccupied"*.

6.3.3 I first turn to the operation of the firing ranges. In her proof Mrs Hetherington explained, by referring, *inter alia,* to the evidence which had been given by Major Evans on behalf of the MoD at the 2001 Public Inquiry, that each of the firing ranges had its own weapon danger area template and that the range complex had its overall range danger area template. These were the areas stipulated for safety when live firing was taking place. Mrs Hetherington said that there were 20 ranges in total on the WTA and that up to 14 ranges could used at once. On every firing day multiple ranges were in use. The weapon danger area templates grew larger the more soldiers (extending up to platoons) were training at the time and the more weapons were in use. As Major Evans had explained in his evidence for the 2001 Public Inquiry, moving firing exercises took place and field-firing boxes for these exercises could be of a considerable size (up to 1,000 metres wide and 3,000 metres long). And, as made clear in Mrs Hetherington's proof, whatever

[40] Mr Elvin explained that the evidence concentrated on the recent position in order to take a proportionate approach to matters and to reflect the fact that the focus of the Waste Land of a Manor Issue would be on the status of the Commons at 31st March 2003 (although the following period might also be relevant). The approach was chosen for pragmatic reasons not because it was considered that there was any significant change over the period described by Mrs Hetherington from the position which had obtained previously.
[41] I generally do the same when later reporting the evidence of others.

the extent of the ranges in use and their individual weapon danger area templates, the Byelaws prohibited access to the whole Danger Area when any live firing was taking place. The boundary of the Danger Area also needed to accommodate flexibility (an example of which was to accommodate a future proposal for a new vehicle-mounted weapon, the danger template for which would extend well into the Danger Area and beyond Swindale Edge). The military training justification for the extinguishment of the rights of common which had been accepted at the 2001 Public Inquiry related to the Danger Area. It was not possible to have the ranges without the Danger Area.

6.3.4 Mrs Hetherington was not able to quantify the extent of ordnance which would ricochet into the Danger Area. On some of the ranges that might always happen, on others it would depend on what the ordnance hit and, in some of the ranges, ordnance might be captured in the range footprint but have a propensity to go into the Danger Area. Mrs Hetherington did not know how much ordnance landed in the Danger Area on a weekly basis nor were there any records to assist in that regard. She was not sure whether this was a regular or exceptional occurrence. Some of the ranges had bunds to catch ordnance but others (such as on the eastern side) did not.

6.3.5 Mrs Hetherington said that before 2003 there had been 100 or so non-firing days in the course of a year. Now there were fewer and the ranges were used more. There were presently, not counting Sunday afternoon access, some 46 guaranteed non-firing days (as provided by the relevant undertaking given as part of the 2001 Public Inquiry)[42]. Since extinguishment of the rights of common, use of the ranges had increased, including firing on Mondays. Up to 2003 on more than two thirds of the days in a year it was not a good idea to be in the Danger Area whereas it was a good idea that the Danger Area should be unoccupied when firing took place. There had been little night firing before 2003 but this intensified afterwards and some of the ranges were re-oriented in the direction of the Commons (whereas previously their safety templates had been restricted not to extend that far). The use of the ranges that was predicted at the 2001 Public Inquiry to arise after extinguishment of the rights of common was broadly how the ranges remained used at present. There was no significant change in the use of the WTA between 2001 and 2003. The WTA was extremely busy and was in use most days of the week other than over the Christmas shutdown.

[42] The arithmetic derived from the relevant undertaking actually produces 48 days: see paragraph 6.6.2.5 below.

6.3.6 The overall boundary of the Commons was either walled or fenced save for a steep area on the north western edge of Murton Common in the vicinity of High Cup Gill where it was impracticable for there to be a boundary feature. The boundary between the MoD's freehold land and the Licenced Area was fenced. The Range Impact area was separated from the Commons by a wall and fence (along the line of the former "fell wall" which had fallen into disrepair). The fence had been erected in 1963. It was there to prevent the ingress of sheep and the inevitable harm which would follow were they to get on to the ranges. There were otherwise very few internal walls or fences. Boundary repairs were originally undertaken by way of patching as and when the need arose but repairs were later undertaken as part of programmed management. The boundaries between common land and enclosed land generally belonged to the enclosed land. Reliance was placed on boundary repairs to show that work was going on and that access was taken across the Commons in order to reach the boundaries. Mrs Hetherington had no record of how many days per year would be spent on boundary repairs. Maintenance took place from time to time as required.

6.3.7 Mrs Hetherington said that of the 14 red flag locations specified in the Byelaws none fell within the Commons. There was also a red flag at Murton (near the car park there) which, although not specified in the Byelaws, was within Murton Common. It had been there since her involvement with the WTA from 1999. Red lights were used at the same locations as the flags (and displayed on the flagpoles). There would usually also be a copy of the Byelaws displayed near the flagpole with a sign saying that the Danger Area (marked by a sign) would start within so many metres. The Danger Area signs, which (as Mrs Hetherington explained in her proof) marked the boundary of the land subject to the Byelaws at intervals of approximately every 50 metres, had been in use since her first involvement with the WTA in 1999. The Danger Area signs were not referred to in the Byelaws but it was the practice of the MoD to mark the Danger Area with such signs. They went all round the whole of the Danger Area. There was a length of Danger Area signs which ran through Murton Common along the boundary between Area Victor and the Danger Area.

6.3.8 Rights of way in the Danger Area were checked for unexploded ordnance by range staff on a weekly basis (during non-firing periods). This had been the practice all the way through Mrs Hetherington's involvement with the WTA. What would then happen if unexploded ordnance was found would depend on exactly what was found. The matter

would be reported to the range officer. The UXO (Unexploded Ordnance) team visited on an annual basis. The vast majority of the Commons were not inspected for ordnance on a regular basis. After the 2001 Public Inquiry Mrs Hetherington had accompanied the UXO team on a wider sweep for ordnance on the Commons in the vicinity of the rights of way. This was the first such wide sweep that she was aware of. The exercise had taken a few days and had produced several vehicle loads in a range of sizes which were brought down for disposal. This quantity could have accumulated over a period of 20-30 years.

6.3.9 Parts of the Commons such as the northern end of Hilton Fell would not appear any different from other commons save for Danger Area signs and the presence of UXO personnel. Military personnel would not be encountered on a firing day. In respect of Hilton and Warcop Commons there would be less physical presence than on a common run as a grouse moor. As firing took place on most days, military personnel would not be on the Commons most days. They would rarely be there.

6.3.10 As for Area Victor, there was some cadet usage of it for dry training. The regular army and the Territorial Army also did dry training. Areas apart from Area Victor were used for dry training. Some operations were covert and would not necessarily be observed. Mrs Hetherington did not know the relative proportions of dry training that were carried out on Area Victor and other areas. Sometimes soldiers would have equipment with them on Area Victor; sometimes they would just yomp there. It was always safe to be there. Mrs Hetherington was not able to say how many days a year Area Victor had been used for military purposes over the period 2001-2003 and was not able to provide any figures at all in relation to its usage. She was happy with the figures in Dr Aglionby's evidence (which, based on information from local residents, described 20-30 days of use a year, predominantly by army cadets in the school holidays). In appearance Area Victor was indistinguishable from the rest of the Commons. There was no military infrastructure on it. Activities such as yomping and orienteering would take place on lots of other commons in Cumbria. I should also add that in her proof of evidence Mrs Hetherington mentioned use of Area Victor for helicopter pilot training for touchdown practice on difficult terrain.

6.3.11 Mrs Hetherington noted in her proof that there were 133 recorded historical sites in the WTA. Some were on the Commons but she said she was not sure how many. They were

subject to regular survey. Any necessary work was carried out on an *ad hoc* basis as and when funds were available. The preservation of the historic mining remains in Scordale formed a separate project. Mrs Hetherington was not able to say how many hectares were occupied by the Scordale Mines. It might have been in the order of less than 5% of the Commons.

6.3.12 After the extinguishment of the rights of common and the commencement of the Grazing Licences, the position was that there was less access for shepherding on Hilton and Warcop Commons but access to Murton Common remained similar to how it had been previously. Grazing levels were considerably lower after extinguishment of the rights of common[43]. This had been anticipated and explained at the 2001 Public Inquiry. The fees under the Grazing Licences were not at a market level because the purpose of the Grazing Licences had not been to obtain a market return but to ensure grazing was at a level consistent with the requirement of Natural England for appropriate management of the SSSI.

6.3.13 Peatland restoration works after extinguishment of the rights of common (on 20 hectares of Little Fell – part of Warcop Common – in 2013 and planned further work on a similar size area at Murton Heads – part of Murton Common) occupied a small percentage of the overall Commons area (of some 4,200 hectares). However, Mrs Hetherington said that there had to be movement backwards and forwards across the Commons to undertake the works.

6.3.14 Overall, Mrs Hetherington considered that, in terms of the scale of its involvement and the size of projects undertaken for the purposes of conservation or preserving historic monuments on the Commons, the MoD did more than was usual in terms of land management on other commons. She did not have recent experience of estates other than the military estate. However, the management the MoD undertook of the Commons for military purposes was a unique feature of the case. She was not aware of any other commons where there was a danger of death or serious injury from military activities or where there were restrictions on use comparable to those imposed by the Byelaws in the present case.

[43] Before extinguishment there had been some 12,000 sheep on the Commons. The Grazing Licences provided in total for 2,440 sheep. See paragraph 6.4.4.5 below.

6.3.15 Mrs Hetherington did not recall the question of manorial waste to have been raised at the 2001 Public Inquiry.

6.4 The Evidence and Submissions of Objecting Parties on the Waste Land of a Manor Issue

6.4.1 *Introduction*

6.4.1.1 I report next the evidence and submissions of Objecting Parties on the Waste Land of a Manor Issue. The contribution of some speakers was (entirely understandably) a mixture of evidence and argument.

6.4.1.2 No evidence was called on behalf of the OSS and, for convenience, I report the detailed submissions on the Waste Land of a Manor Issue made on its behalf by Mr Laurence and Miss Crail under a separate sub-heading in section 6.5 below.

6.4.2 *Councillor Connell*

6.4.2.1 Councillor Connell gave brief evidence directed to the issue of the Commons' being land of manorial origin. As it is accepted by the MoD that the Commons are land which is of manorial origin, I need say no more about this.

6.4.2.2 Secondly, Councillor Connell questioned whether the Applications had any purpose. I have dealt with this issue in section 2.7 above.

6.4.3 *The Friends of the Lake District*

6.4.3.1 Dr Jan Darrall spoke on behalf of the Friends of the Lake District ("the FLD"). The FLD strongly objected to the Applications and supported the objections of other parties.

6.4.3.2 Dr Darrall said that the FLD was itself the owner of a common (at Little Asby) and that, while (at 464 hectares) it was not of the scale of the Commons under discussion at the Inquiry, it was nevertheless a common on which regular land management tasks such as dry stone walling, conservation work, peat restoration (undertaken by one person over a period of one week in every month) and surveys were carried out. It had rights of common on it and was not subject to byelaws. There was a little bit of ordnance on

Little Asby (probably dating from before 1945 when the land would have been used under emergency powers).

6.4.3.3 The activities that the MoD relied on in respect of the Commons were (aside from use of the Commons as a danger area and for dry training on Area Victor) those which any responsible landowner would undertake on any area of upland fell or common land. These would include repairing shooting butts where land was used for shooting, capping mine shafts, repairing paths and tracks, minor conservation activity and other similar tasks. In the context of the 42 square kilometres of the Commons, the activities were insignificant. For the overwhelming majority of the land nothing had been done except the grazing of sheep. If the level of activity relied on by the MoD was sufficient to constitute occupation, there would not be a single hectare of conscientiously managed land in England which remained waste. There were examples of other commons (Winton and Kaber, and Stainmore) where there was significant signage. There were other commons where one could do oneself serious harm. The Commons were no different from surrounding commons or other commons across England.

6.4.3.4 Dr Darrall considered that the MoD's activities had effectively left the Commons entirely unchanged from how they would have been before the MoD came on to the scene. It was accepted that there might be a small amount of ordnance on the Commons but otherwise the land was exactly how it had always been. If anything, it was now even wilder with the reduction in grazing. This demonstrated lack of occupation. The Commons were just as one would find, and expect to find, any commons in any part of the English uplands – desolate, poor grazing, few sheep, virtually no sign of man's intervention (save for the absence of tree cover) and no inclosure. In their physical state, the Commons were indistinguishable from any other. No legal device – whether tenancy, licence, sporting agreement or byelaw – could change, or had changed, the position nor was it ever likely to do so as the land was too remote and unproductive to ever make improvement worthwhile.

6.4.3.5 The Commons therefore remained *"open, uncultivated and unoccupied"*, and remained waste land of a manor.

6.4.4 *The Foundation for Common Land*

6.4.4.1 Dr Julia Aglionby spoke on behalf of the Foundation for Common Land ("the FCL") of which she is the Executive Director for England. She both gave evidence as a witness and made a closing submission. I provide a combined account of her contributions in these separate roles. By profession Dr Aglionby is a chartered surveyor and agricultural valuer practising in matters of common land and uplands. She is also a Board Member of Natural England (but did not speak on its behalf at the Inquiry). She had previously been employed by H&H Bowe Ltd in which capacity she had assisted in the drafting of the evidence which Alan Bowe had given on behalf of the MoD to the 2001 Public Inquiry (concerning compensation for the acquisition of the rights of common) and she had also helped Defence Estates in negotiating purchase agreements. Further, she had interviewed applicants for the Grazing Licences in 2002 and had assisted in the preparation of those documents. She was able to confirm that the Grazing Licence for heft 2 (in respect of which no copy could be found) had been entered into in identical terms to all the others.

6.4.4.2 The material points of Dr Aglionby's case for present purposes were as follows. First, Dr Aglionby, while not accepting that it was relevant to consider what had happened after 31st March 2003 (because that was when the relevant historical event occurred), pointed out that the graziers could not, given the express terms of the Grazing Licences, be considered occupiers of the Commons. The same followed under the successor licences granted in 2005.

6.4.4.3 Secondly, Dr Aglionby did not accept that the decision in *Re Arden Great Moor* was correct but considered it not to be comparable with the present case in any event. *Re Arden Great Moor* concerned tenancy agreements whereas the present case involved restrictive licences permitting limited grazing periods and limited access.

6.4.4.4 Thirdly, the licence fees were *de minimis* and, in effect, only a peppercorn payment providing no benefit to the MoD, a view Dr Aglionby maintained when pressed on the point in cross examination (and also reiterated in her closing submission): per each right (or sheep) the fee (£1) was a peppercorn. An actual or notional peppercorn would have been unacceptable in the local community. Dr Aglionby drew a contrast between the licence fees and the scale of the support that the graziers (not the MoD) would have

obtained via government support schemes. She estimated (conservatively in her view) that the latter would have amounted to some £1.5 million between 2003 and 2014 compared with the figure provided by the MoD of £40,000 received in licence fees to date since 2003. The licence fees were also very small compared with the expenditure on the purchase of the rights of common. The purpose of the Grazing Licences was to ensure that the grazing of the Commons met the nature conservation needs of the SSSI. It was also to retain the character of the area.

6.4.4.5 Fourthly, there had been a substantial decrease in grazing on the Commons after the extinguishment of the right of commons compared with the position beforehand. Alan Bowe's proof for the 2001 Public Inquiry had evidenced 12,039 sheep grazing on the Commons in the summer months. This equated to approximately 2.86 sheep per hectare. There would have been no sheep on the Commons immediately before extinguishment of the rights of common because sheep were taken off the Commons in the winter (which was usual for most commons in the area). The Grazing Licences permitted 2,440 sheep to graze on the Commons, which equated to approximately 0.58 sheep per hectare. There was an 80% reduction in grazing or stocking levels. The level of grazing after the rights of common were extinguished was also below that found on neighbouring commons. Further, the numbers of persons involved in shepherding had declined substantially. The hefts, where grazing was encouraged, were all at the front of the Commons so at the back of the Commons there was little grazing. Given that sheep could stray, it would have been impractical not to allow rights over the Commons generally apart from the hefts. The total area of the hefts made up between a third and a half of the area of the Commons. It was useful to consider the view expressed in the DEFRA Guidance (at paragraph 7.3.14) that extensive grazing of upland sites by tenancy or licence did not amount to occupation.

6.4.4.6 Fifthly, none of the land management activities described by Mrs Hetherington were other than standard across large areas of the North Pennines and did not, in Dr Aglionby's opinion, amount to occupation of the Commons. Footpath maintenance was no different to other commons. Conservation of archaeological sites was primarily at the Scordale Mines. The site was some 5 hectares, about 0.1% of the total area of the Commons, and immaterial. The work referred to was also carried out after the relevant date, 31st March 2003. The same applied to peat restoration which had only taken place recently and was over an area of 20 hectares, about 0.4% of the total area of the

Commons. The activity did not amount to occupation and, even if it did, was not of a meaningful size compared with the whole area of the Commons. Mrs Hetherington had agreed that general activity by military personnel on the Commons would be less than on a common run as a grouse moor. Shooting for sporting purposes on such commons would, as with use of land as a ricochet area for ordnance, also pose safety risks. Most other commons she had in mind had rights of common over them but some had rights through tenancy agreements so there was a mixture of such arrangements.

6.4.4.7 Sixthly, and so far as concerned military activity, Dr Aglionby's evidence was that she had been informed by local residents that the use of Area Victor for dry training was predominantly by army cadets and took place primarily in the school holidays. Over a whole year the use was about 20-30 days. Dr Aglionby did not consider that this amounted to occupation. As for the use of the rest of the Commons as the Danger Area, the claim that this was occupied by virtue of ordnance landing was equivalent to suggesting that land neighbouring a golf course was occupied for golf because golf balls landed on it. Mrs Hetherington had not been able to provide any indication of the amount of ordnance that would land in the Danger Area on a yearly basis and no records were kept. The several vehicle loads she referred to could, Mrs Hetherington agreed, have accumulated over 20-30 years. The Danger Area could not be said to be occupied. Other commons were subject to byelaws regulating their use (and were a commonly used instrument) but Dr Aglionby was not aware of others subject to military byelaws (or military use) or others where byelaws excluded public use for the greater part of the year. The existence of byelaws did not amount to physical occupation.

6.4.4.8 Seventhly, the character of the Commons was consistent with waste land of a manor. If one were to land on them from a helicopter, there would be nothing to suggest that they were not *"open, uncultivated and unoccupied"*. Mrs Hetherington had agreed as much in relation to the northern part of Hilton Common.

