COMMONS REGISTRATION ACT 1965

Reference Nos 209/D/345
209/D/346
209/D/347

In the Matter of South Tawton Common, Ash Common, Gooseford Common, Firestone Common, Addiscott Common, Pixies Garden Common, Ramsley Common and waste, Week Hills and manorial waste, Waste at Ford Lane, and Taw Green, all in South Tawton, West Devon Disrtict, Devon

SECOND DECISION

Introduction

This decision is supplemental to my decision dated 5 October 1984 and made in this Matter after a hearing held at Exeter on 8 and 9 November 1983; and is occasioned first by a letter dated 2 November 1984 pointing out an "obvious error" in line 4 of page 30 of my said 1984 decision in that it does not accord with what is therein set out under the heading "The two near Belstone Pieces" at page 16; and secondly by letters from Mr Christopher John Woide Godfrey specified in Part I of the First Schedule hereto, alleging errors under the heading "Ash Common" at page 12 of my said 1984 decision.

The two near Belstone Pieces

The November 1984 letter is from Burd Pearse Prickman & Brown (their Mr F J Woodward was present at my said 1983 hearing) and claimed that my said 1984 decision should be amended as specified in Part I of the Second Schedule hereto. I have a letter dated 27 November 1984 from Devon County Council saying that from the Registration Authority's view point my said 1984 decision ought to be so amended.

In my opinion such amendments are needed to correct clerical errors on my part due to an accidental slip or emission, and accordingly I have this day corrected them under regulation 33 of the Commons Commissioners Regulations 1971.

Ash Common

The said letters of Mr Godfrey are in effect an application to me to set aside my said 1984 decision and continue my said 1983 hearing with a view to my confirmation of the Land Section registration at Entry No. 1 being modified not only (as now) by the removal from the Register of the parts of the Unit Land specified in sub paragraphs (A), (B), and (C) of paragraph 1 of the Third Schedule thereto, but also by the removal from the Register of Ash Common ("the Disputed Part").

I held a hearing for the purpose of inquiring into the said application at Exeter on 16 July 1985. At the hearing: (1) Mr Godfrey attended in person on his own behalf and as representing "the interests" of Mrs Susan Eileen Godfrey who is with him a grantee under the conveyance of 22 March 1982; and (2) Mr F J Woodward solicitor of Burd Pearse Prickman & Brown, Solicitors of Okehampton represented South Tawton Parish Council and South Tawton Commoners Association (their membership being I suppose all or most of those listed in paragraph 7 of the said Third Schedule).

At the beginning of the hearing Mr Woodward started to submit that the application was contrary to law. I ruled that Mr Godfrey should begin by putting forward his case as applicant and that I would consider legal submissions afterwards.

Accordingly Mr Godfrey then gave oral evidence in the course of which he produced the documents specified (except CJWG/10) in Part III of the First Schedule hereto, and referred to the epitome of title specified in Part I of such Schedule. He read the statement (CJWG/1) which in effect repeated with some additions his February 1985 statement specified in Part I of such Schedule, made various submissions hereinafter by me considered in detail, and answered questions about them.

Mr Woodward as to the law about setting aside decisions referred to me to (i) regulation 33 of the Commons Commissioners Regulations 1971 under which a Commissioner may correct "any clerical mistake or error arising from any accidental slip or omission", (ii) RSC Order 20 rule 11 which confers on the High Court a similar power, and (iii) → the notes about this rule in the Annual Practice 1985 at pages 351 to 354 where mention is made of R v Cripps, ex p. Muldoon (1983) 3 WLR 465. He also referred to (iv) RSC Order 59 rule 10 under which the Court of Appeal may "receive further evidence on questions of fact ... but in the case of an appeal from a judgment after ... hearing of any ... matter on the merits, no such further evidence ... shall be admitted except on special grounds" (v) the notes in the Annual Practice 1985 at page 831 particularly the quotation from Ladd v Marshall (1954) 1WLR 1489: "... first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that if given it would probably have an important influence on the result of the case though it need not be decisive; thirdly the evidence must be such as is presumably to be believed or in other words it must be apparently credible although it need not be uncontrovertible" and (v) to Halsbury Laws of England vol 22 (3rd edition 1958) paragraphs 1670 and 1671*. He submitted that because Mr Godfrey was represented at the 1983 hearing, his application was not within regulation 21 (default of appearance) of the 1971 Regulations; there is nothing else in the Regulations empowering a Commons Commissioner to set aside his decision; so the application should be disallowed.

