COMMONS REGISTRATION ACT 1965 Reference No 203/D/23

In the Matter of Sedrup Green, Stone with Bishopstone, Aylesbury Vale District, Buckinghamshire

DECISION

This dispute relates to the registration at Entry No 1 in the Land Section of Register Unit No VG. 84 in the Register of Town or Village Greens maintained by the Buckinghamshire County Council and is occasioned by Objection No 100 made on behalf of Lord Saye and Sele, Mr R B Verney and Mr D Skilbeck as "The Trustees of The Ernest Cook Trust" and noted in the register on 26 January 1972.

I held a hearing for the purpose of inquiring into the dispute at Aylesbury on 24 and 25 June 1976. At the hearing (1) Mr Anthony Huff of Undine Cottage on whose application dated 17 December 1969 the registration was made, (2) Mr Arthur Thadē Pilley whose application dated 18 December 1969 is noted in the Register and (3) Stone with Bishopstone Parish Council were all represented by Mr P J Howarth solicitor of Wilkins and Son, Solicitors of Aylesbury; and (4) Lord Saye and Sele (5) Sir Ralph B Verney and (6) Mr D Skilbeck were all represented by Mr O Albery of counsel instructed by Francis & Crookenden, Solicitors of London.

The grounds of Objection are: "The land and no part thereof was a Town or Village Green (as defined in the Commons Registration Act 1965) at the date of registration.

The land ("the Unit Land") comprised in this Register Unit, containing (according to the Register map, 1921 OS no 14) 8.685 acres, is (if indentations and irregularities be disregarded) approximately square, each side being about 200 yards long. It is about 700 yards southwest of the Aylesbury-Thame Road (A418); the only access to the Unit Land with motor vehicles is by a minor road which leaves the A 418 near the Bugle Horn Public House (about 2 miles from Aylesbury), and after passing the entrance to Calley Farm, enters the Unit Land at its west corner, and ends near its south corner.

Oral evidence was given: (1) by Mrs D M E Good who is chairman of the Parish Council and has lived in the area since 1936, (2) by Mr A S Clarke who was born in 1916 and from his earliest years lived until he married either in a cottage (since demolished and rebuilt) near the gate ("the West Gate") formerly across the road where it enters the Unit Land, or afterwards ⟶ in another cottage on the southwest side of the Unit Land; (3) by Mr Pilley who has lived in Hazel Cottage (on the southwest side of the Unit Land) since 1938 or 1939; (4) by Mr Huff who has lived at Undine Cottage (just north of Hazel Cottage) since 1961; (5) by Mr J S Hickman who was born at Calley Farm in 1920 and has ever since (except between 1942 and 1945) lived there; (6) by Mr L F White who has

lived at Sedrup Farm house since 1955 (he and his brother then became joint tenants of the Farm); (7) by Mr R J White who with his brother became tenant of the Farm in 1955 and has lived in Bishopstone since 1949; (8) by Mr A Wixon who was born in 1931, now works for the Hartwell Estate and has been acquainted with the Unit Land and its surroundings all his life; (9) by Mr G Jeffery who was born in 1900 and started to work for the Hartwell Estate in 1919, and has lived in Hartwell since 1924 or 1925; and (10) by Miss P A Maxwell who was an articled clerk with and is now (in expectation of becoming a solicitor) employed by Francis & Crookenden.

Between the first and second day of the hearing I inspected the Unit Land.

Mr Howarth accepted that the only relevant part of the definition of a town or village green in section 22 of the 1965 Act is: "land on which the inhabitants or a locality have a customary right to indulge in lawful sports and pastimes". His contentions can I think be summarised as two propositions:- first, the Unit Land has always been a distinct piece of land which has been or could be referred to as a "Green", and has always been the centre of an inhabited locality known as Sedrup or Southwarp; and secondly, although there is no evidence that the inhabitants of this locality ever indulged in any organised sport or pastime, the children of the inhabitants have made some recreational use of the Unit Land, enough, because the inhabitants were never sufficiently numerous to want to do anything more to establish the requisite customary right.

As to the first proposition, the public and published documents produced or referred to were as follows:-

(A) The Hartwell and Stone Inclosure Act 1776 (16 Geo.3.c. 46), which provided for the inclosure of about 1,740 acres including (among other open and common fields) Southwarp Field, all then owned by Sir William Lee, the then Lord of the Manor of Hartwell and Stone. This Act contains no express reference to the Unit Land.