6.4.4.9 Eighthly, there had been no suggestion at the time of the 2001 Public Inquiry that the Commons would not remain common land upon the extinguishment of the rights of common. The MoD's position then, as recorded in the Inspector's Report[44], was that the MoD had put in place arrangements that guaranteed that the Commons would not

[44] Paragraph 12.3.2.

be de-registered and would remain common land in perpetuity. The suggestion that they were not common land had only arisen when the Commons Bill was published. As for the undertaking not to de-register, Dr Aglionby was not able to comment on the (surprising) suggestion that it had been given for pragmatic reasons (to satisfy the Countryside Agency); all she could say was that the undertaking had been given. The MoD was reneging on its undertaking without any overriding public interest justification for doing so. I have dealt this in paragraph 2.7.7 above.

6.4.4.10 Dr Aglionby concluded that the Commons were, and always had been, *"unoccupied"* and remained waste land of a manor, and thus common land.

6.4.5 *Hilton Commoners*

6.4.5.1 Mr William Patterson, Chairman of Hilton Commoners, gave evidence on their behalf. Mr Patterson farms at Coupland Beck Farm in the Parish of Warcop. He formerly held grazing rights on Hilton Fell and was a member of the Committee of Hilton Commoners formed to negotiate with the MoD over the purchase of the rights of the common. Hilton Commoners were of the view that the MoD did not have the right to cancel its undertaking not to de-register the Commons. I have dealt with this point in paragraph 2.7.7 above.

6.4.5.2 Mr Patterson stated that the Commons were grazed by 12,000 sheep prior to 2001 but that the figure reduced to some 2,400 under the Grazing Licences. Even if, which was disputed, the hefts provided for in the Grazing Licences were occupied, the rest of the fells were not. The lower stocking levels had caused the fells, in particular, the Back Fell, to become very under-grazed allowing heather, bracken and scrub to take over certain areas. Natural England had become very concerned about the situation and had suggested "pulse grazing" (where sheep were kept for several weeks in areas specifically fenced-off for the purpose) to address matters. They had also sent heather cutters up the Back Fell to try to control the growth and had put feed blocks out to encourage the sheep to graze, a measure which had met with little success.

6.4.5.3 As to use of the Commons by the MoD, Murton Fell was used by cadets during school holidays for no more than seven days a year. Hilton Fell had not been used at all in

recent years. The Hilton Commoners had limited knowledge of Warcop Fell but their consensus view was that it too had very little, if any, use.

6.5 The OSS's Submissions on the Waste Land of a Manor Issue

6.5.1 *Section 13(a) of the Commons Registration Act 1965*

6.5.1.1 The OSS submitted through Mr Laurence and Miss Crail that the phrase *"land ... ceases to be common land"* in section 13(a) of the 1965 Act was to be read as meaning "*ceases to be common land by reason of compulsory purchase or by reason of other land being substituted for the common land"*. The decision in *Milburn* was said to be authority for this reading of the provision. Reliance was placed on the fact that, as recorded in *Milburn,* in enacting the 1965 Act, Parliament intended to give expression to the recommendation of the Royal Commission on Common Land (1958) that land, including waste land of a manor not subject to rights of common, should be registered as common land and thereafter preserved as such[45].

6.5.1.2 It was accepted that Lord Templeman recognised, as he had to, that land registered as common land could be de-registered under section 13 and the regulations made under it. However, having referred to those provisions[46] and the recommendation by the Royal Commission that land (other than road verges) should only cease to be common land if compulsorily acquired or if other land was substituted in its place[47], Lord Templeman then said as follows: *"[i]n my opinion section 13 of the Act of 1965 ...* [was] *... only intended to give effect to the recommendations of the Royal Commission and ...* [was] *... not intended to enable land to be removed from the register as a result of a simple change of ownership*[48] *… 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."*[49]

[45] [1991] 1 AC 325 at 338G-H, 340D, 340E, 341A, 342B, 342F-G, 343F, 343H and 344A contain the passages on which Mr Laurence and Miss Crail found.
[46] At 342B-C.
[47] At 342H.
[48] At 343B
[49] At 343H-344A.

6.5.1.3 The OSS recognised that *Milburn* involved a simple change of ownership and that the facts of the case did not raise the question whether the land had ceased to be *"unoccupied"* in the *Hanmer* sense. Nevertheless, it was submitted that Lord Templeman clearly intended to hold that section 13 should be construed so as to give effect to, and not frustrate, *"the conclusion"* (derived from reading the report of the Royal Commission) that, in enacting the 1965 Act, *"Parliament intended to prevent waste land ceasing to be common land"*[50] (except if compulsorily acquired or substituted by other land). It was contended that, if the House of Lords in *Milburn* had been faced with the occupation question raised in the present case, it was clear that Lord Templeman would have construed section 13, or Baron Watson's words in *Hanmer*, or both, so that the Commons would not cease to be waste land of a manor by reason of any voluntary act of the MoD, such as purporting to occupy them.

6.5.2 *Approach to "Unoccupied" in the Hanmer Definition*

6.5.2.1 Next a number of submissions were made on behalf of the OSS in relation to the approach to be taken to the *"unoccupied"* limb of the *Hanmer* definition. The first of these submissions was that the word *"unoccupied"* was to be approached on the basis of a strong disposition to find that land which, like the Commons, remained *"open"* and *"uncultivated"* was also *"unoccupied"*. It was argued that, although the words *"open, uncultivated and unoccupied"* could be read grammatically as "*open* [and] *uncultivated and unoccupied"*, the true meaning was more subtle. Each of the words, though they were not synonyms, overlapped in meaning such that land which was unenclosed (*"open"*) would often also be *"uncultivated and unoccupied"*. This was said to matter because the meaning of the word *"unoccupied"* or *"occupied"* varied according to context. It would then follow, for example, that if land was submitted to have become *"occupied"* at a time when it remained *"uncultivated"* and *"open"*, more (perhaps much more) would be required to uphold such a submission than if the land had also been cultivated and/or enclosed at the same time. Reliance was placed on the *Mid-Glamorgan County Council* decision[51] where, so it was argued, Lord Browne-Wilkinson (with whom Lords Ackner and Griffiths agreed) appeared to regard it as self-

[50] At 343F-G.
[51] [1995] 1 WLR 313.

evident that if waste land of a manor remained *"open"* (because there was no power to enclose it), then it automatically remained waste land of a manor[52].

6.5.2.2 The next submission was that, even if it were not to be accepted that Lord Templeman's approach in *Milburn* required section 13 of the 1965 Act to be construed in the way argued for by the OSS (as in section 6.5.1 above), nevertheless that approach had other implications for the question of whether land had ceased to be common land and how the question of *"unoccupied"* was to be understood. The first such implication was that the alleged cesser had to be regarded as effectively permanent. Even if, which was not accepted, the Commons had been occupied since they were acquired by the MoD, it would not follow that they had *"ceased"* to be waste land of a manor. They might at any time once again become *"unoccupied"* as was the case in *In re Yateley Common*[53] where Foster J said that the land in question *"can easily revert to a common when its use as an aerodrome stops"*[54]. It was there regarded as self-evident that the prospect of that event occurring was relevant to whether the land had in fact ever ceased to be *"unoccupied"*. Thus, it was submitted that wherever such a prospect existed - it need not be more probable than not as long as it was recognised as a possibility - a decision-maker should, guided by the approach in *Milburn*, be very slow to find that land had ceased to be *"unoccupied"* in the *Hanmer* sense.

6.5.2.3 A submission was then made on the topic of the interrelationship between use and occupation. There was, it was argued, a distinction between land having been used for a purpose and occupied for that purpose. Use and occupation could, and often would, go together. Land which was occupied would normally also be used. But land which was used was not necessarily occupied. Here the Danger Area was kept *"unoccupied"* so that it could be *"used"* as an area over (some of) which ordnance resulting from firing in the impact area could stray or ricochet. Reference was made to, and reliance placed on, the decision in *Newcastle City Council*[55]. Further, an illustration of the difference between use and occupation in the very context of waste land of a manor was to be found in the decision of Nourse J in *Re Burton Heath*[56] where it was held that land subject to a yearly tenancy of shooting rights was *"unoccupied"*.

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[52] At 328C-D and 332A-B.
[53] [1977] 1 WLR 840.
[54] At 853F.
[55] [1959] AC 248 at 255 where the question of whether land found to be *"used"* was *"occupied"* was treated a distinct question. See also paragraph 6.2.4 above.
[56] Unreported 12th May 1983.

6.5.2.4 It was then argued that the meaning of *"occupy"* was not fixed and that it *"varies according to the subject matter"*: *Graysim Holdings Ltd*[57]. And *"the consequences flowing from the presence or absence of occupation will throw light on what sort of activities are or are not to be regarded as occupation in the particular context"*[58]. In the present case, the consequence of the absence of occupation (i.e., the consequence of refusing to find that the Commons had ceased to be *"unoccupied"* in the *Hanmer* sense) would be to promote the policies of the 1965 Act as explained by Lord Templeman in *Milburn*. That in turn threw light on what sort of activities would be sufficient to establish occupation. It meant that only decided and obvious acts of occupation establishing non-transitory physical presence would do. For example, the fact, it was submitted, that the owner owned adjoining land which he might use and occupy for a particular purpose would not lead, as it might in another context, to the conclusion that occupation of that adjoining land could be treated as being referable to the whole (even if the use of that adjoining land could be so treated). So, to take the very example given by Lord Denning in *Newcastle City Council*, use of land as a rifle range might permit the conclusion that land acquired nearby for safety was also used even though the owner never set foot on it[59]. But it would not follow that the same nearby land was also occupied *"so as to form part of an entire whole"*[60].

6.5.3 *Application of Law to Facts*

6.5.3.1 Against the above legal backdrop, Mr Laurence submitted that the Inquiry had not been provided with the benefit of evidence on the various ways in which the Danger Area was used which enabled it to be known in relation to these uses enough about their frequency, duration, location, significance, timing, likelihood of being repeated in the future or cost to the MoD to be able to make these uses the foundation for a finding of occupation. That was because these uses in the period leading up to 2003 (and beyond):

(a) was too vague to provide such a foundation; and
(b) did not lend itself to analysis such that it could be assumed that the relevant activities were other than as Mrs Hetherington described some of them, merely *ad hoc.*

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57 [1996] 1 AC 329 at 334G per Lord Nicholls. See also paragraph 6.2.3 above.
58 At 335B.
59 [1959] AC 248 at 255.
60 Ibid at 256.

6.5.3.2 Where, as here, there was no discernible pattern to the activities such that it could safely be concluded that they would continue in the future, they fell far short of establishing non-transitory physical presence of the sort that the present context so emphatically required if land such as the Commons was to be regarded as having ceased to be *"unoccupied"*.

6.5.3.3 The instances of control on which the MoD relied in relation to the Commons really amounted to very little indeed. Insofar as the *ad hoc* nature of the activities relied on by Mrs Hetherington permitted any useful quantification at all, they were virtually *de minimis*. By themselves they amounted to significantly less, even when taken cumulatively, than the activity of dry training on Area Victor.

6.5.3.4 The firing ranges and impact area were occupied by the MoD and linked (albeit not closely[61]) with the Danger Area. However, that linkage did not mean that the Commons had ceased to be *"unoccupied"*. There was no suggestion that the firing ranges and impact area were waste land of a manor. Some of this area fell within the Warcop Inclosure Award and it was neither *"open"* nor *"unoccupied"*. If it was once waste land of a manor, it had long since ceased to be so by inclosure and/or by the construction of infrastructure and by the regular physical presence of men, machinery and weapons. By contrast, the non-Victor Area part of the Commons had, since the MoD took occupation of the ranges and impact area, been even more *"unoccupied"* (if that were possible) than it was before. That was the consequence of the use of the firing ranges and impact area requiring a safety or danger area from which people would be excluded when firing was taking place. The use of the former area needed to, and did, result in the *"unoccupied"* character of the non-Victor Area part of the Commons being preserved and enhanced. There were cases where it could be said that a person occupied all of his land even though he was rarely to be seen on parts of it as in the example given by Lord Denning in *Newcastle City Council* (of a farmer occupying the whole of his farm even though he did not set foot on the woodlands within it from one year's end to another[62]). However, the present case was far removed from that example. The linkage was not enough to establish that the non-Victor Area part of the Commons formed, in Lord Denning's words, *"part of an entire whole"*[63].

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[61] The *"not closely"* description is taken from paragraph 11 of the MoD's skeleton argument of 26th October 2018.
[62] [1959] AC 248 at 255.
[63] Ibid at 256.

6.5.3.5 Once the linkage argument was discarded, all that was left upon which to hang a conclusion that the non-Victor Area part of the Commons was ever occupied was the minimal *ad hoc* activities relied on by the MoD. The instances of control of this land would be available to any owner. Here, owing to the land having the status of SSSI or other protected listings, the range of operations available to the owner without Natural England's consent itself ensured in practice that the land would remain *"unoccupied"*. That conclusion was reinforced by the Byelaws. Their effect was to ensure that, across the Range Impact area and the Danger Area (the Range Impact Area forming part of the Danger Area for the purposes of the Byelaws), access could be restricted whenever the Range Impact Area was being used for firing. The MoD's right to control access to, *inter alia*, the land of the Blackett-Ord family (an owner and licensor to the MoD of part of the Licensed Area) did not, of course, mean that it was occupied by the MoD. Nor did the MoD's right to control such access to the non-Victor Area part of the Commons mean that it was occupied by the MoD.

6.5.3.6 There was another reason why the Danger Area beyond the ranges and the impact area was not to be considered occupied. This was because there was a large part of the Danger Area, apart from the Commons, which belonged to others (the Blackett-Ord family, the Earl of Strathmore and Kinghorne and Wemmergill Estates LLP) and was licensed to the MoD for Danger Area use. If the MoD's linkage argument were accepted, its logic would lead to the conclusion that all this part of the Danger Area was also occupied by the MoD, which would be an absurdity. This part of the Danger Area was needed as much as the non-Victor Area part of the Commons was when firing was in progress in order to secure safety.

6.5.3.7 As the owner of the Commons, the MoD could control what happened there. Those who wanted to carry out bird surveys or ancient monument surveys needed, and no doubt got, permission. If the MoD wanted to repair a wall separating the Commons from the land it held on licence no doubt its agents might find it convenient to get to the relevant spot using a track which crossed the Commons. Mrs Hetherington evidently thought that such use of the land contributed to a conclusion that it had ceased to be *"unoccupied"*. That was an unsustainable proposition. No doubt some of the tracks were very old and had been used for centuries.

6.5.3.8 Turning to Area Victor, Mr Laurence submitted that it appeared to have been (intermittently) used for dry training, but insufficiently to support a finding that that land had ceased, at some point before 1st April 2003, to be *"unoccupied"* in the *Hanmer* sense for the purposes of section 13(a) of the 1965 Act as interpreted in *Milburn*. Area Victor was not linked to the firing ranges.

6.5.3.9 Mr Laurence submitted that the evidence established that:

(a) Area Victor was indistinguishable in appearance from the remainder of the Commons and there was no military infrastructure on it;

(b) there were no records of its past use and Mrs Hetherington could not say how many days a year it was used before (or after) 31st March 2003;

(c) dry training and other military activities that took place on Area Victor also took place on other parts of the WTA but the MoD had no breakdown of the distribution of activities between different parts of the WTA;

(d) Mrs Hetherington expressed herself to be happy with the figures which Dr Aglionby had provided (based on information from local residents) that dry training on Area Victor, predominantly by army cadets (and largely in the summer holidays), occurred on some 20-30 days a year although Mr Patterson's evidence that this use was for no more than seven days a year was not challenged;

(e) the use of Area Victor varied in that sometimes soldiers brought equipment with them but on other days they just yomped over it;

(f) yomping and orienteering (another activity on Area Victor) would take place on many commons in Cumbria.

6.5.3.10 Mrs Hetherington's evidence in relation to Area Victor was overall, so submitted Mr Laurence, wanting in particularity as regards the when, where, how much and how often of the military use of that area. Major Evans's evidence (at the 2001 Public Inquiry) had been given for a different purpose, was unable to be cross-examined and left one little the wiser. The approach to the question of whether use could harden into occupation for *Hanmer* purposes had to be guided by the approach of Lord Templeman in *Milburn*. It was not necessary in the present case to categorise the use as *"infrequent and spasmodic"* (as Nourse J did in relation to use of the land in *Re Burton Heath*). All it was necessary to do was to hold that use of land whether for recreation or military manoeuvres was not enough to make it occupied where so to hold would fly in the face of the policies of the 1965 Act as explained by Lord Templeman.

6.5.3.11 Moreover, it was important, in deciding whether Area Victor had by 2003 ceased to be *"unoccupied"* by reason of its use for dry training, to pose the right question, which was whether this area had by reason of its use for dry training over many years ceased to be *"unoccupied"*. The wrong way of posing the question would be to beg it by postulating that someone was in occupation of the area and then asking the question in a manner designed to establish who that person was.

6.5.3.12 The present was not a case of competing candidates for the role of occupier. The quest for what Ralph Gibson LJ in *Wandsworth LBC*[64] called *"the minimum sufficiency of physical presence or control"* was to be informed by what he called a *"standard established by the nature of the premises in question regarded in the light of the statutory purpose, which is to enable tenants occupying property for business purposes to obtain new tenancies in certain cases."*[65] Here, the standard established by the nature of the property regarded in the light of the relevant purpose was a standard of determining whether the minimum sufficiency of physical presence or control had been attained, governed by the approach mandated by the House of Lords in *Milburn*. That approach compelled the decision-maker to focus on whether enough had happened to compel the conclusion that land which remained *"open"* and *"uncultivated"* had nevertheless ceased to be *"unoccupied"*, regarded in the light of the purpose of the Royal Commission which was (compulsory purchase and land substitution apart) to prevent waste land ceasing to be common land so that it should be preserved for the benefit of the public. Lord Templeman had no doubt that, in enacting the 1965 Act, Parliament intended that purpose to be given effect. The use of the ranges/infrastructure/impact area was no doubt enough to establish a sufficiency of physical presence or control to establish the MoD as being in occupation of that area; the use of Area Victor as a dry training area was most emphatically not.

6.5.3.13 Overall, Mr Laurence submitted that the matters relied on by the MoD in terms of its military activities, whether taken singly or cumulatively, did not support a conclusion that at some point before 1st April 2003 (or after 31st March 2003) the Commons had ceased to be *"unoccupied"* in the *Hanmer* sense. The same submission was made in respect of all other activities relied on. Occasional acts of maintenance here and there, such as any responsible landowner might carry out on any area of fell,

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[64] (1991) 62 P & CR 219. See also paragraph 6.2.4 above.
[65] At 230.

would have affected only *de minimis* parts of the Commons and would have been wholly consistent with their remaining waste land of a manor.

