

## Written evidence from Dr Paul Stafford (MAR 39)

### Submission to the Justice Select Committee Inquiry into Manorial Rights

#### Executive summary

- Manorial rights are property rights whose owners are protected from dispossession of those rights by the Human Rights Act 1998.
- For legislation which abolishes those rights to be HRA compliant, it will be necessary to provide financial compensation to owners. That compensation will be substantial, and its cost would be met by taxpayers. The process of establishing compensation will be protracted and expensive for government. Alternatively, legislation could give the owners of property subject to manorial rights the right to buy out those rights.
- The problems caused in Anglesey and elsewhere by the Unilateral Notice Procedure concern the law and practice of land registration rather than the law of manorial rights. These problems can be addressed by procedural changes introduced by the Land Registry.
- A more serious problem is that of manorial waste because of its potential to change land ownership with major impact on local residents. Again, this problem should be capable of satisfactory management if addressed by the Land Registry and where necessary with input from the Crown Estates Commissioners.

#### Introduction

1. I was called to the Bar of England and Wales in 1987 and since 1992 have been in independent practice as a barrister in chancery chambers at Ten Old Square, Lincoln's Inn, London WC2A 3SU. My practice is mostly concerned with property and construction law but since 2008 has involved significant experience dealing with manorial rights and land registration. I have acted for and against lords of the manor in relation to manorial rights issues. I have also acted for charitable and non-charitable trustees in connection with manorial mineral rights and chancel repair liability arising from ownership of the lordship of a manor. That experience has included both advice and representation in court at various levels, including the tribunal of the Adjudicator to HM Land Registry (now called the First Tier Tribunal of the Property Chamber), the Chancery Division of the High Court, the Court of Appeal and the Supreme Court. I am the author of a number of published articles (hard copy and online) concerning manorial rights, and since 2012 I have been giving lectures to solicitors on the subject in the context of associated issues such as land registration and fracking. In case it is of relevance, I should disclose that in the Welsh Assembly elections of 2011 I stood as a candidate for the Conservative Party.

2. I was unaware of the existence of this inquiry until I received an email from Mr Beale, clerk to the Committee, who invited me to submit written evidence. As at the date of this submission, I have read the transcript of the Committee proceedings for the first day of evidence on 15 October 2014, together with the written submissions of the witnesses before the Committee on that date. I agree with the analysis of the law and the conclusions given in the submissions from the two practising lawyers, Mr David Towns of Bond Dickinson LLP, and Mr Christopher Jessel of Farrers LLP. I am also in broad agreement with the written evidence given by the Chartered Minerals Surveyor, Mr Timothy Troman, which is consistent with my own knowledge and experience of manorial mineral rights and mineral rights derived from manorial title which are now statutory pursuant to parliamentary Inclosure Acts and awards made pursuant to those Acts.
3. Against that background I see no purpose in rehearsing the matters so clearly set out by Mr Towns, Mr Jessel and Mr Troman, but I want instead to make some modest proposals for reform of the existing position so that the distress recently caused to property owners in Anglesey and elsewhere may be averted. I also want to focus on a particular matter which appears not to have been dealt with in the earlier evidence.

#### **Manorial rights – anachronistic or misunderstood?**

4. First, however, and fundamental to the debate about whether manorial rights are a feudal anachronism with no place in the 21<sup>st</sup> century, is the point that manorial rights are a species of property rights which are often commercial in nature and capable of being bought and sold in the same way as bricks and mortar. Their origins date back to the Norman Conquest and beyond, when all land in England was held in manors whose ownership was confined to the upper echelons of the feudal pyramid at whose apex stood the Crown in whom, ultimately, all land was vested. However, the 1289 Statute of *Quia Emptores* (which remains in force) effectively brought an end to the monopoly of ownership of manorial rights hitherto enjoyed by a privileged elite. What the statute did was to provide for the alienability of land by those who held it in fee simple (the old term for freehold) so that ownership of and rights affecting that land could be sold to third parties for cash instead of being granted to tenants for services. Land sold as freehold went out of the manor and was no longer subject to manorial rights unless such rights were reserved to the lord in the conveyance. Conversely, land which stayed in the manor as copyhold remained subject to manorial rights some of which were retained under the Law of Property Act 1922 ('the 1922 rights') and continued to affect the land after its statutory metamorphosis into freehold in 1926.<sup>[1]</sup> By that date the process of break-up and extinguishment over the centuries meant that the number of lordships had shrunk from about 20,000 in medieval England to no more than several thousand in England and Wales. By 2003 the number of lordships registered with the Land Registry was about 400. However, since there has never been any requirement to register, the actual number today may be about 2,000.<sup>[2]</sup>

5. For present purposes, the following points about the 1922 rights are important:
  - (1) Between 1926 and 1950 the newly enfranchised freeholder could buy out the remaining rights from the lord of the manor under a statutory compensation scheme. Many did. Using that experience, such a scheme could be devised again.
  - (2) The lord could sell the rights to third parties. There is currently an active market for such rights and also for lordships, which can change hands for five or six figure sums. Reasons for purchase include commercial requirements, the prospect of speculative gain, and antiquarian interest.
  - (3) The rights could not be exercised over (or under) the freeholder's land without the freeholder's consent. The freeholder was therefore able to stop the lord or anyone to whom the lord had sold them from doing anything with the rights.
  