Mr Godfrey said that not being a lawyer he could provide no answer to the said submissions of Mr Woodward; his application was within liberty to apply granted at page 22 of my said 1984 decision about "other errors which ought to be corrected without putting the parties to the expense of an appeal".

*Vol 26 (4th edition 1979) paragraph 561.

I cannot in any decision of mine by granting a liberty to apply confer on myself a power not by law authorised. I regret that Mr Godfrey may have been misled by the words I used. As a general rule a Commons Commissioner who has given a decision is functus officio and cannot alter his decision he has given, see R v Cripps supra. As appears in the said notes in the Annual Practice to Order 20 rule 11, to this rule (as applied by the High Court) there are a number of exceptions both under the RSC and under the inherent jurisdiction of the High Court; these exceptions (set out in the Annual Practice) cannot be summarised briefly. I have in other cases granted liberty to apply using similar words; of the not many applications received, the majority have been granted because they seemed to be within one of the exceptions and those concerned were all agreeable or indifferent, and the minority of them, except for one and possibly a few others, were withdrawn or not pursued because of opposition or some other sufficient reason. I cannot recollect more than one (there may have been a few others) about which I have given a decision after a contest, and I can think of none which relevantly resemble the instant case.

I am inclined to the view that on the above summarised legal arguments of Mr Woodward ⟶ I should dismiss Mr Godfrey's application without any consideration of the particular errors he specifies merely on the ground that having heard the "matter on the merits" in the presence of his representative, I am functus officio, and in the absence of any evidence of any relevant matters occurring after the hearing, I cannot under any inherent jursidiction I may have as a Commons Commissioner reopen the hearing.

Because Mr Godfrey and others may consider this an unsatisfactory way of disposing of his application, I now consider the "secondly" mentioned in the judgment of Ladd v Marshall supra: "evidence ... such ... would probably have an important influence on the result ..."; for my jurisdiction cannot be larger than that of the Court of Appeal.

Mr Godfrey in his statement mentions "points in the decision" by him numbered (1) to (16); of these numbers (1) and (8) were those most discussed at my 1985 hearing.

Point (1), Mr Godfrey is not the owner of Coldstone (near to and to the northeast of the Disputed Part) in succession to Major C B Andrews; neither ever owned Coldstone which currently belongs to Mr Jim Barker.

In my 1984 decision I assumed that the Disputed Part was in the same ownership as Coldstone from sometime before 1920. This assumption is confirmed by CJWG/7 up to the 1956 conveyance. Mr Godfrey, if the hearing was reopened could give possibly credible evidence that after the 1956 conveyance the Disputed Part and the adjoining OS No. 257 containing 1.784 acres were not in the same ownership as Coldstone and that after the 1982 conveyance the Disputed Part was owned separately from OS No. 257.

At my 1983 hearing I was considering the ground of the Objection, that the Disputed Part "has been enclosed for many years" and in my 1984 decision I considered whether it had become part of the adjoining farm lands, and assuming it had since 1920 been in the same ownership as Coldstone concluded it had not been enclosed (never having become part of the farm lands so called). The falsity of this assumption as regards the years 1956 to 1970 (the date of the Objection) is not against, and is if anything for my conclusion.

Point (8), as orally explained by Mr Godfrey, was in effect:- The Tithe Award specifies as having "right on Ash Common" 4 holdings, being Coopers Ash, Westaways Ash, Tolly's & Coombes Ash and Part of Kapman's Ash containing 70a.3r.1p.; 49a. 2r.24p.; 33a.2r.0p.; and 43a.3r.15p.. These holdings can be identified with modern holdings (all around East Ash and northeast of Blackaton Brook). Under the 1965 Act no rights of common attached to these holdings have been registered. Therefore sometime before the 1965 Act the rights were abandoned. So the Disputed Part ceased to be common land within the meaning of the Act.

Against this point Mr Woodward submitted (in effect):- (1) the Tithe Award is inadmissible. (2) Rights of common are not abandoned by non exercise, Tehidy v Norman 1971 2QB 528. (3) The relevant date is when the registration was made (Land Section 8 December 1967, Rights Section mostly in 1968); this was before it became impossible for those entitled to any of the said 4 holdings ——→ ——→ to apply for a registration of rights; so there was no evidence of abandonment before then.