6.5.4 *The Relevance of Events After 31st March 2003 and the Grazing Licences*

6.5.4.1 Miss Crail made submissions at the Inquiry as to the relevance of events after 31st March 2003, with particular reference to the Grazing Licences, developing arguments first made in that respect in the OSS's skeleton arguments for the Inquiry. It was submitted that the Applications to de-register the Commons could not succeed unless the MoD could prove that they had ceased to be waste land of a manor by the date of the Vesting Deeds (31st March 2003). It would be no good to show that at some later date the Commons had ceased to be waste land of a manor. Matters subsequent to 31st March 2003 were legally irrelevant. The 2006 Act and the 2014 Regulations did not provide for land to be de-registered on the basis that it had ceased to be waste land of a manor before the commencement of paragraph 2(2) of Schedule 3 to the 2006 Act (or before any other date). That was not a prescribed trigger for the right to apply for an amendment. The 2006 Act and the 2014 Regulations instead provided for, and only permitted, applications to amend the register to be made, for the purposes of Schedule 3 to the 2006 Act, in consequence of prescribed qualifying events.

6.5.4.2 One such qualifying event occurred in the present case when a *"relevant instrument"* effected a *"disposition"* within the meaning of paragraph 2(2)(c) of Schedule 3 to the 2006 Act and paragraph 21 of Schedule 4 to the 2014 Regulations, read in the light of the third entry in the paragraph 8 table. The relevant qualifying event occurred on 31st March 2003 when the Vesting Deeds were executed. If, contrary to the OSS's case, the power to make applications to de-register the Commons was available in the present circumstances, the MoD nevertheless had a further hurdle to overcome: that of proving that, on 31st March 2003, the Commons ceased to be common land within the meaning of the 1965 Act as a consequence of the extinguishment by the Vesting Deeds, on that date, of all rights of common.

6.5.4.3 The MoD could only prove that if, at the moment the Vesting Deeds took effect, the Commons were no longer waste land of a manor. It would not avail to prove that the Commons had ceased to be waste land of a manor at some date subsequent to 31st March 2003. If they were still waste land of a manor on 31st March 2003, then the Applications,

founded as they were on the Vesting Deeds of that date, could not succeed. Even if it could be shown that (which was not accepted) the Commons ceased to be waste land of a manor at some date after 31st March 2003 (by reason of occupation occurring through the Grazing Licences coming into effect the next day or through intensification of the MoD's activities), that would not allow the Applications to succeed and was not the basis of the Applications which had been made. The Applications were made under paragraph 21 of Schedule 4 to the 2014 Regulations based solely on the dispositions effected by the Vesting Deeds. The only amendments which could (in the language of paragraph 21 of Schedule 4 to the 2014 Regulations as well as paragraph 2(1) of Schedule 3 to the 2006 Act) be made *"in consequence of"* the Vesting Deeds were amendments that followed solely and directly from the dispositions effected by the Vesting Deeds. Such amendments were those that could have been made (had the 2014 Regulations then been in force) the instant the ink dried on the Vesting Deeds.

6.5.4.4 The Vesting Deeds extinguished the rights of common. Cancelling the entries relating to those rights followed solely and directly from the Vesting Deeds. If, contrary to the OSS's case on the Power Issue, it was possible to apply to de-register the Commons as well, that would only be so if, at the time of the execution of the Vesting Deeds, they were no longer waste land of a manor. That consequence would follow solely and directly from the Vesting Deeds because they would have caused the definition of common land in the 1965 Act to cease to apply at that point. However, the Commons' ceasing to be waste land of a manor and (accordingly) common land after the Vesting Deeds were executed by acts of the MoD and/or others which were independent of the Vesting Deeds would not have been effected by the Vesting Deeds or in consequence of them. At the highest, it could be said that the Vesting Deeds had given the MoD an opportunity to do such acts. The MoD's interpretation of the law would strain the meaning of *"in consequence of"* well beyond breaking point.

6.5.4.5 The MoD's argument that, if the Commons had not previously been occupied, they became occupied immediately after the extinguishment of the rights of common when the terms of the Grazing Licences commenced on 1st April 2003 and that there was thus no point in time after 31st March 2003 that the Commons were waste land of a manor not subject to rights of common, missed the point. There was a period of time on 31st March 2003 following the execution of the Vesting Deeds before the term of the Grazing Licences commenced. There was no evidence that the Vesting Deeds were

executed at the stroke of midnight rather than in ordinary business hours on 31st March 2003 and, if they had been so executed, they would have been dated 1st April 2003. The commencement of the terms of the Grazing Licences was later in time than the taking effect of the Vesting Deeds and was not a consequence of the disposition effected by them.

6.5.4.6 Mr Laurence then took up the cudgels in putting forward alternative submissions in respect of the Grazing Licences if, contrary to the above, they did fall for consideration. In short, these were that the Grazing Licences:

(a) did not demonstrate occupation of the Commons or any part thereof by the licensees;
(b) did not enable it to be found that the MoD's entitlement to licence fees was equivalent to occupation by the MOD;
(c) were liable to be determined at any time on one month's prior notice (and thus not necessarily likely to be permanent or to endure).

6.5.4.7 The reality was, it was submitted, that the Commons were used significantly less than they used to be for grazing. Before 31st March 2003, the Commoners' use of the Commons for grazing in the exercise of their rights of common did not cause the land to cease to be waste land of a manor: the grant of the Grazing Licences on 27th March 2003, for a substantially lower level and intensity of grazing, could not have had a different effect.

6.5.4.8 Moreover, it was submitted that the mere receipt of licence fees could not operate as a kind of constructive occupation on the part of the licensor. An owner might derive income from his land by doing something on it (whether by himself, his servants or agents) and thereby be able to demonstrate that he had taken occupation of it. In such a case there would be *"the notion of physical occupation"* to which Eveleigh LJ referred in *Hancock & Willis*[66] in a passage cited in *Wandsworth LBC*[67] or the *"presence on the land"* to which Lord Wilberforce referred in *Williams and Glyn's Bank Ltd v Boland*[68]. But, also per Lord Wilberforce, a mere *"entitlement in law"* to rents and profits (or licence fees) was not enough to constitute being in occupation[69]. It was therefore

[66] (1983) 256 EG 473 at 474. See also paragraph 6.2.4 above.
[67] (1991) 62 P & CR 219 at 224. See also paragraph 6.2.4 above.
[68] [1981] AC 487 at 505B-C.
[69] Ibid.

submitted that *"occupation"* applied only to land which was being put to some real use involving physical presence and not to land just because it was let or licensed. It did not follow from the terms of the Grazing Licences (see especially clause 3.2) that the graziers' being expressly excluded from *"exclusive occupation or possession"* meant that the MoD's claim to remain *"in full occupation and possession of the Land"* in any way strengthened the MoD's claim to be in occupation. The terms of the Grazing Licences could not determine the legal question whether their effect was to cause the Commons to be occupied by the MoD.

6.5.4.9 To the extent that the decision of Chief Commons Commissioner Squibb in *Re Arden Great Moor*[70] contradicted the submission above, I was invited not to follow it. Mr Laurence submitted that the simple fact that an owner took in the sheep of other people (in this case his tenants) to graze on land was no more determinative of the factual question of whether such use amounted to occupation than it would be had the owner depastured his own sheep on the land. And the extra rents that the owner was able to obtain from his tenants under their tenancy agreements by allowing them the right to graze on the moor could not of itself be a basis for a finding of occupation given that, as decided in *Boland*, an entitlement to receive rents and profits would not suffice.

6.5.4.10 It was pointed out that a different approach was taken by the successor Chief Commons Commissioner, Mr Langdon-Davies, in the case of *Re Twm Barlwm Common*[71], where he said: *"[i]n my opinion the fact that .. [the land] .. has been let is a relevant consideration but is not conclusive. A tenancy merely gives a right to occupy. If a tenant never goes to the land he has taken it may well remain unoccupied. If he does make use of it the question whether the land is 'occupied' is a question of fact."* Similarly, Chief Commons Commissioner Langdon-Davies said in the case of *Re Corngafallt Common*[72], rejecting an argument that the mere fact that land was included in the tenancy of a neighbouring farm meant that it was occupied: *"I do not think that this is so. A tenancy gives the tenant a right to occupy. Whether or not he does occupy is a matter of fact."* It was submitted that these remarks, if correct in the case of a tenancy, had to apply *a fortiori* to a mere licence agreement.

[70] The relevant passage is set out at paragraph 6.2.2 above.
[71] Reference No. 273/D/106-10.
[72] Reference No. 276/D/948-949.

6.5.4.11 It was further submitted that the approach set out above was consistent with the decision and reasoning in *Milburn*. Lord Templeman there expressly agreed[73] with the reasoning of Slade J in *Re Chewton Common*[74]. Slade J had said that he could *"see no good reason why Parliament should have chosen to make registrability dependent on whether, at the date of registration, the waste land still happens to be owned by the lord of the manor of which, historically, it has once formed part. To hold that it did would involve the conclusion that the lord of a manor could remove waste land of that manor not subject to commonable rights entirely out of the ambit of the Act by the simple device of conveying the lordship to another person, while retaining the land, or vice versa."*[75] It could not be the law that the landowner could remove waste land of a manor out of the ambit of the 1965 Act by the simple device of granting a tenancy or licence of the land.

6.5.4.12 The conclusion urged by the OSS was said to be consistent with the DEFRA Guidance. In paragraph 7.3.14 this stated that: *"[i]n Defra's view, 'open' means unenclosed. In terms of 'unoccupied', land does not cease to be unoccupied (and therefore cease to be waste) merely because it is subject to a tenancy, lease or licence whose sole or principal purpose is to enable the land to be extensively grazed. Occupation requires some physical use of the land to the exclusion of others: such might occur if the land were occupied by a quarry, or were improved by a tenant (e.g. by cultivating and reseeding moorland) for his own exclusive use and benefit. Nor does Defra consider that shared upland grazing of manorial origin will have ceased to be waste land merely because there is provision for grazing the land contained in several tenancy agreements. In R v Doncaster Metropolitan Borough Council, ex parte Braim, the High Court thought (obiter) that mowing land did not constitute cultivation, and that a golf club which enjoyed certain rights over part of the (unregistered) common, but did not have exclusive possession, could not be said to occupy the land."*

6.5.4.13 Moreover, the owner of waste land of a manor did not have to leave it in an untouched wild state in order for it to remain waste land of a manor. Cutting the grass for hay and silage would not deprive land of its status as waste land of a manor: *In re Britford Common*[76]. Taking the natural produce of the land by way of low level, rough

[73] [1991] 1 AC 325 at 344B.
[74] [1977] 1 WLR 1242.
[75] At 1249D-E.
[76] [1977] 1 WLR 39 at 48C.

grazing was no different, whether done by the owner or by a tenant or licensee of the owner. Even during the currency of rights of common of grazing, the owner was entitled to use or let or license to others such of the grazing as was surplus to the commoners' requirements. See, for example, *Musgrave v Inclosure Commissioners for England and Wales*[77]: *"[t]he owner of the soil, unless there be something to the contrary, as pasturage of course is incident to the soil, enjoys it as part of it. When it is subject to the rights of common in others, he still has that right, subject always to this, that he must not exercise it to such an extent as to interfere with the rights which by his ancestors were granted originally to the different persons in respect of whose lands there is that right of common"*[78] (per Blackburn J). By so doing, the owner did not deprive the land of its status as waste land of manor. The same, it was submitted, had to apply even if the rights of common had been extinguished where, as here, there was no change in the physical condition of the land or the use to which it was put. No one looking at the land would discern any difference other than a diminution in the grazing activity.

6.6 The MoD's Response and Final Submissions

6.6.1 *Legal issues*

6.6.1.1 The MoD took issue with a number of legal points raised by the OSS. First, the construction which the OSS had advanced of section 13(a) of the 1965 Act was not accepted. No authority had been identified which (on a proper reading) provided any support for the OSS's submissions on this issue. In particular, it was an error to contend that the submissions were supported by Lord Templeman's reasoning in *Milburn* and the OSS had over-interpreted or misinterpreted that decision. The issue before the House of Lords there was whether the subject land was still *"of a manor"* and not whether it was still *"waste land"*, which was the issue in the present case. The point made by Lord Templeman was that Parliament could not have intended that waste land (of a manor) would cease to be common land, save in strictly defined circumstances (compulsory acquisition or substitution of land) even though it was no longer associated with a manor. The issue raised was the very specific one of whether waste land had still to be associated with title to the manor. The *Box Hill Common* decision of the Court of

[77] (1873-74) LR 9 QB 162.
[78] At 174.

Appeal[79] allowed landowners who owned the manor and waste land to avoid the application of commons registration provisions by severing title. This obvious avoidance device was what was contrary to the statutory purpose dealt with by Lord Templeman. It could not fairly be said that Lord Templeman was grappling with the *Hanmer* test itself or applying it to the facts, or purporting to do so. Moreover, Lord Templeman did not suggest that there was any intention on the part of Parliament to prevent land ceasing to be waste land as a result of a voluntary act by the owner. In contending for that approach, the OSS was applying an impermissible gloss on the application of the *Hanmer* definition of waste land of a manor, which gloss found no support in *Milburn* or, indeed, in *Mid-Glamorgan County Council*, the other House of Lords authority relied upon by the parties.

6.6.1.2 Secondly, and turning to issues relating to the approach to the word *"unoccupied"* in the *Hanmer* definition, it was not accepted that it was necessary for it to be interpreted with a strong disposition to find that land which remained *"open"* and *"uncultivated"* was also *"unoccupied"*. The emphasis placed by Lord Browne-Wilkinson in *Mid-Glamorgan County Council* upon the *"open"* criterion simply reflected that, on the facts of that case, he was considering (inter alia) whether the prohibition on the enclosure of the land contained in section 36 of the Commons Act 1876 remained in force. The proper approach was found in the judgment of Lord Jauncey, who applied all three limbs of the *Hanmer* definition. The approach suggested by the OSS was contrary to authority. It had been accepted from Baron Watson onwards that there were three requirements for land to be waste land of a manor and occupation was one of them. However much *"open"* and *"uncultivated"* might have been placed together in some cases[80], they had not been combined with *"unoccupied"*. It was also clear that courts and the Commons Commissioners had looked at *"unoccupied"* as a separate requirement. Nourse J approached matters in that way in *Re Burton Heath*. The Chief Commons Commissioners' decisions in *Re Arden Great Moor* and *Re Twm Barlwm Common* focused on occupation. In the latter decision the Chief Commons Commissioner observed that: *"...the mere fact that land is not fully fenced cannot be conclusive that it is unoccupied for if all land that is 'open' is 'unoccupied' no meaning can be given to the word 'open' in Watson B's definition."* Analytically, occupation was to be considered as a separate issue. Whether or not the OSS was right to criticise

[79] *Box Parish Council v Lacey* [1979] 1 All ER 113.
[80] See *Re Burton Heath* (unreported) and *In re Britford Common* [1977] 1 WLR 39 at 47D.

the approach to occupation in *Re Arden Great Moor*, the decision nonetheless treated *"unoccupied"* as a separate issue.

6.6.1.3 The permanence point which had been taken on behalf of the OSS was also inadequately supported by authority. The sole decision relied upon was *In re Yateley Common* where Foster J's remarks on the point were *obiter* given that he had already come to the conclusion that the land remained subject to rights of common (which had not been abandoned). Moreover, the case was one where some 40 planning applications had been made in respect of the land, there were 14 outstanding enforcement notices relating to the airfield and, in view of the owner's inability to obtain the requisite planning permissions, the local planning authority had accepted a purchase notice on the ground that the land had become incapable of reasonably beneficial use in its existing state. In consequence, Foster J explained that *"I cannot, in view of the present position, come to the conclusion that the future of the airfield is, to say the least, secure..."*[81]. The case provided no support for a general principle of permanence. It was accepted that, in the context of occupation for *Hanmer* purposes, consideration should be given to whether what was put forward as occupation was temporary in nature, whether it was likely to end in the near future or whether it was otherwise liable to be brought to an end for some specific reason. None of those factors applied in the present case. The correct approach was to look at the facts and come to a conclusion without applying any principle of permanence.

6.6.1.4 As to the submissions of the OSS in respect of the distinction between use and occupation derived from *Newcastle City Council*, Mr Elvin did not suggest that there was no such distinction but pointed out that, although in that case the Privy Council dealt separately with the two elements of what was there a statutory phrase, *"used or occupied"*, the distinction between the two concepts was not one that mattered to the decision in question because all that had to be found was one or the other. Moreover, Lord Denning did not suggest that there was a hard line between the two and accepted that a passive use would be a use nonetheless. No use was made of the hospital land under consideration in that case in any practical sense. That was not the case with the Commons which were subject to strict control for the majority of the year and were put to the use of receiving ordnance as well as the other activities referred to by Mrs

[81] [1977] 1 WLR 840 at 847E-F.

Hetherington. This was not a case of a passive use where nothing actually happened at all. It was important to take away from the case the point that someone did not have to be physically present on every part of his land in order to occupy it. In the present case there was sufficient occupation of the Commons by the MoD. Lord Denning's approach supported the MoD's case. Mr Elvin was also at pains to point out that the present case was in no way like a simple rifle range which Lord Denning had instanced at one point. Here there was a whole series of complex mobile firing exercises.

6.6.2 *General Points*

6.6.2.1 There were a number of general points to be appreciated. First, by way of initial clarification, it was necessary to understand that the Danger Area comprised not only the Commons but included the ranges and impact area as well, as set out in the Byelaws where, in byelaw 1(2) and the annexed plan, the latter were referred to as *"the Range Impact Area"*. That had significance because part of the MoD's argument was that the WTA, including the Commons, should not be dissected in the way that Mr Laurence had sought to do. Rather than do that, one should stand back and ask the common sense question, i.e., what are the purposes for which the MoD has the WTA and are the Commons part of it? Are the Commons part and parcel of the overall use and occupation of that land or should they somehow be artificially divided from it? Mr Elvin urged the rejection of the forensic exercise undertaken by Mr Laurence as an unrealistic treatment of each part of the WTA in isolation when it was an entire unit. Different parts of it had different functions but they all operated in the context of the national need for military training at Warcop.

