JL

COMMONS REGISTRATION ACT 1965

Reference Nos. 209/D/135-136

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In the Matter of Beesands Green,
Stokenham, Devon

DECISION

These disputes relate to the registration at Entry No. 1 in the Land Section of Register Unit No. VG 18 in the Register of Town or Village Greens maintained by the Devon County Council and are occasioned by Objection No. 303 made by Beesands Estates Ltd and Objection No. 621 made by Mr S J Honeywill and Mr J S Honeywill and both noted in the Register on 25 March 1971.

I held a hearing for the purpose of inquiring into the dispute at Dartmouth on 20 May 1972. The hearing was attended by Mr J Broom, Solicitor, on behalf of the County Council, and by Mr S Tuckey, of Counsel, on behalf of the Objectors.

The land comprised in the Register Unit consists of an open area of grass-land, bounded on the east by the beach, in the village of Beesands in the Parish of Stokenham. It is described as "Beesands Green" in the tithe apportionment award of 1841. There is no record of an Act of Parliament creating a right for the inhabitants of the locality to indulge in lawful sports and pastimes on the land, so if there was any such right it must have been a customary one.

The other evidence for the existence of such a right was not strong. It was apparently believed at the end of the last century that the land was subject to some right, for on 4 May 1899 the Clerk of the Stokenham Parish Council was instructed to inform the Rural District Council that hurdles had been placed at each end of Beesands Green and that the Parish Council considered this "an interference with the public right". It appeared that such a belief persisted, for it is stated in the Parish Council minutes of 15 December 1948 that "although the private ownership of the land is undoubted the public have from time immemorial had freedom of access to the land for passage and recreation". It is, of course, impossible for the public to have a right of access to this land for recreation, but it is easy to understand how laymen might described the inhabitants of a locality as "the public". This was supported to some extent by the evidence of some of the inhabitants, which was confined to the acts of local residents.

From 1952 onwards parts of the land had been used as the sites of moveable dwellings. This was considered by some to be an infringement of rights of way, common rights, and customary rights. In 1960 the Clerk to the Rural District Council looked into the matter, and in a letter dated 14 July 1960 he stated that the Council did not think that the evidence went anywhere near establishing a village green. However, the matter was not allowed to rest there. In October 1960 statements were taken from a number of elderly inhabitants of Beesands regarding the use which had been made of this land during living memory. Several of the people who made statements have since died and their statements were put in under the Civil Evidence Act 1971, and evidence was given by one of the survivors and also by some younger inhabitants of Beesands.

So far as material to these proceedings, the statements and the oral evidence showed that there had been some use of the land for sports and pastimes by the inhabitants of Beesands during the present century. The inhabitants held celebrations on the land on the occasion of the 1935 Jubilee, Armistice Day, VE Day and the 1937 Coronation.

Football had been played on the land, but the football club paid rent to the owner of the land, and after 1945 the club moved to another pitch. There was also some evidence of unorganised playing of cricket and football by children living in Beesands. There was some conflicting evidence about Gunpowder Plot bonfires, some witnesses saying that they were on the grass-land comprised in the Register Unit and others saying that they were on the adjoining beach. On the balance of probabilities, I found that these bonfires were on the beach. Finally, there used to be what some of the witnesses described as a "fair" held on the land on Whit Tuesday in each year, with stalls, a shooting gallery, and coconut shys without permission from anyone. Although described as a "fair", there was no evidence that these activities were a fair in the legal sense of the word, and it would appear that the witnesses were using the word "fair" in its modern colloquial sense.

While it is not unknown for a piece of land to retain its name after its status has changed, I considered that the fact that this land was named Beesands Green in 1841 was prima facie evidence that at some time the inhabitants of the locality had a right to indulge in lawful sports and pastimes on it. I used the expression "prima facie evidence" in the sense in which it is defined in 17 Halsbury's Laws of England (4th ed.) para. 28 as meaning "evidence which, if not balanced or outweighed by other evidence, will suffice to establish a particular contention". Although the other evidence for the existence of such a right was not strong, it was at least consistent with the land having been a village green, though if it had stood by itself, it would have been barely sufficient to prove it. However, it seemed to me that I was justified in relying on the facts that the land had been known as Beesands Green for the whole of the period covered by the evidence and that there had been resistance to interference with the use of the land for sports and pastimes.

I considered that the persistence of the description of the land as "X Green" was of much greater value in determining its present status than the continued use of the name "X Common". While the name "X Common" indicates that the land so named was at some time subject to rights of common, it would be unsafe to regard it as indicating the present subsistence of such rights. Rights of common can be extinguished by surrender or abandonment of which there is no public record, so that land can only be safely found to be subject to rights of common if there is positive evidence of the existence of such rights. The position with town or village greens is different, for the persons entitled to customary rights to use them can only be deprived of their rights by Act of Parliament: see New Windsor Corporation v Mellor, [1975] 3 W.L.R. 25, at p. 33.

My attention not having been directed to any statute terminating the rights of the inhabitants of the locality to indulge in lawful sports and pastimes on this land, I found on the evidence that the inhabitants of the Village of Beesands had a customary right to indulge in lawful sports and pastimes on it, and I gave a decision to that effect on 19 July 1980.