Mr Godfrey contended (in effect):- Mr Woodward could not logically rely on the Tithe Award as showing that the Disputed Part was known as Ash Common and subject to the rights of common specified in it, and at the same time contend that there could be any right over it other than those specified in the Award as attached to the said 4 holdings.

About the evidentiary value of a tithe award, I have the High Court judgment, Knight v David 1971 1WLR 1671. Section 64 of the Tithe Act 1836 enacts that "every ... statement in ... (an award) ... shall be deemed to be satisfactory evidence of the matters therein ... stated ..." Such section means "satisfactory" for the purposes of the 1836 Act and the commutation to be made under it, see Wilberforce v Hearfield (1877) cited in the said judgment. But nevertheless an award may be evidence of any fact recorded in it at common law or under the Civil Evidence Act 1968.

From this judgment I deduce first that the instant Award is not for the purposes of determining the extent of rights of common a judicial decision that there were over the Disputed Part the rights in it mentioned and not any other rights; and secondly the evidential value of the Award is to be determined like any other old document upon the circumstances so far as ascertainable in which it was made and the likely knowledge of the person who made it of the facts which afterwards have come to be disputed.

The Valuer who made the Award assumed as an essential part of his apportionment of the tithe on the Disputed Part that it was then a common over which there were rights of common attached to the said 4 holdings. To do this he must have been informed that the Disputed Part was known as Ash Common and that rights were then being exercised over it from the said 4 holdings; to this extent the Award is I think weighty evidence of these facts. But it was not necessary to his apportionment for him to record, or even to consider whether there were attached to other lands in the Parish rights over the Disputed Part which were not being exercised so much as to make it proper to burden these lands with part of the apportioned tithe; so as to the then non existence of any such rights, the Award is I think evidence of little if any weight.

For these reasons in my opinion the production of the Award at any reopened hearing would be unlikely to have an important influence on, and might if anything be against any, result wanted by Mr Godfrey.

I need therefore express no opinion about the question raised by Mr Woodward whether the non-registration under the 1965 Act of the right of common makes the land outside the definition of common land in section 22; about this so far as the question depends on the importance of the words "date of registration" in section 10 of the Act there is some conflict of authority, see Central Electricity v Clwyd 1976 1WLR 151, re Box 1980 Ch109 and Corpus v Gloucestershire 1983 QB 360.

About the 14 other points made by Mr Godfrey (CJWG/1) I have the following comments:- (2) That for some years the only possible north exit from the Disputed Part was to the smaller and remote OS 246 is for my 1984 decision. (3), (4) and (5) That the Disputed Part had been enjoyed with Throwleigh House (being near or ? the same as the Sanatorium marked on the Register map), the ownership of the horses whose hoof marks I saw, and the value of the Disputed Part for recreational purposes, at any reopened hearing, could not influence the result. (6) The relevant words in the 1926 and 1969 conveyances (PC/6 and PC/7) are (as pointed out by Mr Woodward) "all other the rights in or upon ... Ash Common ...", and not as mistakenly stated at page 12 of the 1984 decision (without "the"). (7) Whiddon Down was not registered, perhaps because it is generally accepted as private farm land. (9) Appearances can seldom if ever be decisive, but they are relevant. (10) The statutory declaration of Mr Webber was obtained on behalf of Mr Godfrey; by reason of his age, it would be a hardship on Mr Webber to give oral evidence in Exeter; merely because his oral evidence might make an impression more favourable to Mr Godfrey, is not I think reason enough for my making special arrangements to take Mr Webber's evidence orally in his house, even if this is agreeable to him. (11) Point does not arise. (12) As to the absence of evidence of being "exclusively occupied", see page 15 of my 1984 decision. (13) I am not concerned with the effect of my decision, so I say no more than: I do not agree that its effect would necessarily be what Mr Godfrey suggests. (14) See below. (15) The legal proposition stated, although correct, would not influence the result at any reopened hearing. (16) See above.