6.6.2.2 Secondly, consideration needed to be given to the purpose behind the enactment in the 1965 Act of the definition of common land to include waste land of a manor. While there was no statutory definition of waste land of a manor, Parliament would undoubtedly have legislated in 1965 in the context of the *Hanmer* definition and the phrase was accordingly to be interpreted in the light of that definition. The issue therefore was the application to the Commons of the long-established *Hanmer* definition. However, it was worth considering not just the well-known words of Baron Watson but also what he had to say before then, namely, that *"[t]he large open commons within and parcel of the manor over which rights of common or other*

commonable rights are exercised, are 'wastes' of the manor.''[82] The important point when looking at the purpose of the *Hanmer* definition was essentially that it was based on a form of common right which remained exercisable by the public at large. It was originally the rough grazing attached to the manor available to villagers to graze animals on and to support a living but these days it was a form of public access if it was still common land.

6.6.2.3 If it was looked at from that point of view and occupation understood in that context, there were two matters arising. First, occupation had to mean not only physical presence but also control, as had already been submitted. Secondly, where the purpose for which the land was used was actually inconsistent with the right referred to by Baron Watson in *Hanmer*, as it was in the present case for most of the year, then it was plain that land could not be waste land of a manor. If the MoD could, as it did, exclude everyone from access to the Commons through the Byelaws, then the right to do that was entirely inconsistent with the status of the Commons as manorial waste. Assistance for this could be gained from Nourse J's judgment in the duck-shooting case of *Re Burton Heath*. The judge noted there not just the *"infrequent and spasmodic"* entry of the shooting tenant on to the land but also the point that duck-shooting was not inconsistent with the land's remaining manorial waste because the marshy land there in question would hold game much better than grassland. That was entirely opposite to the position in the present case where the MoD's use of the land was wholly inconsistent with its remaining waste land of a manor with those rights which would traditionally be associated with the use of the land as waste. It prevented that use. That point had been ignored by the OSS and other objectors. The context of the case of *Williams & Glyn's Bank Ltd*[83] (fixing vendors with notice of rights of those in occupation) and cases on occupation under Part II of the Landlord and Tenant Act 1954 was not the same.

6.6.2.4 Thirdly, the purpose of the 2001 Public Inquiry had been specifically to consider whether the MoD's need for the Commons was sufficiently compelling to justify the extinguishment of the rights of common. That was found to be demonstrated in the national interest. The Inspector and Secretary of State agreed that the rights of common were restrictive of the MoD's ability to operate the WTA specifically over the Commons and that the public interest in the use of the WTA for less restricted military

[82] (1858) 27 LJ Ch 837 at 840.
[83] See paragraph 6.5.4.8 above.

purposes justified extinguishment at public expense. It appeared to be overlooked by the objectors that the justification for extinguishment was directly related to the military need in respect of the Danger Area covering the great majority of the Commons.

6.6.2.5 Fourthly, Mrs Hetherington's evidence was that the usage and operation of the WTA was broadly the same at the time of extinguishment as it had been in 2001. In this context it was to be noted that (as recorded in paragraph 6.4.4 of the Inspector's Report following the 2001 Public Inquiry) range usage was 243 days in 2000 as against 256 days reserved (a cancellation rate of 5%). Also, the undertakings given guaranteed a minimum number of "non-firing" days when there could be public access and the Byelaws would not be in operation, which were every Sunday after 1pm, 12 weekends, 24th December to 1st January and 15 short notice access days - a minimum of 48 days plus Sunday afternoons. There was a minimum guarantee of access but a likely reduction in the number of non-firing days.

6.6.2.6 Fifthly, the Commons were not somehow distinct in terms of ownership from the rest of the MoD's land. They were all part of the WTA within the MoD's freehold ownership and the use and occupation of the Commons could not rationally be treated as distinct from the land as a whole. While objectors might prefer to try to separate use and occupation of the Commons from that of the ranges and impact area, and indeed Area Victor, this was incorrect. The purpose of the use and occupation was directly related to the same military use for which the MoD retained its freehold land and had obtained rights over the Licensed Area. It was undoubtedly the case (which Mr Laurence had accepted in his submissions) that there was physical occupation of at least the ranges and impact area. It was submitted on behalf of the MoD that the question of occupation of the Commons could not be divorced from that and that it was unreal to do so.

6.6.2.7 Sixthly, as agreed by Dr Aglionby, in terms of grazing in the area, the general pattern was for there to be no grazing on the fells during the winter months. The fact that there would have been no sheep on the Commons at the end of March 2003 was entirely to be expected and, when grazing resumed on 1st April 2003, it was under the terms of the Grazing Licences, with payments to the MoD, and not through the exercise of rights of common.

6.6.2.8 Seventhly, comparisons with other common land and what might be seen from a helicopter were of little, if any, relevance. This was for the following reasons.

(1) There was no issue with respect to the Commons being *"open"* and *"uncultivated"* within two of the three *Hanmer* criteria. There was the interesting question why Slade J in *In re Britford Common*[84] followed by Nourse J in *Re Burton Heath*[85] combined *"open"* and *"uncultivated"* as one factor and referred to *"unoccupied"* as another but the fact was that those judges still kept *"unoccupied"* separate from the other two criteria. Care had to be taken not to confuse *"open"* and *"uncultivated"* with the issue of occupation which, whilst it had to have physical aspects, was not required to be met for each and every part of the land in question.

(2) It appeared from the evidence of Dr Darrall and Dr Aglionby that the other commons they had referred to were ones with rights of common registered which strongly implied that the issue of waste land of a manor had not arisen there and, indeed, would be unlikely to have done so given the terms of section 22(1) of the 1965 Act.

(3) Dr Darrall accepted that Little Asby was not subject to any restrictions by byelaw nor was there any power to exclude members of the public because they might be killed or injured by ordnance. The ordnance on Little Asby dated from the use of emergency powers prior to 1945.

(4) There were no comparable registered commons referred to by Dr Darrall or Dr Aglionby with military use still less one comparable with the Commons.

(5) Although some commons might have byelaws or regulations governing their proper use and access, none had anything comparable to the Byelaws here which allowed the MoD to exclude public access altogether for a significant proportion of the year, in the order of two thirds of each year, and certainly of that order in 2001-2003.

(6) Dangers on other commons could be matched by similar features on the Commons but that missed the point that the main hazard in the latter case arose from the unique circumstances of military training.

(7) Although Dr Aglionby had referred to some commons with shooting rights (and, indeed, shooting for sporting purposes took place on the Commons) this was not military in scale, duration or nature. In *Re Burton Heath* the shooting was *"infrequent and spasmodic"* and consistent with the status of the land there as manorial waste. The present case was the opposite. In *Mid-Glamorgan County*

[84] [1977] 1 WLR 39 at 47D-F.
[85] Unreported.

Council Lord Browne-Wilkinson noted that if public access rights were exercisable over the land there, even if rights of common had been extinguished, the land would remain common land as waste land of a manor not subject to right of common[86]. In other words, he was making a point related to that of Baron Watson in *Hanmer*, i.e., waste land of a manor was a form of common right. That brought one back to the purpose of waste land of a manor and the point in *Re Burton Heath* about consistency with manorial waste. In the present case, contrary to Baron Watson in *Hanmer*, Lord Browne-Wilkinson in *Mid-Glamorgan County Council* and Nourse J in *Re Burton Heath*, the military use did operate wholly inconsistently with the claimed status of the Commons as waste land of a manor. The military use of the Commons posed a threat to life and limb and resulted in the complete exclusion of the public during firing. It was far from *"infrequent and spasmodic"* and tightly controlled with notices and warnings given of firing.

(8) The helicopter point was, in truth, a facile one since it failed to take into account that those coming to the WTA would not be able to avoid the warning signs as well as the more intermittently spaced flags and the fact that access would be prevented for a significant part of the year. There was more to understanding occupation and manorial waste than hypothetical views from a helicopter, although helicopters did land occasionally at Area Victor. The objectors had over-emphasised visual aspects.

6.6.3 *Occupation of the Commons*

6.6.3.1 On the question of occupation of the Commons, it was submitted that the issue had to be looked at by reference to the MoD's land as a whole and not simply by an artificial division of that land as assumed by the objectors. All of the MoD's land was acquired in the 1950s, was held, used and, it was submitted, was occupied for military training purposes. The Commons comprised part of the Danger Area (the great majority of the Commons) and, in part, Area Victor used for dry training. The MoD did not simply use and occupy its land by reference only to the Commons or the ranges but by reference to its land as a whole. It was also important to remember the need for flexibility (which the Inspector had accepted in 2001) in the use of the WTA. It was through consideration of the use of the WTA as a whole with the issue of the rights of common restricting its use so that MoD could not deliver a full package of training that the Inspector in 2001

[86] [1995] 1 WLR 313 at 328A-B.

found justification for his recommendation of extinguishment of the rights of common in the national interest.

6.6.3.2 The cases demonstrated that what was to be considered occupation depended on the specific context, as Lord Nicholls had observed in *Graysim Holdings Ltd*[87], and as was shown in *Wandsworth LBC*[88] where the council occupied an open space by virtue of works of maintenance carried out on it. Application to the present case of the ordinary man test used in the latter case – what would he say if asked who was in occupation? – would give the answer that the MoD occupied the Commons.

6.6.3.3 In the present case the context included the following.

(1) The MoD's freehold land, including the Commons, was acquired for the purposes of military training in the 1950s and had been retained for that purpose since then.
(2) The WTA included the Commons.
(3) The military use of the Commons was considered to be sufficiently compelling in 2001 to justify the extinguishment of the rights of common. It was clear from the Inspector's Report and the decision to allow extinguishment of the rights of common that the military purposes were considered to be in the national interest. It also appeared not to be disputed that the ranges and impact area were occupied by the MoD. What was disputed was whether the Commons were occupied.
(4) The Danger Area which comprised the Commons was a key part of the operation of the WTA.
(5) The Danger Area was subject to physical interventions not only in terms of ordnance from the ranges but also in terms of regular visits to remove ordnance and to maintain walls and fences and signage in connection with the military use.
(6) The use of the Commons could not sensibly be divorced or considered in isolation from the ranges and impact area which were undoubtedly occupied by the MoD. The ranges and impact area could not operate without the Danger Area including that part of it on the Commons.
(7) The majority of the MoD's land was fenced or walled and fences and walls were maintained to mark the boundary of ownership and, in the case of the fell wall along the northern edge of the ranges and impact area, to deter sheep from straying into the ranges and impact area and being killed or injured.

[87] See paragraph 6.2.3 above.
[88] See paragraph 6.2.4 above.

(8) The Danger Area was also indicated by the placement of flags, red lights and signage around its perimeter. This was not only a warning to the public but also an assertion of control since it was directly connected to the operation of the Byelaws and the MoD's decision to use the ranges and to exclude the public as a result.

(9) The MoD also undertook maintenance and other work on the Commons, as part of the MoD's land, in respect of public access, ecology and ancient monuments. While these aspects might occur elsewhere on other land as part of estate management, they remained relevant here since they were further instances of the use and occupation of the Commons as part of the MoD's land generally.

6.6.3.4 It was also important that occupation had been said to be physical presence or a sufficient measure of control over land to prevent strangers from interfering: *Newcastle City Council*[89]. The fact that the MoD might not occupy the Commons as the ranges and impact area were occupied did not mean that the whole was not occupied. The farm analogy given by Lord Denning was a relevant one since the Commons were indisputably a key element of the WTA even if the MoD's physical presence there was not the same as in the ranges and did not have staff/employees/trainees actually present on the land with the same regularity, though there was physical presence through the deposit of ordnance, and military and other management and maintenance. In the present case, as at 31st March 2003, the MoD had a sufficient measure of control over the Commons and things were *"actually done"* (in words of Lord Denning in *Newcastle City Council*) on them. Furthermore, the Commons were adequately linked to the firing ranges and to other elements of the WTA so as to form part of an entire whole that was occupied by the MoD. Taking the requisite account of *"the whole situation"* (per Eveleigh LJ in *Hancock & Willis*[90]) it was plain that the Commons were occupied on 31st March 2003.

6.6.3.5 As to relevant facts, the summary originally provided in the skeleton argument of 2nd October 2018 could, following oral evidence, be updated as follows.

(1) Mrs Hetherington's evidence was that there had not been any significant change in the operation of the WTA from the 2001 Public Inquiry to the extinguishment of the rights of common on 31st March 2003. She explained that the training use was

[89] See paragraph 6.2.4 above.
[90] See paragraph 6.2.4 above.

then intensified (as had been proposed) with the inclusion of Mondays and night firing.

(2) On firing days, if the relevant ranges were in use ammunition would ricochet over the part of the Commons that was in the Danger Area, resulting in a severe risk of death or injury as a consequence of which (for safety reasons) no one was permitted to access the Commons. It was not possible to have the ranges without the Danger Area. Mrs Hetherington thought that the straying of ordnance into the Danger Area was regular rather than exceptional[91].

(3) Before extinguishment there was some night firing which took place because the safety template fitted within the range land, not going across the Commons. This severely restricted the firing (as shown in the proof of Major Evans for the 2001 Public Inquiry). After extinguishment of the rights of common, better night firing was possible because safety templates could be used that extended on to the Commons.

(4) Access to the Commons was (and is) prohibited on firing days by the Byelaws. The Byelaws provided (and still provide) a significant degree of control over the Commons to the MoD and ensured public safety. The objectors had produced no evidence of any comparable byelaws restricting access to and use of commons in the way that the Byelaws restricted the use of the Commons here. Still less had they produced evidence of any decision that treated land so restricted as still remaining as waste land of a manor.

(5) Mrs Hetherington had discussed the volume of ordnance that was left on the Danger Area in her proof. She also explained that prior to the 2001 Public Inquiry the MoD had removed ordnance directly from the public footpaths together with ordnance lying in direct sight of the latter. Following the 2001 Public Inquiry she had been up to the Commons with the UXO team which spent several days walking the footpaths and the land running either side of them. Vehicle loads of unexploded ordnance of varying sizes had been recovered, ranging in size from small sections to large pieces. While the UXO team visited on an annual basis the MoD inspected the Danger Area around the public access points for ordnance on a weekly basis.

(6) The MoD operated and maintained a system of red flags, red lights and Danger Area signs. One of the flags was situated on the Commons (on Murton Common) although this flag was not referred to in the Byelaws. Mrs Hetherington's evidence

[91] My record of what Mrs Hetherington said on this specific point (in re-examination), confirmed by notes taken by officers of the Registration Authority, is that she was not sure.

was that it had been in place since the beginning of her involvement with the WTA in 1999. The Danger Area signs had also been in place since at least 1999 and were positioned at approximately 50 metre intervals along the entirety of the Danger Area boundary, including where that ran across the Commons.

(7) The MoD used Area Victor for dry training and it was also used as a thoroughfare. While activities such as orienteering and yomping took place on other commons across Cumbria, the military training use that was made of this land was unique to Area Victor, e.g., military helicopter touch downs. Some of the dry training use involved covert operations and it was only to be expected that members of the public would not observe everything that was going on.

(8) The MoD undertook boundary maintenance. Mrs Hetherington explained that the MoD initially patched holes in the boundary as it became aware of them and later undertook programmed management.

(9) The MoD also addressed issues affecting public rights of way on the Commons by, *inter alia*, removing ordnance from the immediate vicinity of public rights of way.

(10) The MoD as freehold owner of the WTA was required to comply with national and international environmental legislation. In accordance with MoD policy, there was an active MoD conservation group regularly undertaking projects on the Commons and the monitoring of this.

(11) The MoD undertook *ad hoc* work to meet its legal obligations as the freehold owner of scheduled monument sites. It was not clear what was wrong with *ad hoc* work, and the fact that it did not occur every day of the week or every week of the year was not determinative. It formed part of the picture that had to be looked at as a whole.

(12) The MoD licensed sporting rights to the Warcop Military Shoot, which resulted in up to ten days of shooting each season. The MoD also undertook limited, related maintenance tasks.

(13) The MoD undertook *ad hoc* maintenance work to Scordale Mines and also carried out extensive work to repair the Scordale bridleway following damage sustained in August 2002.

(14) The MoD had, on 27th March 2003, entered into the five Grazing Licences in respect of the five hefts, the term of each of which would commence on 1st April 2003. Dr Aglionby confirmed that a Grazing Licence for heft 2 existed and was in identical terms to those for the other hefts. Each Grazing Licence permitted the sheep to stray across the entirety of the Commons. As Mrs Hetherington explained,

the stocking regime subsequent to the extinguishment of the rights of common over the Commons on 31st March 2003 had been anticipated and explained at the 2001 Public Inquiry. Sheep would have gone back on to the Commons pursuant to the Grazing Licences on 1st April 2003.

6.6.3.6 The MoD's closing submissions then turned to consider two matters in further detail, the Danger Area and the Grazing Licences.

6.6.4 *The Danger Area*

6.6.4.1 The importance of the relationship between the use of the Danger Area and the range and impact areas had been referred to above. As already submitted, and contrary to the approach of the objectors, those areas could not be considered in isolation and the issue of occupation had to be considered as a whole since the use and occupation of the ranges required the use and, it was submitted, the occupation of the Danger Area.

6.6.4.2 The Danger Area was demarcated not only by boundary fences and walls along most of its length but also by warning signs at approximately 50 metre intervals. The use of the Danger Area was subject to stringent controls not only through the MoD's ownership but also by the Byelaws which excluded access by others. These controls were in operation for the majority of the year. The unique nature of the ability this conferred on the MoD had already been referred to. The proper analysis was not that the Commons were unoccupied during firing days but that, for safety reasons, the public was then excluded and, for obvious reasons, MoD personnel did not enter the Danger Area at those times either. However, they did enter the Commons outside those times and occupation was manifested on firing days through both control and the fact that ordnance entered that land from the ranges. That military use and control was inconsistent with the Commons being waste land of a manor.

6.6.4.3 Prior to 2003 over two thirds of the days of the year were firing days. In the Inspector's Report following the 2001 Public Inquiry, the range usage was stated to be 243 days in 2000. There was also occasional night firing which had been concentrated on the MoD's unencumbered freehold land. While some of the ranges had bunds, others did not. In any event, ricochets would enter the Danger Area. As could be seen from the safety templates produced as an appendix to Mrs Hetherington's evidence, the potential

for ricochet for the various types of ordnance/ammunition used was what governed the size/dimension of its safety template. As Major Evans's proof for the 2001 Public Inquiry showed, with limited exceptions all templates affected the Commons. It was for that reason that the Byelaws existed to ensure public safety.