(B) The Award dated 19 March 1777 which contains an allotment of:"one other private Cart Carriage and drift Road...(30 feet)...leading out of the common street of Bishopstone...leading into through and over the Green of Southwarp hereinafter awarded to the said Sir William Lee and a certain Lane called Calley Lane to a gate at the end of the Road leading over the said Close called the Calley into the Turnpike Road..."; and an allotment to Sir William Lee of "ONE other PLOT of Ground called the Green in Southwarp aforesaid containing eight acres two roods and twenty four perches including all roads into through and over the same... bounded on the South or Southeast by a certain old Inclosure in Southwarp called Coxes Close...and on the South or South West by the Eighth Allotment...and on the several other parts thereof by other old Inclosures and Homestalls in Southwarp..." I am satisfied that the private road so allotted is the track (now a public bridleway and footpath) from Bishopstone to the south corner of the Unit Land and the then part of the above mentioned minor road which now crosses the Unit Land; and also satisfied that the Green referred to in the Award and the Unit Land (a little more or less perhaps) are the same land.

(C) An extract from the History and Antiquities of the County of Buckingham by G Lipscomb (1847) vol 2:- "Parish of Stone with Bishopstone and Sedrup. Sedrup anciently known as Southwarp. Separately described in Domesday Book as follows: William...holds...one virgate of land and six acres in Sudcote. There is land to half a plough..."

(D) Aedes Hartwellianae: Manor of Hartwell, Capt W H Smyth RN. The map adjoining page 1 ($1\frac{1}{2}$" = 1 mile) marks "Southarp Green".

(E) Addenda to Aedes Harwellianae by Admiral W H Smyth (1864) at page 85:- "Sedrop Farm...a good old tenement...it consists of 214 acres 130 of which are pasturage and the remaining 84 are arable land, looking upon a now rare Village Green" and the map ($3\frac{1}{2}$" = 1 mile) marks "Sedrop Farm" and separately (referring to the Unit Land) "The Green", shows a water course flowing from the southwest across the middle of the Unit Land to join the water course from Sedrop Farm pond along the northeast boundary of the Unit Land.

(F) Shorter Oxford Dictionary: "Green:

The private documents produced on behalf of the Objectors were:-

(G) A mortgage dated 29 October 1889 by which Mr E D Lee mortgaged the Hartwell Estate (including Hartwell House) by reference to a Schedule and plan. Such plan marks "Sedrup Farm" and marks the Unit Land as "Sedrup".

(H) A conveyance dated 25 April 1938 by which after reciting that in 1926 lands thereby conveyed were vested in Mrs E K Eyre (then Miss E K Lee) the Hartwell Estate (including Hartwell House) was conveyed to Mr Ernest Edward Cook.

(K) A tenancy agreement dated 5 August 1955 by which the Ernest Cook Trust (sic) granted to Mr R J and Mr L F White a yearly tenancy of Sedrup Farm containing 215.139 acres including the Unit Land (OS no 14: Pasture: 8.685).

I need not I think summarise the oral evidence given by each of the witnesses, because except possibly on some unimportant matters of detail, there was no conflict.

As to the surroundings of the Unit Land:- As Mr Clarke and Mr Jeffery first remembered (in the 1920's) there were in addition to Sedrup Farm house and buildings about 12, 13 or 14 cottages, and the animals grazing there were confined by the West Gate above mentioned. Two (?three) of these cottages situated near the east corner of the Unit Land were soon after demolished and the ground levelled as it now is. More recently the two cottages near the west corner have been replaced by a modern dwelling house. The other cottages have been renovated, in some cases two cottages being turned into one dwelling house. About 1959 or 1960 a fence ("the First Fence") was erected by Mr White dividing the Unit Land into two parts; one ("the Y Part") being a Y-shaped strip along the southwest boundary, being the said minor road, the verges on either side of it, a triangular piece at the southwest end and all the tracks and paths leading to the buildings to the west, southwest and south of the Unit Land; the other ("the Grazed Part") being the rest of the Unit Land. Mr White said that the purpose of the fence was to prevent cattle straying from the Grazed Part northwards along the minor road, it having become impossible by reason of the increased motor traffic to the surrounding buildings, to be certain that the West Gate would be kept shut. The First Fence was differently described by the various witnesses; but I conclude that it was ordinary single wire electric fence or something like this. About 1964-65, Mr White in place of the First Fence erected the now existing post and barbed wire fence ("the Second Fence") which is about 10 to 15 feet nearer to the minor road than the First Fence, so that in the result the Y Part became somewhat narrower and the Grazed Part somewhat larger. When I

walked over the land, I saw two short lengths of fence apparently recently erected, inclosing two small areas near the south corner; I had no evidence about these; they are I think irrelevant to any issue I have to determine, and I disregard them. Save as aforesaid, for as far back as any witness remembered, the Unit Land had no fence across it, and it was all open to the road.

"We all know what is meant in popular parlance by a village green; it is a small open space covered with turf, traversed generally be one or two footpaths, usually surrounded or crossed by roads lying in the midst or on the outskirts of a village", per Sir R Hunter in Preservation of Open Spaces (1896), cited by Mr Albery. In popular parlance, I am satisfied that the Unit Land, if it is not now,certainly was before the First Fence was erected and before the cottages were demolished and reconstructed, a village green in popular parlance; I consider therefore that Mr Howarth's first proposition is established.