Whether or not having regard to what happened at my 1983 hearing, I then had or now have any doubts about my 1984 decision is irrelevant, as I am precluded from altering or explaining it by the legal rules referred to in R v Cripps supra. Having regard to what happened at my 1985 hearing, my present decision is for the reasons set out above that the additional evidence which might at any reopened hearing be then produced by Mr Godfrey would not have any important influence on the result.

Mr Godfrey in his point (14) explained why he did not attend the 1983 hearing in person. In reply to my request to him to amplify this explanation, he said (in effect):- That he did not rely on such explanation and accepted that Mr Bennett was authorised to act for him at the 1983 hearing. When he purchased in 1982 the attitude of the vendors was that they were selling a "field", not common land like the high moor surrounding Cawsand Hill (such moor in my 1984 decision called South Tawton Common) and that the "field" certainly was not a common.

Upon the above considerations, I conclude that the secondly and possibly also the first in the above quotation from Ladd v Marshall are not satisfied. Accordingly I dismiss Mr Godfrey's application; and I need not consider any other of Mr Woodward's submissions of law.

Mr Woodward asked for costs.

Against, Mr Godfrey produced the correspondence CJWG/10 and contended that his application not being vexatious, in accordance with the practice at Town Planning inquiries, by making it he was not at risk.

The Commons Commissioners very seldom make an order for costs, the reason being that under the 1965 Act persons were in effect encouraged to make registrations and to make claims which but for the Act might never have been made within a time limit generally not long enough for the making of any proper investigation; so it would be unjust to award costs against such persons merely because after a public hearing their claimswere after an investigation, rejected; in short a costsorder is not made unless there is some reason additional to that of being the unsuccessful party. The discretion conferred by section 17 of the 1965 Act is not I think limited to vexatious claims. As to there being a reason:- The hearing required by the 1965 Act was concluded in 1983 and followed by my 1984 decision. The only reason for my holding a hearing in 1985 was the application. Mr Godfrey was represented at the 1983 hearing and I infer that if he had been present, having regard to his vendors attitude, he would have said much the same as Mr Bennett did. His telephone conversion with Mr Cann referred to in his letter of 1 February 1985 (CJWG/10) was (so he said) to the effect that he had a problem because the only lawyer who knows anything about commons is Mr Woodward, and he would therefore like to meet Mr Cann as chairman and ask his advice; it cannot I think be held against the Parish Council on costs that the suggested meeting was refused; or held against them that Mr Godfrey (as he said at the hearing) was told by his own lawyer that he was sorry he could not help. In the letter of 11 March 1985 (CJWG/10) Mr Godfrey was told that neither the Parish Council nor the Commoners Association would give way without "formal" legal proceedings; so he knew they were opposed to any application on the lines of his letter of 21 December 1984 (see Part I of the First Schedule hereto), and could therefore have withdrawn his application in time to avoid my 1985 hearing, notice of which was not sent until June. My decision is that these facts are reason enough for making a costs order against Mr Godfrey.

I think the appropriate scale is No. 2. The Parish Council were entitled to be heard at the 1983 hearing on all questions relating to the Land Section, as a "concerned authority" and accordingly an essential party to the application ; they should therefore have all their costs. The South Tawton Commoners Association came into existence in 1981, and Mr Godfrey should not be charged with any extra costs as a result of Mr Woodward also representing them; but the costs payable to the Parish Council should not be reduced merely because Mr Woodward represented them as well as the Parish Council. The application raised unusual questions of law, which by Mr Woodward may have needed special consideration. Upon these considerations my order for costs will be in the form of the Third Schedule hereto.

I am required by regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggreived 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.