6.6.4.4 Mrs Hetherington drew attention to the fact that firing was not always static and she referred to the use of fire and manoeuvre ranges (with movement boxes) and the detailed descriptions given by Major Evans in 2001. Some of the movement boxes he described extended up to 1 kilometre in width and 3 kilometres in length, depending on the nature of the exercise and the number of personnel involved. Both firing and soldiers might be mobile.

6.6.4.5 As to the number of days per year that the ranges were now in use, they were very busy and there was activity most days of the week other than during the Christmas close down period. Pursuant to the undertakings given subsequent to the 2001 Public Inquiry, in the order of 46 to 48 days plus Sunday afternoons were guaranteed as "non-firing". Multiple ranges were used simultaneously every firing day. Since the rights of common were extinguished, the MoD's use had intensified. It now used Mondays for firing and there was increased night firing, the templates having been (as explained by Mrs Hetherington) swung around so as to point into the Commons following the extinguishment of the rights of common. Upon that extinguishment, the proviso found in section 14(1) of the Military Lands Act 1892[92] also ceased to apply.

6.6.4.6 It was suggested (by Mr McDarren in questioning Mrs Hetherington) that very little ordnance now entered the Danger Area, the WTA no longer being used for heavy artillery[93]. However, there were some heavier items being used as at 2001 (even if that had changed in recent years) but, as Major Evans's evidence showed, the large proportion of training was field-firing, intended to provide *"a realistic tactical setting"*. Mrs Hetherington's evidence was also that it was proposed to introduce a new vehicle-mounted weapon at Warcop in the future, the template of which would extend well into the Danger Area. Whether recent changes were considered to be relevant or not, the

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[92] *"Provided that no byelaws promulgated under this section shall authorise the Secretary of State to take away or prejudicially affect any right of common."* See also paragraph 2.1.3 above.

[93] Major Evans's evidence at the 2001 Public Inquiry had been that the main armoured unit training was undertaken elsewhere even in 2001.

important point was that there was nothing odd about changes over time since there was a need for flexibility in training. That went to the point about the WTA and the MoD's land being looked as a whole with the MoD having the ability to change its training over time. There was no lack of permanence but the changing of training regimes should be no surprise; it did not indicate any lesser occupation or use of, or the need for, the whole WTA.

6.6.4.7 The suggestion that the Danger Area was only required for exceptional cases was wrong. There seemed to have been a misunderstanding that the exercises were akin to target practice with bunds to prevent ricochets. The provision of realistic tactical settings in field-firing exercises was quite different and involved moving targets and mobile soldiers. As noted above, the ranges could not exist without the Danger Area.

6.6.5 *The Grazing Licences*

6.6.5.1 The Grazing Licences were not, as claimed by the OSS and the FCL, legally irrelevant. Each was entered into on 27th March 2003 prior to extinguishment of the rights of common (in preparation for that event) and the term of each began on 1st April 2003 immediately following the extinguishment of the rights of common on 31st March 2003. The significance of that was that there was no point in time following 31st March 2003 at which the Commons were *"waste land of a manor not subject to rights of common"* since the commencement of the Grazing Licences followed on immediately after extinguishment. Even if (contrary to the MoD's primary submission and evidence) the Commons were not occupied on 31st March 2003, they became occupied upon the commencement of the term of the Grazing Licences.

6.6.5.2 As to the effect of the Grazing Licences, the Chief Commons Commissioners' decisions of *Re Arden Great Moor* and *Re Twm Barlwm Common* supported the view that occupation of land might arise from the leasing or licensing of it for grazing. The legal basis on which land was used for grazing was important. The reason why grazing in those cases was found to be occupation by the owner was because the grazing took place by virtue of contractual rights and not by virtue of rights of common or rights

over manorial waste. The Chief Commons Commissioner explained this in *Re Arden Great Moor*[94].

6.6.5.3 Mr Laurence had given a complicated explanation as to why the decision was wrong but the Chief Commons Commissioner's position was quite clear: the decision was reached because the owner was conferring contractual rights from which he derived benefit. The decision reflected the support to be found in the authorities for the concept of occupation as control over the subject land.

6.6.5.4 In *Re Twm Barlwm Common*, while the Chief Commons Commissioner made it clear that the mere fact that land was let did not stop its being common land, since the land might remain *"unoccupied"*, the facts in the case led to the conclusion that the land was occupied and thus not waste land of a manor. The facts of the case were that land was let and grazing licensed by the tenants. The point was simply that just because land was let or licensed for grazing did not mean that it was actually used or occupied. It was only if the rights conferred by the owner were taken up that occupation arose.

6.6.5.5 As for paragraph 7.3.14 of the DEFRA Guidance, the explanation for it was the fact that the grant of the rights was not of itself enough but those rights had to be exercised. Therefore, the DEFRA Guidance did not take the matter any further than *Re Twm Barlwm Common*. If it went further, it did not refer to any authority, other than *obiter* remarks in *R v Doncaster Metropolitan Borough Council, Ex p Braim*[95] that related to the question whether land was *"uncultivated"* (as opposed to whether it was *"unoccupied"*) and whether the particular golf club and racecourse use that was made of the subject land amounted to occupation.

6.6.5.6 So far as the OSS had again relied on the reasoning of Lord Templeman in *Milburn* to justify its submissions in relation to the Grazing Licences, that reliance confused two questions: whether land that remained *"waste land"* should be susceptible to being removed from the ambit of the commons legislation by a voluntary act of the owner; and whether land's *"waste land"* status could be lost by such an act.

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[94] The relevant passage is set out in paragraph 6.2.2 above.
[95] (1986) 57 P & CR 1.

6.6.5.7 Neither *In re Britford Common*[96] nor *Musgrave*[97] supported the OSS's case. The first of these decisions was concerned with whether the owner simply by taking the natural produce of a piece of waste land would make it cease to be waste. There was no discussion of the position if the owner were to receive payment from other parties for doing so. The second decision did not discuss what was required for land to be occupied and thus not waste land of a manor.

6.6.5.8 In the present case it was indisputable that the grazing on the Commons took place from extinguishment of the rights of common only by virtue of contractual rights. Although Dr Aglionby argued that the fees totalling £40,000 received by the MoD for the Grazing Licences were effectively *de minimis* or amounted only to a "peppercorn", this was self-evidently incorrect. It was money that could not have been obtained for grazing before extinguishment since this was enjoyed by virtue of the rights of common. The definition of a peppercorn rent in Woodfall on *Landlord and Tenant* was *"a nominal rent not intended to be paid, but stipulated for on the (erroneous) view that the reservation of some rent is necessary to constitute a lease."*[98] This was not the case with the Grazing Licences, where the fees were charged and paid to the MoD and were a benefit, even if not as great as might have been the case if the MoD had charged a full market rate. The fact that the fees were not as great as they might have been did not mean that they were not a benefit for the purposes of *Re Great Arden Moor* or *Re Twm Barlwm Common.* Dr Aglionby's view that £40,000 was nominal was not accepted. She said that the MoD could not have charged a genuinely token rent (e.g., a peppercorn) because this would not have been acceptable in the local community. The end result appeared to be that, while the fee paid to the MoD was not as high as the market might allow, it was not a mere token and was plainly not of only token value.

6.6.5.9 The fact that the sheep numbers on the Commons were reduced after extinguishment of the rights of common did not mean that sheep were not present on the Commons. They were permitted in a significant number, namely, 2,440, not merely a token few sheep per heft, even though that number was a reduction over the pre-extinguishment position. Indeed, the numbers and the grazing regime were the result of the views of English Nature (now Natural England) as to the appropriate grazing regime. The MoD's

[96] [1977] 1 WLR 39. See paragraph 6.5.4.13 above.
[97] (1873-74) LR 9 QB 162. See paragraph 6.5.4.13 above.
[98] Volume 1, chapter 7 at paragraph 7.014.

aims with regard to the Grazing Licences had not been primarily financial but rather to satisfy conservation objectives. The Grazing Licences had been renewed on two further occasions.

6.6.5.10 As was clear from the plans showing the five hefts, the hefts comprised a significant part of the Commons. Moreover, there was nothing to confine the sheep to the hefts and they were allowed to stray over the wider Commons. The entirety of the Commons was covered by the Grazing Licences in terms of both the hefts and the rights to stray beyond them.

6.6.5.11 Each of the Grazing Licences was entered into on 27th March 2003 prior to extinguishment of the rights of common (in preparation for that event) and the term of each began on 1st April 2003 immediately following the extinguishment of the rights of common on 31st March 2003. If the MoD was wrong on the question of military use and occupation, there was no point in time following 31st March 2003 at which the Commons were waste land of a manor not subject to rights of common since the commencement of the Grazing Licences followed on immediately after extinguishment. Even if (contrary to the MoD's primary case) the Commons were not occupied on 31st March 2003, they became occupied upon the commencement of the terms of the Grazing Licences a split second afterwards, a *scintilla temporis*. There was no real period of time in which the Commons could be waste land of a manor if the MoD's submissions on the Grazing Licences were accepted because there was in reality no opportunity for any waste land of a manor rights to arise before the grazing regime was put in place, having already been set up several days in advance of extinguishment. The point put forward by OSS in that regard again lacked reality. While, after 31st March 2003, the Commons were no longer burdened by rights of common, they were not waste land of a manor at any point after that date.

6.6.5.12 Finally, it was not the case that for the Applications to be granted it had to be shown that the Commons had ceased to be waste land of a manor by 31st March 2003. In circumstances where rights of common over land were extinguished by a paragraph 2(2)(c) qualifying event (such that the land no longer satisfied the s. 22(1)(a) definition of common land) and the land subsequently (but whilst the 1965 Act still governed the position) ceased to be waste land of a manor (such that it no longer satisfied the section 22(1)(b) definition of common land either), the statutory purpose behind the transitional

provisions in the 2006 Act was best served by allowing the register to be amended under paragraph 21 of Schedule 4 to the 2014 Regulations. Loss of common land status would still be *"in consequence of"* a paragraph 2(2)(c) qualifying event where the disposition was the first of two steps in the process (extinguishment of rights of common and subsequent loss of the status of waste land of a manor. Applying a purposive approach and looking at the factual context, it was thus possible to look beyond the strict timing of the qualifying event (such as the commencement of the Grazing Licences on 1st April 2003).

6.6.6 *Summary*

6.6.6.1 The summary remains as set out in paragraph 6.2.12 above but I repeat it here for convenience. The MoD's primary submission was that the Commons were occupied on 31st March 2003, had been so occupied for many years prior thereto and had remained occupied ever since. If that primary submission was rejected, the MoD's alternative submission was that it occupied the Commons from the commencement of the term of the Grazing Licences on 1st April 2003. If that was correct, there was no point in time following 31st March 2003 at which the Commons were *"waste land of a manor not subject to rights of common"* and the Commons had therefore ceased to satisfy the 1965 Act definition of *"common land"* upon the extinguishment of the rights of common on 31st March 2003. If that alternative submission was also rejected, then having regard (i) to the increased use and control of the Commons by the MoD for military purposes that occurred from 1st April 2003 onwards and (ii) to the use of the Commons for grazing that took place pursuant to the Grazing Licences, it was submitted in the further alternative that it was nevertheless clear that the MoD occupied the Commons prior to the 1965 Act ceasing to have effect. The Commons thus ceased to be waste land of a manor and ceased to satisfy the 1965 Act definition of *"common land"* prior to the advent of the 2006 Act. They could therefore have been de-registered under the 1965 Act. The MoD accordingly requested that its Applications be accepted and that the Commons be de-registered.

6.7 Analysis of the Waste Land of a Manor Issue

6.7.1 *Milburn*

6.7.1.1 *Milburn* is a seminal authority on sections 13 and 22 of the 1965 Act. The OSS used Lord Templeman's speech to underpin a number of its arguments. I therefore start my analysis by considering *Milburn*.

6.7.1.2 I am unpersuaded by the OSS's argument that, in the light of Lord Templeman's speech, the phrase *"ceases to be common land"* in section 13(a) of the 1965 Act, should be read to mean *"ceases to be common land by reason of compulsory purchase or by reason of other land being substituted for common land"*. I think that Mr Elvin's submissions are correct on this point. I agree with him that the construction advanced by the OSS is not supported on a proper reading of Lord Templeman's speech and that the issue before the House of Lords in that case was whether the land in question there was still *"of a manor"* not whether, as in the present case, it is still *"waste land"*. The point was whether de-registration could be achieved by the device of severing the lordship of the manor from ownership of the waste. In finding that it could not be, Lord Templeman observed that it was *"impossible to read the report of the Royal Commission without reaching the conclusion that Parliament intended to prevent <u>waste land</u> ceasing to be common land"*[99] [underlining added] and that Parliament could not *"have intended that every identifiable piece of <u>waste land</u> 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."*[100] I have added the underlining because the emphasis reveals that there are two potentially separate issues: the first is whether land that remains waste land should be susceptible to being removed from the ambit of the commons legislation by a voluntary act of the owner; and the second is whether land's waste land status could be lost by such an act. In my view *Milburn* is properly to be read as being concerned with the first issue and not the second. Lord Templeman began his judgment by noting that the land in question was *"open, uncultivated and unoccupied"*[101], and thus the question of waste status was not in issue. Moreover, his reference to a *"voluntary act"* must take its colour from the facts in the case, namely,

[99] [1981] 1 AC 325 at 343F.
[100] Ibid at 343H-344A.
[101] Ibid at 337H.

the conveyance of the lordship of the manor without the waste land. I do not think that it can fairly be suggested that Lord Templeman was considering the second issue and ascribing to Parliament an intention to prevent land ceasing to be *"waste land"* as a result of the voluntary act of the owner.

6.7.1.3 It also seems to me that the OSS's submission involves an importation of wording into section 13(a) for which there is no proper justification. In my view it would take clear wording in the 1965 Act to constrain the freedom of an owner of *"waste land"* of manorial origin (the meaning attributed by the House of Lords to the phrase *"of a manor"*) from doing things which would cause it to cease to be waste land within the *Hanmer* definition. There is no such wording. If the OSS's construction were correct, the voluntary act of cultivating the waste land[102] would, just as much as the voluntary act of occupation, prove to be ineffective in changing the status of the land. There is nothing in section 13(a) of the 1965 Act which compels that result.

6.7.1.4 I also do not think it assists to suggest, as the OSS did, that, had he been faced with the occupation question posed in the present case, Lord Templeman would have construed Baron Watson's words in *Hanmer* so that waste land would not cease to be such by reason of any voluntary act of the owner. Lord Templeman was not faced with any such issue, did not have to interpret Baron Watson's words and cited them as they were uttered, without gloss or qualification[103].

6.7.1.5 Nothing said above is to deny for one moment that the statutory purpose of defining common land in section 22(1)(b) of the 1965 Act to include *"waste land of a manor not subject to rights of common"* should be a relevant factor in evaluating the question of occupation under the *Hanmer* definition. As Lord Nicholls pointed out in *Graysim Holdings Ltd*[104], the purpose for which the concept of occupation is being used (and the consequences flowing from its presence or absence) will illuminate how it should be understood in the context in question.

6.7.1.6 It seems to me self-evident that the statutory purpose underlying section 22(1)(b) cannot be located in any considerations relating to the existence of rights of common because,

[102] Other land designations might prevent such cultivation but that is nothing to the point for the purposes of the question of principle.
[103] Ibid at 338 G-H.
[104] [1966] 1 AC 329 at 335A-B. See also paragraph 6.5.2.4 above and paragraph 6.7.2.12 below.

by definition, land within section 22(1)(b) is not subject to rights of common. In the course of his judgment in *Milburn* Lord Templeman traced the emergence and recognition, through changing patterns of agricultural production and legislative developments, of the importance of waste land as land to which the public had access rather than as land over which rights of common were exercised[105]. He noted the recommendation of the Royal Commission on Common Land (1958) that all common land should be open to the public as of right[106] and that, while the 1965 Act did not confer any such general public right, further steps were intended to implement the Royal Commission's recommendations[107]. Thus it was that he expressed the opinion that *"it is impossible to read the report of the Royal Commission without reaching the conclusion that Parliament intended to prevent waste land ceasing to be common land, so that existing public rights of access would be preserved and so that provision could be made in the future for public access to be granted"*[108]. [Underlining added]. In my view, the statutory purpose of section 22(1)(b) of the 1965 Act in providing a definition of common land divorced from rights of common was, as to be understood from *Milburn*, to further the interests of public access to land. This is a point to which I will have to return in due course.

6.7.2 *Approach to "Unoccupied" in the Hanmer Definition*

6.7.2.1 I turn next to the OSS's submission that the word *"unoccupied"* in the *Hanmer* definition was to be approached on the basis of a strong disposition to find that land which, like the Commons, remained *"open"* and *"uncultivated"* was also *"unoccupied"*. I prefer Mr Elvin's submissions on this point. Like him, I too, cannot accept that the *Hanmer* definition requires the word *"unoccupied"* to be interpreted on the basis of the suggested strong disposition. The only support put forward for the submission relates to certain passages in the speech of Lord Browne-Wilkinson in *Mid-Glamorgan County Council*[109]. However, I consider that the submission places a weight on Lord Browne-Wilkinson's remarks which they will not bear.

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105 [1981] 1 AC 325 from 338H-340H.
106 Ibid at 340F.
107 Ibid at 341B.
108 Ibid at 343F.
109 [1995] 1 WLR 313 at 328C-D and 332A-B.

6.7.2.2 While it is true that the focus of those remarks was on openness, that arose in the light of the particular facts of the case where there was a statutory public right of access to the common concerned and a legislative prohibition (in section 36 of the Commons Act 1876) on enclosure of the common without the sanction of Parliament. Lord Browne-Wilkinson was not considering, and ventured no views on, the question of how land being *"open"* related to the question of whether it was *"unoccupied"*. It is also of significance that Lord Jauncey (with whom Lord Griffiths, Lord Ackner and, indeed, Lord Browne-Wilkinson himself agreed) applied all three limbs of the *Hanmer* definition in arriving at his conclusion that, the reservoir project having been abandoned before any works had been carried out, *"the land remains as it always has been, open, uncultivated and unoccupied"*[110] and was, accordingly, still waste land of a manor and thus common land within the meaning of section 22(1)(b) of the 1965 Act. It might also be noted at this point that the case proceeds on the assumption that waste land status can be lost by acts which cause it no longer to satisfy the *Hanmer* tests albeit that the acts in question in the case, had they been carried out, would have been authorised under a compulsory purchase enactment.