6. Two observations arise. First, manorial rights are property rights recognised at common law and by statute. The owner of those rights is entitled to protection of them under Article 1 Protocol 1 of the Human Rights Act 1998. To abolish those rights would dispossess owners of their property. Legislation to this effect without adequate compensation would be incompatible with the HRA and, if upheld in the English courts, would be likely to result in actions against the UK government at Strasbourg, where the legislation would be declared unlawful and dispossessed owners would be awarded damages. The cost would be substantial and would be borne by UK taxpayers. Equally, if legislation did provide adequate compensation, the costs would again be substantial and would fall on taxpayers, and the working out of the legislation would doubtless result in numerous cases in court. Buy-out legislation, by contrast, would not require compensation funded by taxpayers but it would require fair valuation of the rights concerned. The process would be expensive and the cost for some prospective purchasers may be out of reach.
  
7. Second, the problem which the 1922 rights create for freehold owners who buy their property in ignorance of such rights will generally be much less serious than may at first appear. That is because in the vast majority of cases owners can veto access to their land so that the rights cannot be used. For homeowners, this ought to mean that there is no effect on the value of their property, its saleability, or its suitability for mortgage or re-mortgage. If prospective purchasers or lenders think otherwise, they are badly advised. Although the law relating to lordships and manorial rights can be technical and complex, the legal profession had been well versed in it for centuries by the time of the 1922-1925 legislation, and there is no reason why the profession today cannot provide a better service by treating it as something which may need to be advised on in any residential conveyancing transaction. This has happened with chancel repair liability ('CRL'). Since the House of Lords' decision in *Aston Cantlow PCC v Wallbank* [2004] 1 AC 546, CRL is now the regular subject of enquiries before contract on conveyancing transactions. Insurance is available against the possibility of CRL unexpectedly arising after purchase.



## The Unilateral Notice

8. The Unilateral Notice raises different issues because the evidence from Anglesey and Welwyn Garden City shows that its service on the unsuspecting homeowner can generate a high level of anxiety. The Land Registry is rightly cautious about the neutral role it must have as a registration body which means that it cannot advise the recipients of such notices about their particular case. However, it seems hard to believe that a standard form explanation cannot be drafted in fuller and simpler language to accompany the Notice. The explanation could, for example, say that where rights under the 1922 Act were claimed in the Notice, then normally they could not be exercised without the freeholder's consent.
9. The Unilateral Notice procedure reflects the objective of the Land Registration Act 2002 ('the LRA 2002') to enhance the protection given to the interests of third parties over registered land.<sup>[3]</sup> This currently operates in a way that makes life much easier for the claimant to the manorial rights than for the owner of the property which the claimant says is subject to those rights. Land Registry Practice Guide 19 contains the following:

### 2.3.3 Unilateral notices

A unilateral notice may be entered without the consent of the relevant proprietor. The applicant is not required to satisfy the registrar that their claim is valid and does not need to support their claim to the interest with any evidence. The registrar will however check that the interest claimed is of a type that may be protected by unilateral notice.

The relevant proprietor is not notified of the application until after the entry has been made so they will not usually be able to object to the application. However, they will always be notified after the application has been completed. They can then apply at any time to cancel the notice and by doing so require the person claiming the benefit of the protected interest to prove the validity of their claim.

There are two elements to a unilateral notice entry: the first part gives brief details of the interest protected and identifies that the entry is a unilateral notice; the second part gives the name and address of the person identified by the applicant as the beneficiary of the notice. This information is necessary as it is the beneficiary who will be served with notice and required to prove the validity of the interest if the relevant proprietor applies to cancel the notice.

10. The lack of requirement for the applicant to satisfy the registrar that his claim is valid means that there is no scrutiny of his claim at the stage of entering the notice. If the Land Registry introduced a requirement that a claimant to manorial rights would need to show at least a *prima facie* case that he was entitled to those rights before entering the notice, it would mean that the applicant would need to research the title and provide evidence in support before the Land Registry would agree to enter the notice and serve it on the property owner. This would mean extra work for the Land Registry, involving scrutiny by legally qualified staff, and this would no doubt require a higher fee from the applicant. The higher hurdle which the applicant has to overcome would have the effect of discouraging or eliminating weak applications, and so would the higher fee. The combination of these procedural steps, together with the fuller explanation from the Land Registry discussed above, would go far to mitigate if not eliminate the problems caused in Anglesey and Welwyn Garden City.

