COMMONS REGISTRATION ACT 1965

Reference Nos 26/D/30
26/D/31

In the Matter of Devon Ox (Green),
Kilsby, Daventry District,
Northamptonshire

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DECISION

These disputes relate to the registrations at Entry No 1 in the Land Section and in the Rights Section of Register Unit No CL. 14 in the Register of Common Land maintained by the Northamptonshire County Council and to the registration at Entry No 1 in the Land Section of Register Unit No VG. 13 in the Register of Town or Village Greens maintained by the Council and are occasioned by the Land Section registrations being in conflict and by the Rights Section registration being subject to a deemed objection under sections 5(7) and 19(1)(h) of the 1965 Act and regulation 7 of the Commons Commissioners Regulations 1971.

I held a hearing for the purpose of inquiring into the disputes at Northampton on 26 June 1973. At this hearing (1) Mrs E M A Bach on whose application (dated 12 February 1968) the CL. 14 Entries were made, was represented by her son Mr C M D A Bach; and (2) Kilsby Parish Council, on whose application (dated 22 April 1967) the VG. 13 Land Section registration was made, were represented by Mr D H M N Williams solicitor of Woodford Robinson Williams & Co, Solicitors of Northampton.

At this hearing before any evidence was heard, Mr Bach applied for an adjournment of the proceedings on the grounds set out in the letter dated 22 June 1973 and written by Mrs Bach's solicitors; they said (in effect) that they had not had time enough to prepare for the hearing. Mr Williams did not agree to an adjournment.

Reference was made to a letter dated 31 March 1973 from the Parish Council in which mention was made of a fence erected by Mrs Bach on Devon Ox Green. Mr Bach stated (among other things) that the fence (ranch type) so mentioned in the letter started by the north side of the drive way leading to "The Lawn" (Mrs Bach's house) and went along the edge of the road about one foot within the land comprised in these two Register Units (CL. 14 and VG. 13) and that the fence contained a gate opposite a path which went westwards from the road towards a building (formerly the Devon Ox PH).

Upon the statement by Mr Bach that Mrs Bach would within seven days remove the said gate and that she agreed: (i) she would leave the resulting aperture open until such time as a Commons Commissioner should give his decision on these two references; (ii) she would not hold the Parish Council liable in any way if they should before such decision was given, cut the grass on the Green (the land comprised in Register Unit VG. 13); and (iii) the Parish Council would not be prejudiced in these or any other proceedings if the said fence stood until such decision was given, I adjourned the

proceedings on the understanding that the said agreement should not prejudice Mrs Bach in these proceedings and that nothing said at the hearing should save as above mentioned, prejudice any proceedings which either Mrs Bach or the Parish Council might bring against each other in the High Court or in any other Court in respect of anything done on the Green.

I held the adjourned hearing at Northampton on 6 July 1977. At this hearing Mrs Bach and the Parish Council were represented by Mr Bach and Mr Williams as before.

The land ("the Unit Land") comprised in the CL. 14 Register Unit is the same as that comprised in VG. 13 Register Unit save that the CL. 14 land is registered in three pieces separated by two tracks which are included in the VG. 13 registration and such registration includes also a small area at the west end of and outside the CL. 14 registration. The difference is not relevant to any question with which I am concerned, and I shall therefore for the purposes of exposition treat the proceedings as relating only to the Unit Land.

The Unit Land contains (according to the OS map, 1900 on which the Register map is based) if the two tracks be included, 3.579 acres. Apart from the above mentioned fence which does not obstruct the access in any way with which I am concerned, the Unit Land is an unenclosed reasonably level piece of grass land (crossed by some tracks leading to the adjoining buildings) situated at the junction of Barby Road and Ashby Road. The CL. 14 Rights Section Entry is of a right attached to a dwelling house "The Lawn" and the adjoining land to graze 1 pony, 12 ducks and 2 goats; The Lawn and the said adjoining land contains (according to the said OS map) 1.116 acres.

In support of the VG. 13 Land Section registration and against the CL. 14 registrations, oral evidence was given: (1) by Mr J J Thomas who has lived in Kilsby since 1946, has been a member of the Parish Council since 1952 and has been since 1955 and is now chairman; (2) by Miss M M H Pitton who has since 1934 lived at the Cedar Lodge (formerly called the Manor House and shown as such on the said OS map), who before that lived at Barby (about 2 miles from Kilsby) having been born there "at the tail end of the last century", and also while living at Barby in the circumstances below mentioned frequently came to Kilsby; (3) by Mr E Emery who was born in Kilsby in 1947 and has lived there ever since (apart from war service 1940-45) and who has been a member of the Parish Council for 2 years; and (4) by Mr W J Mason who has lived at Kilsby all his life (69 years) and has been a member of the Parish Council for the last 4 years. In support of the CL. 14 registrations oral evidence was given by Mr Bach who was born in 1943 and who produced a signed statement by Mrs Bach as evidence by her (she has lived at The Lawn since 1939). Mr Bach also produced a conveyance dated 12 June 1951 by which Lady S M G Crook conveyed to Mrs Bach The Lawn and the said adjoining land and a conveyance dated 30 August 1969 by which she conveyed the premises to herself and him (Mr Bach) jointly upon trust for themselves beneficially in equal shares; he explained that before the 1951 conveyance his father rented the property.