Beesands Estates Ltd being aggrieved by that decision, required me to state a case for the opinion of the High Court.

The case came before Warner J. on 12 February 1982. The learned judge agreed with Mr Tuckey's submission that, when a lawyer says that something is prima facie evidence of something else, he generally means that it raises a presumption of the existence of that something else; the question then being

whether the other evidence is consistent with or rebuts the presumption. He did not think that that was the right way to approach the case, because the fact that the land was called Beesands Green of itself raised no presumption. However, the learned judge did not think that it would be right, in view of my findings, for him simply to decide as a matter of law that the view I reached was untenable, so he remitted the case to me, leaving it for me to consider whether I wanted to hear further evidence and further submissions.

The learned judge gave me guidance in the following passage in his judgment:-

> "Miss Cameron very attractively submitted that what the learned Chief Commissioner realy meant by the statement in the third paragraph of his decision was that the tithe apportionment was his starting point in that it was the oldest piece of evidence before him. If one looked closely at that document one saw that Beesands Green appeared from it to be uncultivated. Taking that factor in combination with the position of Beesands Green on the map, one could deduce that it was more probable that it was called Beesands Green because it was a village green, in the sense of being a piece of land over which the villagers had rights to dissport themselves, than merely because it was a grassy patch. The point being that, in the old days, in general, it was over uncultivated land of the manor that the villagers acquired such rights.
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> "If the learned Chief Commissioner had based his decision on that sort of reasoning, and if he had said that for the sort of reasons that Miss Cameron suggested it was more probable, in this case, that Beesands Green was a "green" in the second sense rather than the first - I think that this decision would have been invulnerable."

I reopened the hearing at Dartmouth on 8 June 1983. The reopened hearing was attended by Miss Sheila Cameron, QC. on behalf of the Devon County Council and by Mr S Tuckey, QC. on behalf of Beesands Estates Ltd.

Each party supplemented the facts which I found in my decision by further evidence. The following additional facts were proved by this evidence.

In addition to the unorganised playing of cricket and football by children, during the 1930's, men living in the village of Beesands used to play these games on the Green on Sunday afternoons. The football was not limited to the pitch let to the football club, but was played anywhere on the Green. On at least one occasion there was maypole dancing on the Green. During the 1937 Coronation celebrations a party attended a service at the Church, after which they went onto the Green, where tables were laid out, a fancy dress competition was held, and there were children's races on the flat part.

There was also some further evidence about Gunpowder Plot bonfires, which indicated that sometimes these were placed on the grass-land comprised in the Register Unit, because they had to be kept away from the fishermen's boats drawn upon the beach, and have only been on the beach in recent years. The boats, nets, and clothes lines also made it impossible to play football on the beach.

Evidence was also given regarding recreational activities on land in front of

the houses to the south of the land comprised in the Register Unit. This land was at one time about 50 yards wide, but much of it has now been washed away by the sea. It was covered in grass. Football was played there; it was used for the Coronation festivities, and swingboats were erected there. I do not doubt this evidence, but it does not negative the evidence regarding the activities on the Green itself.

In my view, the evidence clearly establishes that the land comprised in the Register Unit has been used by the inhabitants of the locality for lawful sports and pastimes as far back as living memory goes. The only question remaining to be considered is whether this has been done as of right. If it has, all the elements necessary to justify a finding that there has been a customary right existing from time immemorial are present. Mr Tuckey argued that the fact that the football club paid a rent for the use of the pitch is compelling evidence that there was no customary right to play football. Unfortunately, there is no evidence of the terms on which the football club held the pitch. The club may have been allowed to erect goal posts and to do other acts which would not have been permissible in the exercise of a customary right. In my view, there is no inherent inconsistency between the football club's right to use a defined part of the land and a right of the inhabitants to indulge in lawful sports and pastimes over the whole of the land.

Mr Tuckey also urged me to bear in mind the possiblity that the activities described by the witnesses were permitted by the good-natured indulgence of the landowners, and he said that if one knocks out the word "Green" in the tithe apportionment, the reset of the evidence is insufficient to support a claim of right. Although Mr Tuckey accepted that the use of the word "Green" has to be taken into account, it is equivocal and does not really help. I do not consider that it would be right so to dismiss the use of the word "Green" in the tithe apportionment. As Warner J. said in the passage from his judgment cited above, one could deduce that it was more probable that the land was called Beesand Green because it was a village green, in the sense of being a piece of land over which the villagers had rights to disport themselves, than merely because it was a grassy patch. This is exactly what I do deduce from a place-name in the form "X Green", and in the present case the remainder of the evidence is consistent with such a deduction.

Finally, Mr Tuckey argued that the size of the land in question, some 7 acres, is so great that a custom to use the whole of it for sports and pastimes is unreasonable. I find myself unable to say that it is unreasonable that such a right can exist over the whole of such an area adjoining and open to a beach.

Therefore, having considered the judgment of Warner J. and the evidence as a whole, I confirm the registration.

I am required by regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggrieved by this decision as being erroneous in point of law may, within 6 weeks from the date on which notice of the decision is sent to him, require me to state a case for the decision of the High Court.

Dated this 3rd day of June 1983

Chief Commons Commissioner