### **Manorial waste – the case of *Burton v Walker***

11. A further and more serious problem for manorial rights law concerns the ownership of manorial waste. Historically, the waste of a manor was its uncultivated part – land that was neither demesne nor tenanted nor copyhold but was available to lord and tenants for such purposes as grazing cattle or sheep. The ownership of waste is incidental to the right of lordship. As a matter of law, the lord of the manor is entitled to freehold ownership of the waste of the manor<sup>[4]</sup>, and the extent of this waste may be considerable. The lord's right to waste is of great importance because in England and Wales large areas of land remain unregistered and unoccupied. If no-one claims ownership to such land it belongs to the Crown. However, the Crown Estate may be unaware of its existence and even if aware may be unwilling to assert an interest over it in order to avoid the risk of unknown liabilities which may fall on the owner. Yet a lord of the manor may claim such land as part of the waste of his manor and acquire freehold title from the Land Registry so that he becomes registered proprietor in possession and is given the statutory protection under Schedule 4 of the LRA 2002 that such status confers. The public availability of Land Registry title deeds and plans means that it is possible to identify areas of land which nobody owns so that the lord, if he can establish that the land falls within the boundary of his historic manor, can gain title to it. The land may be a grass verge, or a plot (that could become a ransom strip), or a much larger area.
  
12. A spectacular example of this process in action comes from the recent and widely reported case of *Burton v Walker*.<sup>[5]</sup> Mr Burton, after a career in banking, moved to north Lancashire and acquired an edge of village house with land next to open moorland known as Ireby Fell. The Fell had been registered as a common under the Commons Registration Act 1965 and for more than 100 years had been managed by the parish committee on behalf of the villagers, who used it for recreational purposes. After buying his house, Mr Burton found himself in dispute with the vendors. The dispute was settled by their agreeing to let him pay them £1 for the lordship of the manor – a title they had never registered or used during their time at the property, and which had not been included in the original sale. The Land Registry granted Mr Burton's application to be registered as lord of the manor of Ireby, and then Mr Burton claimed ownership of verges and strips next to villagers' houses asking them to move their cars and not to allow their gardens to encroach on what he claimed was his land. Next Mr Burton claimed Ireby Fell saying that it was manorial waste, and the Land Registry granted his application for ownership made in his capacity as lord of the manor. Thus, for a nominal sum, he became registered owner of 362 acres of moorland in glorious fell country.
  
13. On the villagers' challenge to his two titles, the court held that both registrations were mistakes because the lordship had been extinguished by 1600 when the land had escheated to the Crown. Hitherto unaware of the land or the dispute, the Crown Estate was notified of this finding after the trial but declined to become involved. The court had deprived Mr Burton of

his title to the lordship but, on the basis that he was now the registered proprietor in possession of the Fell, it exercised its discretion to let him keep the 362 acres because he had spent time and money on the land, that the Crown had shown no interest in it, that the villagers had no better title to it than he did, and that the Land Registry's mistakes were not his responsibility. The Court of Appeal upheld the lower court's decision and the Supreme Court refused permission for a further appeal.

## Reform and scrutiny

14. For the purpose of an inquiry into manorial rights, the decision in *Burton v Walker* would appear to provide a powerful argument if not for the abolition of the rights preserved by the 1922 Act then at least for a change in the law which entitles a lord to ownership of waste. Mr Burton was the beneficiary of two mistakes by the Land Registry and the unwillingness of the Crown Estate to assert ownership of the land which had earlier escheated to the Crown. As a result, for just £1, he acquired 362 acres of spectacular moorland fell over which he granted (and was paid for) shooting rights and grazing rights. This would affront the sense of justice and fairness of most reasonable people. Yet the case is as much about the law and practice of land registration as it is about manorial rights. The performance of the Land Registry in scrutinising Mr Burton's two applications was inadequate; and the Crown Estate's position, while understandable in view of its limited resources and unwillingness to take on potentially burdensome liabilities, will no doubt encourage others who may wish to follow Mr Burton's example. The correct response may not be legislative intervention into manorial rights but closer scrutiny and control of the transfer and registration of those rights by the Land Registry which is able to make rules that will avoid the mistakes made in its handling of Mr Burton's applications. For the Land Registry to do that, it needs proper funding, property lawyers qualified to deal with manorial law, and accountability to ministers and parliament. There would be grave danger in moving its operation to the private sector.

October 2014

---

[1] The rights preserved under Schedule 12 of the 1922 Act in respect of former copyhold land were the lord's rights to mines and minerals, his sporting rights, his right to hold markets and fairs. Also preserved was his or his tenant's liability for the construction and upkeep of dykes, ditches, canals and other works.

[2] Figures about the number of lordships are not easy to come by, and the figures quoted here come from my recollection of what I have read. More accurate information should be available from the Land Registry.

[3] See Law Commission Report 271, 'Land Registration for the Twenty-First Century' (2001), para 2.19.

[4] *Hampshire CC v Milburn* [1991] AC 325.

[5] There are no less than four reported decisions in *Burton v Walker*: the preliminary issue and substantive hearings before Adjudicators to the Land Registry; an appeal to the Chancery Division and a second appeal to the Court of Appeal. The references are REF 2007/1124 (Mr Edward Cousins, 14 May 2009); REF 2007/1124 (Mr Simon Brilliant, 10 Dec 2010); [2012] EWHC 978 (Ch), [2012] All ER (D) 131 (Mr Jeremy Cousins QC); and EWCA [2013] Civ 1228 (Mummery LJ giving the only substantive judgment).