6.7.2.3 In my view, while the three limbs of the *Hanmer* definition may overlap to some extent and while *"open"* and *"uncultivated"* may have been run together in *Re Burton Heath*[111] and *In re Britford Common*[112], *"unoccupied"* is a separate element and satisfaction of the former elements does not involve any predisposition towards the conclusion that this remaining element is satisfied. That remains the case even if it were to be true that *"open"* and *"uncultivated"* land might also often be *"unoccupied"*. *"Unoccupied"* was identified and treated as a separate condition by Slade J in *In re Britford Common*[113] and analysed as such by Nourse J in *Re Burton Heath*. Decisions of the Chief Commons Commissioners in *Re Arden Great Moor*[114] and *Re Twm Barlwm Common*[115] likewise treat *"unoccupied"* as a matter to be considered separately from *"open"* and *"uncultivated"*. I consider that the starting point must always be the particular facts of the case in hand unburdened by any predisposition which requires to be displaced and that the *"unoccupied"* limb of the *Hanmer* definition should be the subject of discrete analysis.

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[110] At 321E.
[111] Unreported.
[112] [1977] 1 WLR 39.
[113] Ibid at 47D-F.
[114] Reference No. 268/D/209.
[115] Reference No. 273/D/106-10.

6.7.2.4 I also do not accept the submissions of the OSS in relation to the issue of "permanence". I do not consider that there is any principle of "permanence" nor do I think that the question of occupation for the purposes of the *Hanmer* definition is to be approached on the basis that a decision-maker should be slow to find that land which would otherwise be found to be occupied should nevertheless be considered *"unoccupied"* in the *Hanmer* sense simply if a prospect or possibility existed of such occupation coming to an end. The sole decision relied upon by the OSS for this aspect of its submissions was *Re Yateley Common*[116]. However, Foster J's remarks on the point were clearly *obiter* given that he had already come to the conclusion that the land remained subject to rights of common (which had not been abandoned). Moreover, those *obiter* remarks were very clearly shaped by the particular facts of the case in which the judge's suggestion that the land in question could *"easily revert to a common when its use as an aerodrome stops"*[117] was made in circumstances where the local planning authority had accepted a purchase notice on the ground that the land had become incapable of reasonably beneficial use in its existing state[118]. I do not consider that the decision in *Re Yateley Common* is of any real assistance to me in the present case.

6.7.2.5 Were I to conclude that the Commons were occupied, a mere possibility that they might cease to be occupied in the future would provide no ground for altering that conclusion. I think that Mr Elvin was right to say that it is relevant to consider, in the context of occupation for *Hanmer* purposes, whether what was put forward as occupation was temporary in nature, whether it was likely to end in the near future or whether it was otherwise liable to be brought to an end for some specific reason but that those factors were encompassed in the approach of looking at all relevant facts and coming to a conclusion. They do not amount to the application of any preconceived notion that there must be a high degree of assurance of permanence of occupation.

6.7.2.6 Having discounted various avenues of approach put forward by the OSS, I turn then to set out how I consider the question of whether land is *"unoccupied"* for the purposes of the *Hanmer* definition is to be approached. There is little direct authority on this question. Case law which discusses the concept of occupation in other contexts must

[116] [1977] 1 WLR 840.
[117] Ibid at 853F.
[118] Ibid at 847E-F.

be approached with a degree of circumspection but I think that some general assistance may be derived in respect of basic principles.

6.7.2.7 First, I consider that the question of whether land is occupied is essentially a factual one. In *Newcastle City Council*[119], where the court was concerned with the meaning of the word *"occupied"* in a rating statute, Lord Denning said that *[o]ccupation is a matter of fact"*[120]. Likewise, but in the different context of business tenancies under Part II of the Landlord and Tenant Act 1954, where section 23 uses the phrase *"premises occupied by the tenant and are so occupied for the purposes of a business"*, Eveleigh LJ said, in considering those words in *Hancock & Willis*[121], that, *"[a]t the end of the day it is a question of fact for the tribunal to decide"*[122]. In *Re Burton Heath*[123], a case which did involve the question of whether the land remained *"unoccupied"* so as to be waste land of a manor, Nourse J did not in terms say that the question before him was one of fact but his reliance upon, *inter alia,* the shooting tenant's entry on to the land being *"infrequent and spasmodic"* in coming to his conclusion that the land remained *"unoccupied"* very clearly embodies factual judgment. In *Re Twm Barlwm Common*[124], the Chief Commons Commissioner expressly stated that whether land was *"occupied"* was a question of fact.

6.7.2.8 Secondly, I think that the basic factual elements relevant to occupation are physical presence or user, and control. These elements are highlighted in *Newcastle City Council* where Lord Denning said that occupation *"only exists where there is a sufficient measure of control to prevent strangers from interfering"*[125] and that *"there must be something actually done on the land"*[126]. They also feature in analyses of the notion of *"occupation"* in cases under Part II of the Landlord and Tenant Act 1954. In *Hancock & Willis* Eveleigh LJ spoke of occupation as connoting *"an element of control and user"*[127] and as involving *"the notion of physical occupation."*[128] In *Wandsworth LBC* Ralph Gibson LJ referred to *"a minimum sufficiency of physical presence or*

[119] [1959] AC 248. See also paragraph 6.2.4 above.
[120] Ibid at 255.
[121] (1982) 265 EG 473. See also paragraph 6.2.4 above.
[122] Ibid at 475.
[123] Unreported.
[124] Reference No. 273/D/106-10.
[125] [1959] AC 248 at 255. See also paragraph 6.2.4 above.
[126] Ibid.
[127] (1982) 265 EG 473 at 475. See also paragraph 6.2.4 above.
[128] Ibid.

control"[129]. I, of course, bear in mind the words of Lord Nicholls in *Graysim Holdings Ltd* that occupation *"is not a legal term of art, with one single and precise meaning applicable in all circumstances"*[130] and that its meaning varies according to the subject matter or context. Nevertheless, I do think that the common threads of physical presence or user, and control, drawn from the fields of rating and business tenancies above, provide helpful guidance, in approaching the question of occupation more generally and are of assistance in the present case in considering the *Hanmer* definition.

6.7.2.9 Thirdly, my view is that the further words of Eveleigh LJ in *Hancock & Willis* stating that it is necessary *"to assess the whole situation where the element of control and use may exist in variable degrees"*[131] represents a sound principle of common sense which should be applied in the present case.

6.7.2.10 Fourthly, I see no reason why the proposition put forward by Lord Denning in *Newcastle City Council* that, while, in order to constitute occupation, something must actually be done on the land, occupation may occur when something is done *"on part in respect of the whole"*[132] is not one which holds goods generally and, as such, is therefore capable of application in the present case.

6.7.2.11 Fifthly, in dealing with the business tenancy case which was before the court in *Hancock & Willis*, Eveleigh LJ made it clear that the physical aspect of occupation did not have to be continuous; it did *"not mean physical occupation every minute of the day, provided the right to occupy continues"*[133]. Again, that seem to me to be a principle which can properly be considered in the present context.

6.7.2.12 Finally, I think that it is important to take account in the present case of the principle enunciated by Lord Nicholls in *Graysim Property Holdings* that *"the purpose for which the concept of occupation is being used … [and] … for which the distinction between occupation and non-occupation is being drawn, and the consequences flowing from the presence or absence of occupation, will throw light on what sort of activities are or are not to be regarded as occupation in the particular context."*[134] In my view

[129] (1991) 62 P & CR 219 at 230.
[130] [1996] 1 AC 329 at 334G-H.
[131] (1982) 265 EG 473 at 475.
[132] [1959] AC 248 at 255.
[133] (1982) 265 EG 473 at 475.
[134] [1996] 1 AC 329 at 335A-B.

it follows from this principle that one of the questions to be considered when assessing whether the activities put forward have caused waste land of a manor to become occupied and lose that status is the consistency or inconsistency of the activities with that status. I return to this matter in section 6.7.4 below.

6.7.3 *General Matters of Approach to the Evidence*

6.7.3.1 I turn next to consider some general matters of approach to the evidence, particularly in relation to the MoD's primary argument which is that the Commons were occupied on 31st March 2003. The first general matter is that, while it was part of the MoD's case that not only were the Commons then so occupied but that that had been the case for many years prior thereto, I do not think that I need (or can) do other than focus on the period on which Mrs Hetherington first concentrated in her evidence (from 1981, and more particularly 1999, to 31st March 2003). Were I to conclude that the Commons were occupied over this period, it would add little to matters were it to be the case that the Commons had also been occupied for many years prior thereto. Were I to conclude that the Commons were not occupied over this period, it does not seem to me that the evidence would enable me to conclude whether or not they were occupied prior thereto, or if they were, why that should necessarily matter.

6.7.3.2 The second general matter I consider is how, on the evidence, relationships between different parts of the WTA, including that of the Danger Area (and thereby the Commons) to the ranges and impact area and that of Area Victor to the other areas, should be approached when considering the question of occupation. This is an issue which was raised by, in particular, the submissions developed orally Mr Laurence on behalf of the OSS and was the subject of specific response by Mr. Elvin. Relevant background to the issue arising from case law is set by parts of Lord Denning's speech in *Newcastle City Council* where he referred to *"something actually done on the land, not necessarily on the whole, but on part in respect of the whole"*[135] and his observation in that case that, in respect of 291 acres of vacant land surrounding a hospital, it was *"difficult to say that they were so much linked with the hospital grounds so as to form part of an entire whole."*[136]

[135] [1959] AC 248 at 255. See also paragraph 6.2.4 above.
[136] Ibid at 256.

6.7.3.3 Mr Laurence accepted that, in the present case, the ranges and impact area were occupied by the MoD, and no one else has suggested the contrary. What Mr Laurence did argue was that the Commons were not sufficiently linked to the ranges and impact areas so as to form *"an entire whole"* and that, upon discarding any support that the MoD might take from a linkage argument, its activities upon the non-Victor Area of the Commons were, and had been, minimal and not sufficient to establish its occupation of the same. In respect of Area Victor, Mr Laurence argued that there was no linkage of Area Victor with the ranges and impact area at all and that the MoD's activities thereon did not amount to occupation of that area.

6.7.3.4 Mr Elvin submitted that it was artificial to divide up the WTA in any way and that such an approach should be avoided. However, I think that a real distinction does exist between Area Victor and the rest of the Commons in that the former is, and was, not part of the Danger Area and is, and was, not subject to the Byelaws. In my view these facts are sufficient to justify separate consideration of Area Victor and the rest of the Commons in coming to a conclusion about what or what might not constitute an entire whole for the purposes of analysis of the issue of occupation in this case.

6.7.3.5 As to the Commons apart from Area Victor, they are encompassed within the Danger Area. I consider, and I so find, that they are sufficiently linked to the ranges and impact area, such as to form an entire whole with them for the purposes of consideration of the question of occupation of the Danger Area. First, there is the legal position under the Byelaws. While in this report I have, for the purposes of convenience of exposition, referred to the Danger Area as a separate area from the ranges and impact area, the position under the Byelaws is (as I explained in paragraph 2.1.2 above) that there is but a single Danger Area of which the Range Impact Area (which I have generally referred to in this report as the ranges and impact area) is part. The Commons (apart from Area Victor) are thus linked with the Range Impact Area in the Byelaws as part and parcel of the Danger Area. Secondly, this is not just a matter of legal definition. The fact is, and I so find, that, as Mrs Hetherington said, it is and was, not possible, for the ranges to exist without the Danger Area (using the last phrase here to denote land other than the ranges and impact area). That was effectively the position which was established following the 2001 Public Inquiry and the basis on which, in order to satisfy the firing needs of the MoD for the purposes of military training, the extinguishment of the rights of common in the Danger Area was found justified. And if any further demonstration

were needed of the relationship in fact between the two, it is found, to my mind, in Mrs Hetherington's evidence, which I accept, that when the public rights of way (and their environs) on the Commons were swept for ordnance after the 2001 Public Inquiry, several vehicle loads were recovered. It may well be that this volume of material had accumulated over some time but the fact that it was there at all nevertheless well illustrates significant receipt of ordnance from the ranges in the Danger Area and a clear linkage between the two.

6.7.3.6 On the basis which I have set out in the preceding paragraph, I include the fact that the Danger Area was sufficiently linked to the occupied ranges and impact area, such as to form an entire whole with them, in my assessment of the question of whether the Danger Area (and thus all of the Commons apart from Area Victor) was occupied at the time of the extinguishment of the rights of common.

6.7.3.7 As to Area Victor, I do not consider that any evidence has been put before the Inquiry which establishes that there is any real linkage between it and the ranges and impact area. As I have already said, Area Victor is, and was, not part of the Danger Area and is, and was, not subject to the Byelaws. It is not required to, and does not, take stray ordnance from the ranges. The fact that Area Victor forms part of the WTA and falls within the MoD's freehold land ownership seems to me, of itself, to have little bearing on the question of how to approach the unity of an area for the purposes of assessing questions of occupation. I consider that functional relationships springing from use and control are much more in point here. It is true that Area Victor could be said, at a relatively high level of abstraction, to be functionally related to other areas of the WTA to the extent that all is used for military training purposes and that its dry training use is a use which occurs elsewhere on the Commons. However, I am not inclined to give significant weight to this point. This is a much looser relationship than the essential role that the Danger Area plays in allowing the ranges to function effectively. I intend to approach the question of the occupation of Area Victor as a free-standing one. I have not lost sight of the fact that the 2001 Public Inquiry found justified the extinguishment of rights of common on the ground of military need across the whole of the Commons, including the Area Victor part of Murton Common. My reading of the Inspector's Report was that this was on the basis that extinguishment of rights on part of a common would be impractical in the absence of permanent fencing in that sheep would continue

to have access to the whole and would require shepherding accordingly such that the need for a FLA could not then be avoided[137].

6.7.3.8 The third general matter I consider is the extent to which assistance may usefully be gained from comparisons with other commons as featured in the evidence of objectors such as Dr Darrall and Dr Aglionby. I consider that a good degree of caution must be exercised here. I have a much less detailed evidential picture for other commons (including Little Asby) than I do for the Commons I am considering here. I accept that general land management activities which have taken place on the Commons (such as the preservation of historic features, nature conservation, boundary repairs or maintenance of rights of way) may differ little from what happens elsewhere. However, there are aspects of the Commons which, on the evidence, are clearly unique. No other examples have been forthcoming of any common used as a danger area for military firing let alone of a common subject to byelaws equivalent to the Byelaws in this case providing for the ability to exclude public access when such firing occurs. And while I have no reason to doubt that the Commons appear, in their *"open"* and *"uncultivated"* state, no different from other north country fell commons, I do remind myself at this point that the present case turns on the separate factor of occupation. I have already rejected Mr Laurence's argument that I should approach this factor on the basis that there is a strong (or any) disposition towards a conclusion that land which is *"open"* and *"uncultivated"* should also be considered *"unoccupied"*.

6.7.4 *Consistency of the MoD's Use of the Commons with the Status of Land as Waste Land of a Manor*

6.7.4.1 The next matter I turn to is Mr Elvin's submissions with regard to the consistency (or otherwise) of the facts of the present case with any conclusion that the Commons remained waste land of a manor. In making these submissions Mr Elvin drew on the words of Baron Watson in *Hanmer*, arguing that the MoD's use of the Commons as a Danger Area was inconsistent with the exercise of the rights of common or commonable rights over waste land which Baron Watson had described as characterising such land. Mr Elvin also argued that the accompanying exclusion by the

[137] See paragraph 6.4.19 of the Inspector's Report (his conclusion on the issue) and paragraphs 6.1.55 and 6.1.56 recording the MoD's reasons for rejecting any partial extinguishment solution (including extinguishment over those sections of the Commons within the Danger Area but not over the Area Victor part of Murton Common).

MoD of public access to the Commons under the Byelaws was inconsistent with the status of the Commons as waste land. He referred to the approach of Nourse J in *Re Burton Heath* in finding that a sporting shooting tenancy was not inconsistent with the land's remaining manorial waste because the land was suitable for holding game and the shooting tenant's entry on the land was, in the nature of things, *"infrequent and spasmodic"*.

6.7.4.2 I think that the question of the consistency of the MoD's activities with the status of the Commons as waste land of a manor is one that does fall to be considered. This is not only because the question of consistency was raised in *Re Burton Heath*. It is also because the question forms, to my mind, part of the wider point made by Lord Nicholls in *Graysim Holdings Ltd* (see paragraph 6.7.2.12 above) which illustrates that the purpose for which the concept of occupation is being used will throw light on what sort of activities are or are not to be regarded as occupation in the particular context. In this case the immediate purpose for which the concept of occupation is being used is to determine whether the Commons remain waste land of a manor. Underlying that are the questions of how waste land of a manor was used historically and what was the statutory purpose of the recognition of waste land of a manor as a type of common land in the 1965 Act.

6.7.4.3 The OSS's approach to this issue has, in broad terms, been to argue (assuming rejection of the argument that section 13(a) of the 1965 Act should be interpreted to refer only to cases of compulsory purchase or the provision of substitute land) that there should be a demanding approach to the assessment of occupation otherwise the purpose of the 1965 Act as explained by Lord Templeman in *Milburn* would not be furthered. It was as part of this approach that the OSS advanced submissions on predisposition and permanence. So also was it argued that only decided and obvious acts of occupation establishing non-transitory physical presence would do. It will be apparent from what I have said already that I consider that these arguments wrongly assume that Lord Templeman's judgment in *Milburn* casts light, in the way suggested by the OSS, on the issue of the circumstances in which waste land can cease to be such and/or on how Baron Watson's familiar words in *Hanmer* are to be understood.

6.7.4.4 However, to my mind there is force in Mr Elvin's consistency argument. Historically, the wastes of a manor were, as Baron Watson said in *Hanmer*, *"[t]he large open*

commons within and parcel of the manor over which rights of common or other commonable rights are exercised"[138]. It seems to me that it is hard to avoid the conclusion that the use of the Commons as the Danger Area for the firing ranges was inconsistent with the exercise of such rights. The Inspector in 2001 referred to *"the inevitable conflict between two essentially incompatible activities: military training on the one hand, and the grazing of animals by a relatively large number of independent graziers on the other"*[139]. The fact that the FLAs were not able to resolve that conflict satisfactorily led to the decision that the extinguishment of the rights of common should be sanctioned. It seems to me that *"the inevitable conflict"* with the exercise of rights of common produced by the MoD's activities is a relevant factor that should be taken into account in assessing the question of occupation.