I am concerned to determine, not whether the Unit Land is a village green in popular parlance, but whether it comes within the above quoted section 22 definition. As pointed out by Sir R Hunter, not every piece of land which is a village green in popular parlance was in his day protected by law, op. cit. ~~supra~~ chapter XVI; and the position is still the same now under the 1965 Act. So I must consider Mr Howarth's second proposition.

All the witnesses agreed that the main use of the Unit Land had always been for grazing sheep and cattle, that at no time had any organised football, cricket or other game been played on it and that any recreational use of it by children or adults as described below was confined to persons living at Sedrup.

Mr Clarke said (in effect):- When he was young, he had played football there; Mr Arnold Small who at that time used to live in or near Hazel Cottage, and who was a "proper footballer" (he played for Aylesbury United), used to play football with the children who lived in Sedrup; but there was no pitch. When he was young there was an annual bonfire on Guy Fawkes night. He with other boys (when he was 12 years old) rode motor bicycles over the Green. There was some cricket (hitting a ball about).

Other witnesses described more recent use of the Unit Land by children. The children kicked or hit a ball about and played other children's games, much as might be expected from the situation of the cottages surrounding the Unit Land. There had only been one (possibly two) Guy Fawkes bonfires since 1939.

Mr Howarth contended that although the customary right may have at the present moment lapsed into disuse, it must have existed in the early part of this century, and on the basis of decided cases cannot be abolished by abandonement.

I agree that a customary right cannot be abandoned but the circumstance that there has been no recreational use as of right in recent years, may be evidence that there never was any customary right, see Hammerton v Honey (1876) 24 WR 603, cited by Mr Albery.

Any use relied on as supporting a customary right, must be "as of right", see Brocklebank v Thompson (1903) 2 Ch 344. There was no evidence that Mr Small or the children or their parents ever asked permission from anyone to play as they did. But as to this I must not overlook the observations made by Harman LJ and Russell LJ (in relation to a claim that certain persons in Durham have a customary right to take coal off the foreshore); that to show that permission

has never been asked or refused "is very far from showing that the exercise of the privilege was under claim of right...that when the law talks of something being done as of right, it means that the person doing it believes himself to be exercising a public right"; that the question is whether the act was done by a person who believes himself to be exercising a right or was merely doing something, which he felt confident that the owner would not stop but would tolerate because it did no harm"; that a distinction must be made between the activities of a person doing something as of right and doing it as "a de facto practice which (he) rightly thinks no one would find objectionable and which the owner...in fact tolerated as unobjectionable", Beckett v Lyons (1967) 1 Ch 449 at pp 468, 469 and 475. In my opinion the recreational use described by Mr Clarke was "unobjectionable" within the meaning of the above quoted observation and was not therefore as of right.

Further the customary right must be reasonable. In my opinion for the inhabitants of no more than 14 cottages to have a customary right to play over so large an area as the Unit Land would having regard to its nature and situation, be unreasonable. Although such a customary right would not I think be unreasonable if it were limited to the Y Part, being the part of the Unit Land now open and unfenced, I can think of no good reason for ascribing the recreational use of the land to this Part.

Further a customary right cannot in law exist unless it can properly be presumed that it existed from time immemorial. The circumstance that the Unit Land was by the 1777 Award allotted without reference to any such right, is I think a strong indication that no such right was then recognised.

Upon the above considerations, I conclude that the Unit Land is not subject to any customary right as has been claimed, and is therefore not within the section 22 definition, and accordingly I refuse to confirm the registration.

Mr Albery contended that I should for the benefit of his clients make an order for costs against Mr Huff, Mr Pilley and the Parish Council, because (i) costs should follow the event unless there is some reason relating to the conduct of the case on the basis of which a discretion to refuse costs can be judicially exercised, and (ii) this is not a case where there have been litigants in person who might not have known of their rights (at all relevant times the persons concerned have been represented by solicitors). The 1965 Act and the regulations made under it contemplate I think that a person may apply for a registration without fully investigating whether he could establish the registration if it were disputed; in my opinion a person who applies for such a registration is not at risk as to costs merely because he applies. In my opinion a person does not become liable for costs in the absence of some unjustifiable act or omission on his part. I think both Mr Huff and Mr Pilley had reasonable grounds for making their applications and the Parish Council had reasonable grounds for supporting them, and that it was in the public interest that the status of the Unit Land under the 1965 Act should be established after a public hearing such as I have held. The representation of Mr Huff, Mr Pilley and the Parish Council by solicitors has significantly reduced the cost of such hearing to all concerned. For these reasons I do not think fit to make any order as to costs.

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 16th — day of August — 1976

a. a. Baden Fuller

Commons Commissioner