On 7 July 1977, I inspected the Unit Land it having been agreed at the hearing that I might do so unattended.

The definition of a town or village green in the 1965 Act (so far as relevant) is: " land...on which the inhabitants of any locality have a customary right to indulge in sports and pastimes...", see section 22. I summarise the evidence for the Unit Land being within this definition as follows:- Mr Thomas said (in effect):- In all the years he had known it, the Parish Council had always treated the Unit Land as a village green for which they were responsible. There used to be a Travelling Fair who approached him as chairman for permission to set up their amusements and roundabouts for two nights (as they had so he understood approached previous chairmen); they paid a fee to the Parish Council; it was considered an annual event; interest in it had now faded so they ceased to come about 7 years ago. Miss Pitton said (in effect):- There used to be a feast on the first Monday in August; they came down to it from Barby. Mr Emery said (in effect):- When he was a boy the Unit Land was open to everybody; he remembered playing ball and cricket there and erecting jumps. Before 1914 Captain C B Forward used to break remounts for gun teams. On the Unit Land there used to be the Old Crock Sale every year by travelling tinkers; in the autumn, kerosene flares. There was Hood's Fair; a steam traction engine with solid rubber wheels; a merry go round, swing boats, rifle range, hoopla, coconut shy, a circus menagerie (a pony, a monkey and 2 or 3 pretty birds etc). The Pytchley Hunt used to meet there. Mr Mason said (in effect):- All his life he had known the Unit Land as a village green; as a child he played cricket and football there. Also there were the fairs with merry go rounds etc. The Salvation Army band from Rugby gave concerts there. The Oddfellows had a rally there. The Church Army came there for processions and preaching.

Against the evidence summarised above neither Mrs Bach in her statement nor Mr Bach in his oral evidence said anything at all, except Mr Bach contended that the Unit Land was not a green because a nearby area (about 250 yards to the east) is on the OS map named "Malt Hill Green" and the Unit Land is not named at all. He said (in effect) that he and Mrs Bach were interested in keeping the Unit Land as an open space and had no objection to children playing on it or to the Parish Council cutting the grass; they had read in the Press of parish councils taking over greens and they were worried; although the present Parish Council said they would not build on it, they or their successors might convert it in some way; to him and Mrs Bach it would be a great disaster if this Common (meaning the Unit Land) were to disappear in any shape or form such as has happened in the case of other greens.

The Lawn and the other buildings to the east and northeast of the Unit Land all appear to be of some age (perhaps 100 years or more); the land on the north (on the other side of Barby Road) and on the east (houses off Devon Ox Road) appear to be a recent development; further there is a modern housing estate to the south of The Lawn. On appearance alone, I can understand anybody who knew the Unit Land before these developments, being worried. Of those acquainted with the law applicable to town or village greens, the majority would I think consider that Mrs and Mr Bach would have less reason to worry if the Unit Land were registered as such, rather than registered as common land; however this may be, I am only concerned to determine whether the Unit Land is within the above quoted definition. I accept the evidence of Mr Thomas, Miss Pitton, Mr Emery and Mr Mason summarised above which shows that the Unit Land has not only been used for many years by the inhabitants of Kilsby for sports and pastimes, but also has been incidentally used for the benefit of such inhabitants in many other ways in which village greens are commonly used. If Malt Hill Green is a village green (I understand it has been

finally registered as such) I should expect it and the Unit Land (they being near together) in the past to have been used together (now there is more motor traffic by Malt Hill Green); the non-naming on the OS map of the Unit Land is I think a circumstance of little weight. In my opinion the customary right claimed has been established.

Apart from the 1965 Act, land may be subject to a customary recreational right and also be subject to a right of common and/or be waste land of a manor. However under the 1965 Act, any such land without prejudice to any right of common over it, is to be registered as a town or village green. So the only other of the various questions raised at the hearing which I need determine is whether the right of grazing registered on the application of Mrs Bach exists.