6.7.4.5 At this point I return specifically to what I consider to be the legislative purpose of the creation by the 1965 Act of what was, effectively, a special statutory category of common land, *"waste land of a manor not subject to rights of common"*. As I said in paragraph 6.7.1.6 above, this was to further the interests of public access to land. And it is here that further inconsistency arises between the MoD's activities and the interests which the 1965 Act promoted. The use of land as a Danger Area with its attendant risks to life and limb is incompatible with public access. Accordingly, the MoD were able, by the Byelaws, to exclude any such access to the Commons within the Danger Area when firing was taking place and operated the Byelaws to achieve that outcome (for periods which, at about the time of the 2001 Public Inquiry, amounted to over two thirds of the year). Again, it seems to me that this is a relevant factor to be taken into account in assessing the question of occupation.

6.7.5 *Assessment of Whether the Commons Were "Unoccupied" on 31st March 2003*

6.7.5.1 I turn to my assessment of whether the Commons were *"unoccupied"* on 31st March 2003. I consider separately those parts of the Commons forming the Danger Area (the eastern part of Murton Common, Hilton Common and Warcop Common) and the western part of Murton Common making up Area Victor.

[138] (1858) 27 LJ Ch 837 at 840. See also paragraph 6.2.2 above.
[139] Paragraph 6.4.9 of the Inspector's Report.

6.7.5.2 I conclude that those parts of the Commons forming the Danger Area could not be said to be *"unoccupied"* in the *Hanmer* sense at the time of the extinguishment of the rights of common on 31st March 2003 and that, accordingly, they were not then waste land of a manor. I consider that the MoD's military operations at the WTA were in themselves a sufficient foundation for this conclusion. I reach my conclusion on the basis of the following considerations.

6.7.5.3 First, the Commons apart from Area Victor were used as part of the Danger Area. This was not simply a passive use like that of the 291 acres of land in *Newcastle City Council* where nothing at all happened on that land, although a passive use would remain a use nevertheless. A physical use was in fact made of the Danger Area by the MoD in that it operated as an area within which ordnance which had escaped the confines of the range and impact area would, and did, land. As I have already indicated, over time significant quantities of ordnance had accumulated there. In the light of that I do not think that anything turns on the regularity or exceptionality of the entry of ordnance to the Danger Area in respect of particular firing activities. Ordnance did land there and the Danger Area existed to guard against risk in any event. True it is that there would, for obvious reasons, be no presence of military personnel on the Danger Area when firing was taking place (which was for most days in the year) but this does not undercut the conclusion that a physical use was made of the Danger Area. Further, range staff did, in fact (as I so find on the basis of Mrs Hetherington's evidence), check rights of way in the Danger Area (but not the rest of it) for unexploded ordnance on a weekly basis (during non-firing periods). I consider that the use element of occupation and its physical dimension as referred to in the case law sufficiently exists in this case in respect of the Danger Area.

6.7.5.4 Secondly, the Danger Area was, as I have already found, sufficiently linked with the undoubtedly occupied ranges and impact area to be treated appropriately as an entire whole. The ranges and impact area could not exist without the impact area. And what was (in the words of Lord Denning in *Newcastle City Council*) *"actually done"* on the ranges and impact area in terms of firing resulted in ordnance landing in the Danger Area.

6.7.5.5 Thirdly, the MoD had, and in fact exercised, strict control over the Danger Area precisely so that it could be used as such. The Byelaws were the instrument through

which that was achieved. They were operated to prevent any public access to the Danger Area during firing periods and were (and still are) put into practice on the ground by the flying of red flags (or display of red lights) and the presence of warning signs spaced at approximately 50 metre intervals around the perimeter of the Danger Area. No ordinary private landowner could have excluded the public in the way that the MoD was able to do here, preventing, on firing days, any access to the Danger Area, even on public rights of way, with the backing of the Byelaws to create an offence if the exclusion were not observed. The evidence shows that in 2000 there were 243 days of range usage and that the Byelaws would thus have been in operation for over two thirds of the year. I have no reason to think that that was not a representative level of operation more generally for other years also before the 2001 Public Inquiry. I consider that the MoD's strict control over access to the Danger Area and its exclusion of all others in order to achieve its use as such is a telling pointer to its occupation of the same and a factor of significant weight in this case.

6.7.5.6 Fourthly, the MoD's use and control of the Danger Area was inconsistent with the exercise of the rights of common traditionally associated with waste land of a manor and also with the purpose of public access underlying the recognition of waste land of a manor not subject to rights of common as a statutory form of common land in the 1965 Act. I have already dealt with this in paragraphs 6.7.4.4-6.7.4.5 above.

6.7.5.7 I have reached my conclusion above by simply looking at the MoD's use and control of the Danger Area for military purposes without consideration of any land management activities carried out by the MoD simply as an estate owner, be those activities related to nature conservation responsibilities, preservation of historic features, boundary maintenance, repair of rights of way or whatever. I perhaps ought also to say that, in looking at military operations, I have not included any reference to dry training activities which might have been carried out on the Danger Area because there is simply insufficient evidence to come to a conclusion about the extent to which this took place. As to the general land management activities (on which I have had more detailed evidence) these activities fall to be considered as part of the overall picture but they do not make a significant extra contribution to my conclusion on occupation. I do not consider that, had they been taken on their own, these activities would have demonstrated occupation of the Danger Area.

6.7.5.8 Before concluding my treatment of the Danger Area, I make four other points. The first point relates to Mr Laurence's argument, based on the existence of a distinction between the concept of use and that of occupation, that the Danger Area was kept *"unoccupied"* so that it could be used as an area over which ordnance resulting from firing in the impact area could stray or ricochet. I do not accept this analysis. The Danger Area was kept free of people when firing took place but the control exerted to achieve that outcome so that the Danger Area could be used accordingly was itself a manifestation of occupation.

6.7.5.9 The second point is simply that I make clear that there is no evidence before me to suggest that the MoD's use of any part of WTA could be said to be merely temporary. Even if (which there is not) there were some principle of permanence to be considered when assessing occupation, such would have been satisfied in this case.

6.7.5.10 The third point I deal with is Mr Laurence's argument that, if the MoD were to be in occupation of the Danger Area within its freehold land on the basis of its military activities, it would also be in occupation of the Licensed Area. Mr Laurence said that this would be absurd but did not explain why that would be so. I do not see any obvious reason for that view. The absurdity argument does not deflect me from my conclusion. In any event, the question it poses does not directly arise for my consideration and were it to do so the context might potentially be different and possibly involve the assessment of competing claims of occupation over land that is not common land (it appearing from the large plan which was on display at the Inquiry that the Licensed Area is not common land, save for a finger of East Stainmore Common).

6.7.5.11 The fourth point is that, because my conclusion in respect of the Danger Area is based on its unique role as such associated with the equally special feature of the strict, exclusionary control of the MoD exercised through the Byelaws, I do not consider that a precedent is thereby set for other commons.

6.7.5.12 I turn next to consider Area Victor. I have already explained why I think that it should be treated as a free-standing area. It is, and was, not part of the Danger Area and is, and was, not subject to the Byelaws. The control of the Danger Area that was operated through the Byelaws thus did not apply in the case of Area Victor. I need not repeat any further here what I have already said in paragraphs 6.7.3.4-6.7.3.5 above. In

my view the question of whether Area Victor was occupied really comes down to the question of whether its use by the MoD for dry training is sufficient to reach that conclusion. The evidence in relation to Area Victor has been inconclusive. Mrs Hetherington was not able to say how many days in a year Area Victor was used for dry training before 31st March 2003 (or after for that matter) nor were there any records to assist in this regard. Neither the Inspector's Report nor the proof of evidence of Major Evans at the 2001 Public Inquiry provide any further real assistance on this score. The evidence of the MoD lacks detail. It is of course the case, as Eveleigh LJ explained in *Hancock & Willis*, that the physical aspect of occupation need not be continuous and does *"not mean physical occupation every minute of the day"*[140] but, as the judgment of Nourse J in *Re Burton Heath* shows, an *"infrequent and spasmodic"* presence may well not be enough. And, as was said by Ralph Gibson LJ in *Wandsworth LBC*, *"[t]hat which is a minimum sufficiency of physical presence or control cannot, in my view, be determined by the court independently of the facts of a particular case by reference to the number of visits per day or per week or per month."*[141] Ultimately I am left in the position where I simply do not have enough particularity to conclude that there was a sufficiency of dry training (or other MoD use or control) to establish occupation of Area Victor[142]. I find that it remained *"unoccupied"* on 31st March 2003.

6.7.5.13 I should also add that there is no inconsistency *per se* between dry training and public access. Public rights of way on Area Victor were not affected by the Byelaws and the Inspector in 2001 found evidence of use of other routes on Area Victor by local people for some years (albeit that the latter was *"clearly precarious"*[143] and not on the basis of established rights). The point I make is simply that this aspect of the inconsistency plank of Mr Elvin's argument, which I have accepted in relation to the Danger Area, does not apply in respect of Area Victor.

6.7.5.14 Before leaving Area Victor, I acknowledge that the effect of my conclusion is to find that Murton Common was occupied in part on 31st March 2003 (in respect of so much of it as fell within the Danger Area) but *"unoccupied"* in respect of the rest (Area

[140] (1982) 265 EG 473 at 475.
[141] (1991) 62 P & CR 219 at 230.
[142] The anecdotal evidence provided by Dr Aglionby and Mr Patterson in relation to cadet usage seems to relate to present day use rather than use before 31st March 2003 but, in any event, appears to suggest infrequent use. I am not able to come to any conclusion about the extent to which unspecified covert (and therefore unobserved) use might have added to overall dry training activity.
[143] Paragraph 8.6.12 of the Inspector's Report.

Victor). I do not consider that there is anything problematic about that. There is no reason in principle why, if the facts bear the distinction out, any common might not be occupied in part but *"unoccupied"* in other part. The facts do bear that distinction out in the present case. The MoD itself treats Murton Common as divided between the Danger Area and Area Victor in terms of use and the Byelaws embody the divide. On the ground, the Danger Area signs run the length of Murton Common marking the boundary between the Danger Area to the east and Area Victor to the west. It would simply not correspond with the facts to suggest that the use made, and occupation, of the Danger Area part of Murton Common could be treated as a use, and occupation, of part of Murton Common in respect of the whole of it.

6.7.6 *The Grazing Licences*

6.7.6.1 It is next necessary that I turn my attention to the Grazing Licences. At this point in the analysis I have found that the Danger Area part of the Commons was occupied by the MoD before the rights of common were extinguished on 31st March 2003. This part of the Commons was not waste land of a manor at that point in time because it was not *"unoccupied"*. It therefore ceased to be common land on 31st March 2003 when the rights of common were extinguished on that date. To that extent, whatever I were to conclude in respect of the Grazing Licences, it would not alter my conclusion here. The MoD has succeeded on its primary argument. I would only need to consider the MoD's alternative argument that occupation occurred on commencement of the term of the Grazing Licences on 1st April 2003 were I to be wrong in my conclusion that the Danger Area part of the Commons was occupied on 31st March 2003. In respect of Area Victor, the position is otherwise. I have concluded that this part of Murton Common remained *"unoccupied"* on 31st April 2003. The MoD's primary argument has failed. Here I must in any event consider the MoD's alternative argument in respect of the Grazing Licences. In the upshot I simply consider the alternative argument across the board as it relates to the entirety of the Commons and the Grazing Licences confer rights accordingly, albeit with the intention that grazing should be concentrated predominantly, but not exclusively, on the hefts.

6.7.6.2 The first question is whether the Grazing Licences are relevant at all. I have set out in paragraphs 6.5.4.1-6.5.4.5 above the detailed submissions which were developed by Miss Crail on behalf of the OSS on this point. The same basic point was taken by Dr

Aglionby. The point was put before me as one of timing. Its essence is that the MoD could only succeed if it could show that the Commons had ceased to be waste land of a manor by the date of the Vesting Deeds on 31st March 2003 and that any matters subsequent to that date are irrelevant. The point is related to the meaning to be given to the phrase *"in consequence of"* (qualifying events) found in paragraph 2(1) of Schedule 3 to the 2006 Act and the same repeated phrase in paragraph 21 of Schedule 4 to the 2014 Regulations (with reference to dispositions by virtue of relevant instruments). The point links back to the Power Issue where I have come to the conclusion that the power which exists under these provisions allows the full consequences of qualifying events or dispositions to be the subject of amendment.

6.7.6.3 Nevertheless, some exercise of judgment must be called for in terms of deciding what could properly be considered the full consequences of a qualifying event or disposition. I do not think that any cessation of waste land status (say, for the sake of argument, arising upon acts of occupation in 2012) up to the point at which the 1965 Act ceased to govern the position (which was 15th December 2014[144]) could properly be considered a consequence of the Vesting Deeds within the meaning of the relevant statutory powers. In truth the position here would simply be that the Vesting Deeds had done no more than the create the opportunity for a future cessation of common land status. Extending the meaning of *"in consequence"* this far would stretch its meaning unduly. It would amount to re-writing the statutory provisions to allow de-registration simply on the basis that land had ceased to be waste land of a manor, and thus common land, before 15th December 2014.

6.7.6.4 What I have said in the preceding paragraph echoes some of the submissions made by Miss Crail. However, I do part company with her on the issue of whether there is a sharp, fixed line to be drawn at the date of the Vesting Deeds such that anything and everything thereafter must automatically be excluded from consideration. I do not think that the words *"in consequence of"* must be read to produce such a result. While Miss Crail did not shy away from the point, the logic of her submissions is that if the Commons did (which, of course, the OSS did not accept) become occupied on commencement of the Grazing Licences on 1st April 2003 that would be too late. Mr Elvin's point was that, if the Commons were occupied on 1st April 2003 (and were so

[144] See paragraphs 2.8.1-2.8.2 above.

occupied in pursuance of arrangements – the execution of the Grazing Licences on 27th March 2003 - put in place prior to the Vesting Deeds), then, even if not occupied prior thereto, it would follow that there was no point in time after the execution of the Vesting Deeds on 31st March 2003 at which the Commons were waste land of a manor. Miss Crail's answer to that was that, unless the Vesting Deeds had been executed on the stroke of midnight on 31st March 2003 (in which case they would have been dated 1st April 2003), there would have been some period of time on 31st March 2003 at which the Commons remained unoccupied until occupation commenced on 1st April 2003. Whether or not the period involved would have been a *"scintilla temporis"*, I agree with Mr Elvin that this reasoning is lacking in reality. It has its own internal logic but I think that it would be wholly artificial to exclude from consideration as a consequence of the Vesting Deeds the position which obtained the very next day after their execution in consequence of arrangements made before their execution. As I have already said, nothing in the wording of the phrase *"in consequence"* compels to me to do so.

6.7.6.5 I turn therefore to consider the Grazing Licences. Mr Laurence, in arguing that the commencement of the Grazing Licences did not give rise to occupation of the Commons by the MoD, made a number of detailed submissions. I have set these out in paragraphs 6.5.4.6-6.5.4.13 above. I think that (as identified below) there is force in a number of these submissions (although I make an exception for Mr Laurence's continued reliance in this context of his approach to Lord Templeman's speech in *Milburn* which I do not consider is warranted for reasons which I have already explained). The question of whether the implementation of the Grazing Licences gave rise to occupation of the Commons by the MoD must be approached by reference to the principles which I have already set out in paragraphs 6.7.2.7-6.7.2.12 above.

6.7.6.6 I agree with Mr Laurence that land is not occupied simply because it is let or licensed and rents or fees derived from that letting or licensing. The underlying question must first be to consider what it is that is actually done on the land in order to produce such rents or fees. Like Mr Laurence, I have difficulty in understanding why it was in *Re Arden Great Moor* that Chief Commons Commissioner Squibb was able to think that the owner's use of the land by taking in the sheep of other people was any more determinative of what should have been the factual question of whether such use amounted to occupation than it would have been had the owner depastured his own sheep on the land. I also accept Mr Laurence's submission that the fact that the owner

was able to obtain from his tenants under the tenancy agreements extra rent by allowing them to graze on the moor could not of itself have properly been a basis for a finding of occupation. The question should have been whether the use of the land productive of the extra rent was, in all the circumstances, sufficient to make a finding of occupation.

6.7.6.7 Moreover, I do not think that the legal basis on which a use occurs on land can on its own be determinative of the factual question of whether that use amounts to occupation. To the extent that Mr Elvin argued to the contrary, I reject such argument. The legal basis on which a use occurs may tie in with the question of the control exercised by an owner over his land. However, the question of what control was in fact exercised by an owner and how that bears on the question of occupation remain for consideration. It seems to me that the reasoning in *Re Ardern Great Moor* focuses on the question of how, from the landowner's perspective, one form of right over land (of common) differs in legal terms from another form of right (under a tenancy) and, while the distinctions it makes in those respects are correct in themselves, the factual questions relevant to the question of occupation are thereby obscured by the legal analysis.

6.7.6.8 I consider that the approach taken by the successor Chief Commons Commissioner, Mr Langdon-Davies, in *Re Twm Barlwm Common* was markedly different and is to be preferred. Mr Langdon-Davies opined that *"the fact that .. [the land] .. has been let is a relevant consideration but is not conclusive. A tenancy merely gives a right to occupy. If a tenant never goes to the land he has taken it may well remain unoccupied. If he does make use of it the question whether the land is 'occupied' is a question of fact."* Mr Elvin argued at one point that all that the decision established was that land would not be occupied if the right to use under the tenancy was never taken up. I do not accept that. The Chief Commons Commissioner clearly made the point that if use was made of the right under the tenancy it was nevertheless still a question of fact whether that use amounted to occupation.

6.7.6.9 I decline to follow the approach taken in *Re Ardern Great Moor*.

6.7.6.10 How then do I assess the matter factually in the present case? I do not think that comparisons with the position which existed before the rights of commons were extinguished can be ignored. That is part of the factual context or *"the whole situation"*

(to use the words of Eveleigh LJ in *Hancock v Willis*[145]) which the MoD have urged me to consider in relation to other issues. Prior to the extinguishment of the rights of common there were 12,039 sheep on the Commons, which, across a total area of 4,206 hectares, was equivalent to stocking density of 2.86 sheep per hectare (as stated in Dr Aglionby's evidence). After extinguishment, each Grazing Licence permitted the grazing of a certain number of sheep across the whole of the Commons, albeit the grazing was to be concentrated predominantly on the hefts. The overall position under the Grazing Licences was that 2,440 sheep were permitted to graze across the whole area of the Commons. This was, as Dr Aglionby said, a stocking density of some 0.58 sheep per hectare. The position after extinguishment of the rights of common amounted to an 80% reduction in stocking levels across the Commons. The physical presence of sheep on the Commons was drastically cut.

6.7.6.11 I do not find that the post-extinguishment stock numbers were nominal but I do find that they were at a low level compared to the scale of the Commons and that, taken in the context of the stock numbers which had obtained previously, the limited and much reduced grazing levels permitted under the Grazing Licences did not give rise to a sufficient use of the Commons, or any part of them, to amount to their occupation. Nor do I think that the control exercised by the MoD over the graziers through the Grazing Licences is sufficient to found a conclusion of occupation given that it was no more than the control of what was only a low level activity on the Commons. The control that was exercised through operation of the Byelaws to exclude all comers was of a wholly different order.

6.7.6.12 My conclusion above, based on the particular facts of this case, is consistent with the view expressed in the DEFRA Guidance at paragraph 7.3.14. I think that the grazing under the Grazing Licences was undoubtedly *"extensive"* in the sense used by DEFRA and far from *"intensive"*. Further, while I have not thought it necessary to rest my conclusion on consideration of the consistency of such grazing with the use of waste land of a manor, I note that there is no inconsistency. As was said in *Re Ardern Great Moor*, in a passage with which I do agree, *"[l]and which is used for grazing cannot ipso facto be regarded as being occupied in the sense in which Watson B used that word*

[145] (1982) 265 EG 473 at 475.

in his definition of waste land, for the waste land of manors was frequently used for grazing by manorial tenants who had rights of common."

6.7.6.13 Given my conclusion that the post-extinguishment grazing regime under the Grazing Licences did not amount to occupation of the Commons, it is unnecessary for me to deal with the question of the level of financial benefit which the MoD obtained from the Grazing Licences. However, given that this matter was the subject of a degree of debate at the inquiry between Dr Aglionby and the MoD I will express my views on it. It seems to me that Dr Aglionby's point that the licence fees were nominal and, in effect, only a peppercorn was directed at distinguishing the present case from *Re Ardern Great Moor* on the basis that, while the owner there obtained a financial benefit from the tenancies provision of a right to graze on the moor, there was, in reality, no such benefit to the MoD from the Grazing Licences in the present case. It should be apparent from what I have said already about *Re Ardern Great Moor* that I do not consider that receipt of financial benefit by an owner of common land from his having put it to use is in itself a determinative factor. At best, it might amount to an indirect measure of how much use was made of the land in that a lesser financial benefit might reflect a lesser use. In the present case, and in the light of the definition of a peppercorn rent given in Woodfall (which I take as authoritative) I do not think that the fees received (which were set at the level of £1 per sheep) was a peppercorn rental. But I am persuaded by Dr Aglionby's evidence that the fees were undoubtedly modest and it is accepted by the MoD that they were below a market level. Be those matters as they may, they do not bear on my conclusion that the low and limited level of grazing on the Commons under the post-extinguishment grazing regime was not sufficient to amount to occupation.

6.7.6.14 The consequences of my conclusion in respect of the Grazing Licences have no impact on my earlier conclusion that the MoD's primary argument succeeds in respect of those parts of the Commons in the Danger Area but it does mean that the MoD's alternative argument in respect of the Grazing Licences does not avail it in respect of Area Victor, where I rejected its primary argument.

6.7.7 *Post 2003 Intensification of Activity*

6.7.7.1 In paragraph 6.7.6.3 I explained the problems which would face an argument based on occupation occurring, if it had not occurred earlier, on the basis of post 2003 intensification of activity up to the point at which section 13(a) of the 1965 Act ceased to have effect in Cumbria on 15th December 2014.

6.7.7.2 As it is, however, I have accepted the MoD's primary case that, save for Area Victor, the Commons were occupied at 31st March 2003 so the question does not arise. And, in respect of Area Victor, I do not consider that I have been provided with any persuasive evidence that there has been any such intensification here in any event. To that extent the question of what could permissibly be considered the limits of the consequences of a qualifying event or disposition does not arise in this respect either.

6.7.8 *Conclusions on the Waste Land of a Manor Issue*

6.7.8.1 My overall conclusion on the Waste Land of a Manor Issue is that, save for Area Victor, the Commons had ceased to be *"unoccupied"* by 31st March 2003 and were not then waste land of a manor within the *Hanmer* definition. Accordingly, when the rights of common were extinguished on that date, the Commons (save for Area Victor) ceased to be common land under section 13(a) of the 1965 because they then ceased to be land subject to rights of common under section 22(1)(a) of the 1965 Act and were not then *"waste land of a manor not subject to rights of common"* under section 22(1)(b).

6.7.8.2 My conclusion in respect of Area Victor is that it remained *"unoccupied"* on 31st March 2003 (and 1st April 2003) and was still then waste land of a manor. Accordingly, it did not cease to be common land when the rights of common over Murton Common were extinguished at that time. It then became *"waste land of a manor not subject to rights of common"* within section 22(1)(b) of the 1965 Act. It has not at any time since then ceased to be *"waste land of a manor not subject to rights of common"*.

6.7.8.3 The result of the above is that the MoD has succeeded on the second main issue, the Waste Land of a Manor Issue, in respect of the Commons save for Area Victor.

7. OVERALL CONCLUSIONS AND RECOMMENDATIONS

7.1 There was power under paragraph 2(1) of Schedule 3 to the 2006 Act and paragraph 21 of Schedule 4 to the 2014 Regulations for the MoD to make the Applications to de-register the commons. The MoD succeeds on the first main issue, the Power Issue.

7.2 In order for the Applications to succeed the MoD must also succeed on the second main issue, the Waste Land of a Manor Issue. It is not sufficient that the Commons ceased, upon the extinguishment of the rights of common by the Vesting Deeds on 31st March 2003, to be common land within section 22(1)(a) of the 1965 Act because it must also be demonstrated that the Commons were not *"waste land of a manor not subject to rights of common"* within section 22(1)(b).

7.3 The MoD has demonstrated that the Commons were, save for Area Victor, not waste land of a manor and, subject to that qualification, has succeeded on the second main issue, the Waste Land of a Manor Issue.

7.4 The consequences of the above are as follows.

7.5 First, the Applications to de-register Hilton Common and Warcop Common should be granted. Secondly, the Application to de-register Murton Common should be granted in respect of the eastern part of it but refused in respect of the western part of it known as Area Victor. There is no procedural issue with respect to an Application being granted in part only: regulation 36(1) of the 2014 Regulations specifically envisages that an application can be granted *"in whole or part"*.

7.6 The eastern part of Murton Common in respect of which the application should be granted is that part of it which lies within the Danger Area. I consider that the plan which should be used to identify the boundary of the Danger Area is the "Plan of the Danger Area of the Warcop Principal Training Area" which is annexed to The Warcop Principal Training Area Byelaws 1981. I refer to this in my recommendations below. In framing the recommendations I use the references allotted to the Applications by the Council.

7.7 Hence my recommendations are that:

(1) Application CA14/4 (CL 27 Hilton Fell) and Application CA14/5 (CL122 Burton Fell and Warcop Fell) are granted.

(2) Application CA14/3 (CL26 Murton Fell) is granted in respect of that part of CL26 which lies to the east of the boundary of the Danger Area as that boundary is shown on "Plan of the Danger Area of the Warcop Principal Training Area" annexed to the The Warcop Principal Training Areas Byelaws 1981 but otherwise (in respect of that part of it known as Area Victor) refused.

Kings Chambers
36 Young Street
Manchester M3 3FT

Alan Evans
23rd November 2018

APPENDIX 1

LIST OF APPEARANCES AT THE INQUIRY

Part 1: 13th -14th September 2018

David Elvin QC and Heather Sargent representing the Ministry of Defence
George Laurence QC and Ross Crail representing the Open Spaces Society
Councillor Andy Connell, Cumbria County Councillor for the Appleby Division
John McDarren, Secretary of Hilton Commoners
Barbara Govan, Chair of Murton Parish Council
Julia Aglionby, Executive Director for England for the Foundation for Common Land
Jan Darrall, Policy Officer for Friends of the Lake District
Joe Relph, Chairman of the Federation of Cumbria Commoners
(The last two individuals on the list were content to adopt the representations of other speakers).

Part 2: 30th-31st October 2018

David Elvin QC and Heather Sargent representing the Ministry of Defence
Clare Hetherington, Principal Estates Surveyor, North of England, Defence Infrastructure Organisation – called as a witness on behalf of the Ministry of Defence
George Laurence QC and Ross Crail representing the Open Spaces Society
Councillor Andy Connell, Cumbria County Councillor for the Appleby Division
Jan Darrall, Policy Officer for Friends of the Lake District
Julia Aglionby, Executive Director for England for the Foundation for Common Land
William Patterson, Chairman of Hilton Commoners

APPENDIX 2

SITE INSPECTION DETAILS

Preliminary inspection Saturday 27th October 2018

On this occasion I drove on the minor road which leads generally north west from the A66 to Hilton and then Murton, passing Moor House near its junction with the A66 and then, where known as Hag Lane, cutting across the Western Part of the Range Impact Area. This enabled me to gain a good general impression of the Range Impact Area and the western slopes of the fells which make up the Commons.

At Hilton, I parked at the eastern end of the village and inspected the MoD’s flagpoles beyond the village as well as displays of the Byelaws. I walked along the Scordale bridleway to the edge of the Danger Area and saw the warning sign encountered on the route at that point.

At Murton, I parked in the car park to the east of the village and gained a general impression of Murton Pike and Mell Fell.

The weather on the day was excellent as was the visibility.

No firing was in progress on the day.

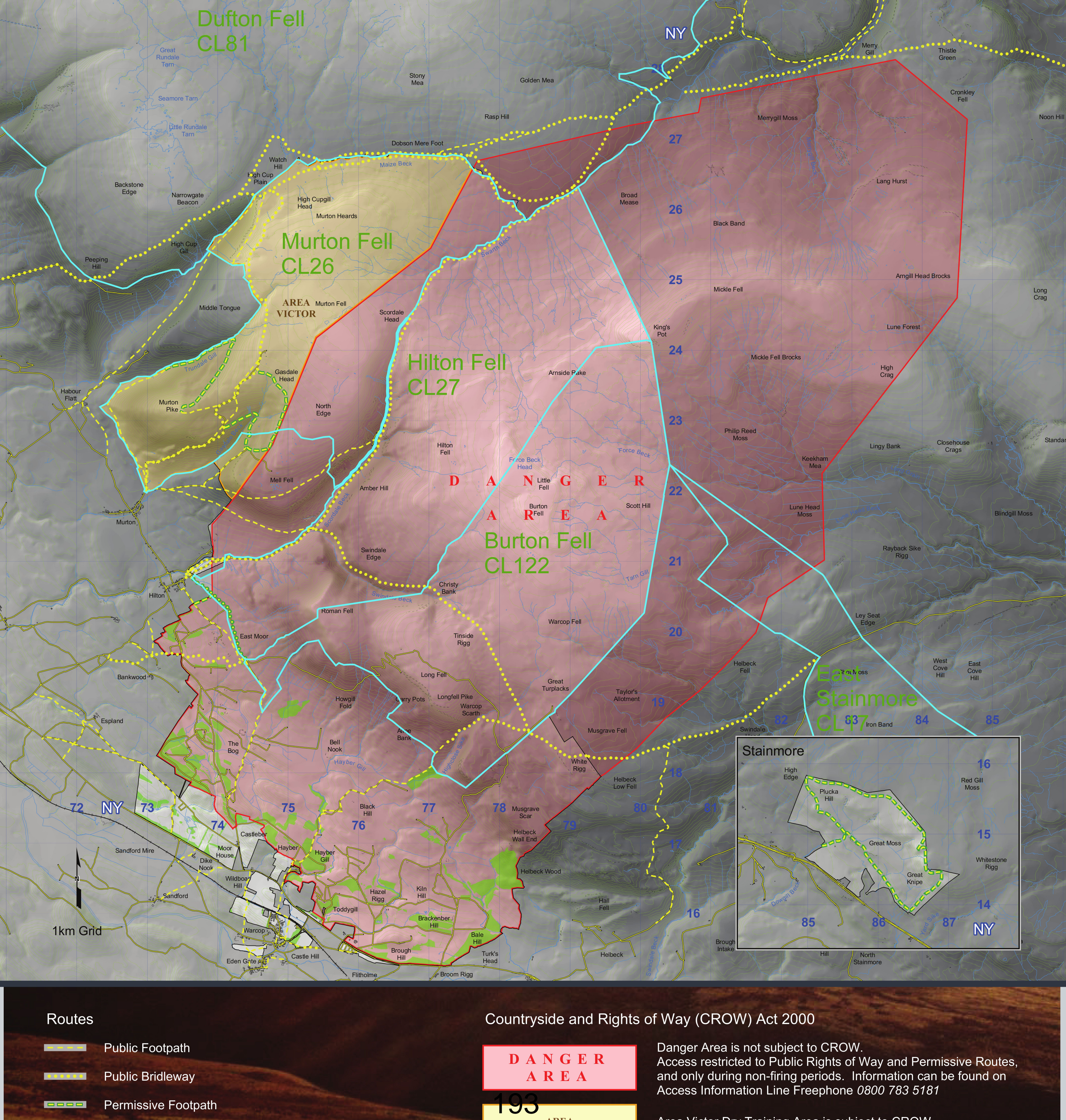
Detailed site inspection Saturday 3rd November 2018

On this occasion (a published non-firing day) I parked in the car park to the east of Murton and then undertook the first of two walks which I accomplished on the day.

The first walk took to me to the summit of Murton Pike which gave me a panoramic view of Murton Common. I then walked around Gasdale Head before going up to the line of warning signs at the boundary of the Danger Area where I could see that the signs were closely spaced and stretched into the distance up the fell. I returned to the car via the eastern side of Gasdale.

I next drove to Hilton and parked to the east of the village. I then undertook my second walk which began by following the Scordale bridleway to its junction with the Swindale Edge bridleway. I walked along the Swindale Edge bridleway across the full width of Hilton Common and then partially across Warcop Common past Christy Bank to the bridleway's high point in the vicinity of Tinside Rigg. From that point it was possible to survey much of Warcop Common. I then retraced my steps along the Swindale Edge bridleway to the Scordale bridleway and, rather than return directly to Hilton at that point, I walked further up the bridleway as far as the former mine workings at Mason Holes. I completed my walk by returning to Hilton via the Scordale bridleway.

The total distance I covered was about 12 miles. There was rain for much of the day but I was below the cloud base and the visibility was fair and amply sufficient to allow a very good impression of the Commons.



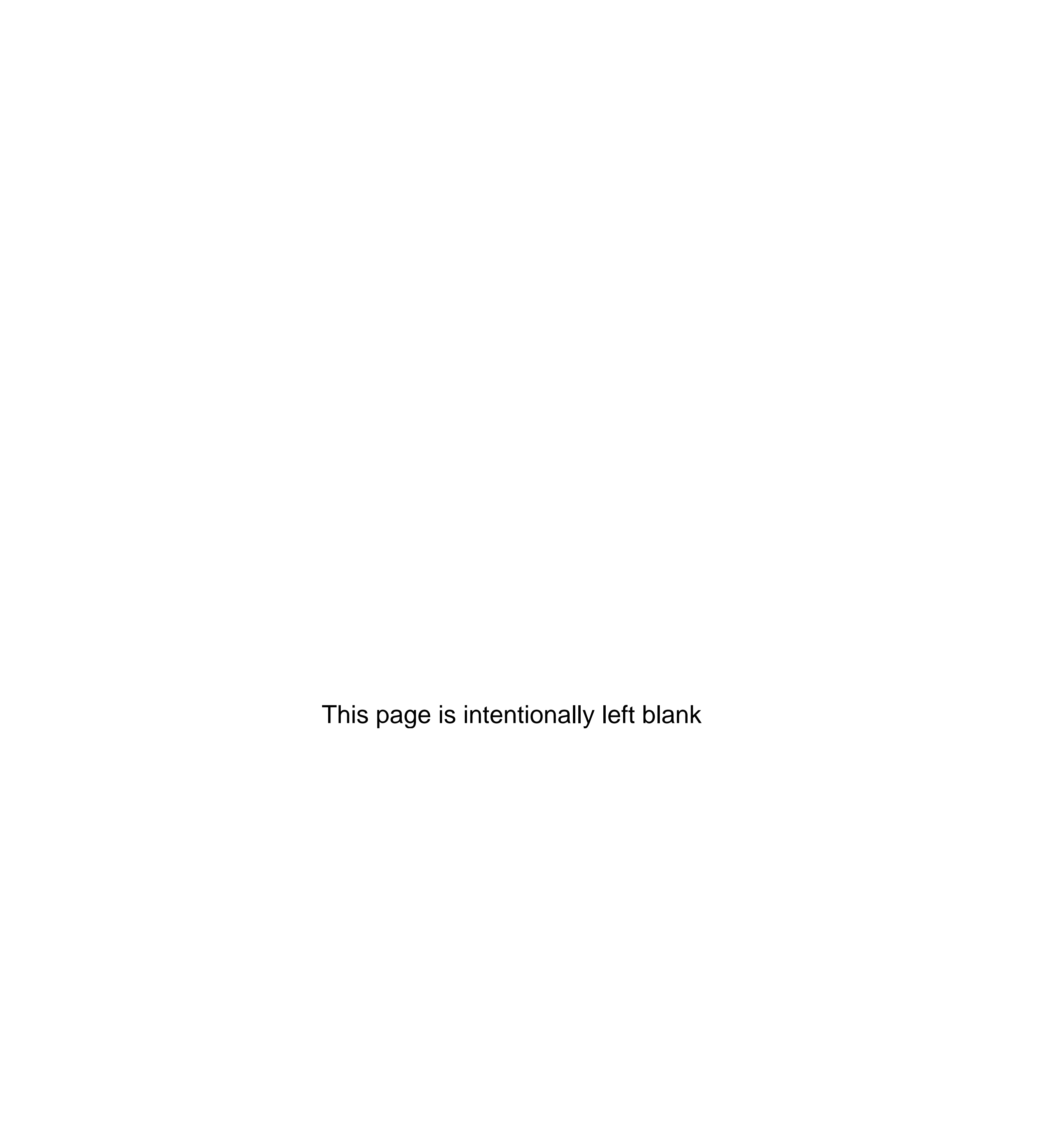
Routes

- Public Footpath
- Public Bridleway
- Permissive Footpath
- Permissive Bridleway

Countryside and Rights of Way (CROW) Act 2000

DANGER AREA — Danger Area is not subject to CROW. Access restricted to Public Rights of Way and Permissive Routes, and only during non-firing periods. Information can be found on Access Information Line Freephone *0800 783 5181*

AREA VICTOR — Area Victor Dry Training Area is subject to CROW. Public access available at all times.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