Mr Bach said (in effect):- At The Lawn, they kept a pony and trap; it was a present to him on his 4th birthday, and was his mother's only means of transport. The pony was grazed on the Unit Land and at night kept in a stable at the back; the necessary hay and winter fodder was partly obtained from the farm opposite and partly from the Unit Land. Since they have sold the pony they have kept ducks which have from time to time been allowed on to the Unit Land. In all the time they kept livestock of any sort, they had used the hay from the Unit Land for bedding and also used the hay for protection of plants from frosts. They kept the pony for "a good few years", 5 or 6 at least, at most 9 or 10 years.

This was the only direct oral evidence of any grazing of the Unit Land from The Lawn, although Mr Bach mentioned that he understood that before he was born one of his elder brothers (now aged 51) kept 2 goats, and that in the last 2 months he had acquired a goat because his mother thought the milk would be good for him.

On one possible reading of Mrs Bach's statement the grazing from The Lawn would have been more extensive than that described by Mr Bach, but he explained that by "livestock" she meant his pony, his brother's goat, her hens and her ducks, and that "the usage...has been continuous", was a reference to the collection of hay and grass, not to grazing by livestock.

The contra evidence (at the hearing given before that of Mr Bach) was to the following effect:- Mr Thomas, Mr Emery and Mr Mason said that (apart from the claim of Mrs Bach) they had never heard of any grazing rights over the Unit Land, although it had like many other roadside pieces of grass been frequently grazed by cattle passing along the road or casually by persons living nearby. Miss Pitton said:- When she was young she had frequently visited The Lawn because they well knew Mr and Mrs Edwards who lived there (Mrs Edwards had been her mother's governess). Mr Edwards in about 1895 retired to The Lawn, having previously been the Minister at a nearby chapel. She had never heard of Mr and Mrs Edwards having any grazing right over the Unit Land; they kept the pony in a big garden at the back.

As I understood Mr Bach, he and Mrs Bach were really concerned to establish, not that they had a grazing right over the Unit Land for themselves, but that the Unit Land was subject to rights which they among others, particularly Mr Goodman, had always exercised and which would if they existed keep the Unit Land as an open space. Adjoining The Lawn is (or was) a house formerly Devon Ox Public House but from some time before 1939 occupied (no longer as a public house) by Mr Goodman who had a milk round; he tethered his milk pony on the Unit Land and grazed horses there.

In my view neither the grazing by Mr Goodman from Devon Ox Farm nor the taking of hay and grass from the Unit Land for use at The Lawn can support the right of grazing now in question. The grazing of the Unit Land from The Lawn as described by Mrs and Mr Bach is not enough to raise any presumption that there is any such right as has been registered. The appearance of the Unit Land is against there being any such right; I accept the evidence of Mr Thomas, Miss Pitton, Mr Emery and Mr Mason. My decision is therefore that the registration should not have been made.

The VG. 13 Land Section contains a note that every entry in the CL. 14 Rights Section is deemed to be made against the VG. 13 land, and there is an Entry in the VG. 13 Rights Section corresponding to that made on the application of Mrs Bach in the CL. 14 Rights Section. This VG. 13 note and this VG. 13 Entry can have no greater validity than the CL. 14 Rights Section Entry which as above stated I have decided should not have been made.

For the above reasons I confirm the VG. 13 registration in the Land Section, I refuse to confirm the CL. 14 registrations, and I refuse to confirm the said VG. 13 note in the said VG. 13 Rights Section Entry.

Mr Williams asked for an order for some part of the costs incurred by the Parish Council. In my opinion Mrs Bach should not be liable for any costs merely because she made an application for a registration which long afterwards was shown to be mistaken; when she made the application, she may well have thought that it would be accepted by the Parish Council. But after the hearing on 26 June 1973 she should I think have considered, taking such advice as might be necessary, during the next 6 months at least, whether the registrations she had made could be supported; in my view after such time these proceedings were being continued at her risk as to costs. Having regard to these considerations I shall order Mrs Bach and Mr Charles Michael Digby Ashley Bach of 28 Westercombe Avenue, Fulham, London SW6 to pay to Milsby Parish Council ONE HALF of the costs incurred by the said Council in these proceedings with the modification that the costs be limited to the things done after 26 December 1973, and I shall direct that such costs be taxed according to Scale 3 prescribed by the County Court Rules 1936 as amended. I shall make an order against Mr Bach as well as against Mrs Bach, because in the course of the hearing it appeared that he under the 1969 conveyance was (in part) her successor in title, and was therefore appearing in these proceedings not only as representing her but also on his own behalf.

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 12th day of August 1977

A. A. Baden Fuller

Commons Commissioner