FIRST SCHEDULE

Part I: letters before hearing from Mr Godfrey to Clerk of Commons Commissioners

22 & 26 November 1984	Letters encling epitome of title certified examined 22/3/82 and saying (among other things) that if it is not possible to rectify certain aspects of the decision "then an injustice will have been done". The said epitome comprises 2 certificates of official search dated 8 June 1964 and 8 March 1982 under the Land Charges Acts 1925 and 1972 against names therein mentioned, copy of the conveyance dated 19 June 1964 being CJWG/4 in Part III below and a copy of probate dated 1 June 1979 of the will of Christopher Bryan Andrews who died 8 February 1979.
21 December 1984	Letter formally requesting Commons Commissioner to set aside his decision as regards Ash Common and continue the hearing on grounds set out in the said letter of 22 November 1984.
18 March 1985	Letter ... I had hoped to be able to arrange a meeting with the lawyer who represented the Parish Council at the inquiry in order to discuss the general situation. The Parish Council has declined to enter into discussions ... again would like formally to request the Commons Commissioner to set aside his decision as regards Ash Common and to continue the hearing within the terms of my letter of 21 December ... and enclosing: (a) statement dated 1 February 1984 of the ground of such application and specimen letter dated 18 March 1981 enclosing the said statement sent to R J M Plant Esq South Tawton Commoners Association and W G Cann Esq, South Tawton Parish Council (one letter) Mrs D Cooper, J W Reddaway Esq, F J Ward Esq, Miss K M F Terry, Mrs P M Warden, C G Courtier Esq, E G T Lowe Esq, Messrs G T G and I A G Harris and Mr P J Trott (of Devon County Council).

4 June 1985	Letter about hearing.

Part II: Other letters before hearing to Clerk of the Commons Commissioners

28 March 1985	From Burd Pearse Prickman & Brown on behalf of South Tawton Parish Council and South Tawton Commoners Association "... some sort of appeal ... instructed ... resist strongly any such appeal by Mr Godfrey"
18 April 1985	Letter from R J M Plant as Hon Secretary of South Tawton Commoners Association: "... application from Mr C J W Godfrey.. This Association will oppose the application ... I am no longer Clerk of South Tawton Parish Council ... authorised by the Council to state that it will oppose the application ..."

Part III: produced by Mr Godfrey at the hearing

CJWG/1	--	Statement of Case (6 pages flscp).
CJWG/2	--	Authority signed by Mrs S E Godfrey authorising Mr C J W Godfrey "to represent my interests at the forthcoming hearing by the Commons Commissioner".
CJWG/3	184-	Extract (2 pages) from Tithe Apportionment Award and extract from Tithe Map showing Tithe Nos, some overwritten in red with subsequent OS Nos.
CJWG/4	19 June 1964	Conveyance by George French to Christopher Bryan Andrews of two fields ... formerly parts of lands ... called ... Coldstone ... Nos 201 and 257 on the Ordnance ... Map ... respectively 3.724 ... and 1.784 acres.
CJWG/5	22 March 1982	Conveyance by James Eaton Pettit and others (exors of C B Andrews) to C J W Godfrey and S E Godfrey of "field ... number 201 in the Ordnance Survey Map ... containing 3.724 acres or thereabout and shown ... on the plan annexed".

CJWG/6	3 April 1951	Conveyance by Edward Thomas Williams to George French of "two fields ... formerly parts of the lands ... called ... Coldstone ... numbered 201 and 257 ... 3.724 and 1.784 acres".
CJWG/7	1964	Abstract of title George French to OS Nos 201 and 257: commencing with a mortgage dated 4 October 1920 by George Ould to John Knapman of "... lands ... called ... Coldstone ... containing 10.a.36.p described in 1st Schedule (as in) Tithe Apportionment Book and also land known as Ash Common otherwise Coldstone or Catson Bushes containing 3a.3r. being 568 in the said Book; both also described in 2nd Schedule Nos. from OS map, totalling 14.470 acres; and including conveyance on sale dated 30 June 1942 by J Knapman and others to Kathleen Lucy Geldard of Coldstone containing 14.470 acres described in Schedule by reference to OS Nos. and conveyance dated 22 October 1948 by K L Geldart to Lt Col Edward Williams of said premises containing 14.470 acres; and including said conveyance of 3 April 1951 (CJWG/6); with manuscript additional abstract of conveyance of 19 June 1964 (CJWG/4).
CJWG/10	1 February 1985	Copy letter from C J W Godfrey to Mr Cann, Chairman of South Tawton Parish Council.
	6 February 1984	Reply from R C M Plant, Hon Secretary of South Tawton Commoners Association acknowledging said letter of 1 February.
	4 March 1985	Copy letter from C J W Godfrey to Mr Plant
	11 March 1985	Letter from R J M Plant to C J W Godfrey... Mr Cann points out ... decision has confirmed the Parish Council claim to Ash Common ... If you wish to pursue the matter further it will be necessary for you to do so by formal legal procedure through the Commons Commissioners.

SECOND SCHEDULE

Part I: obvious errors in my said 1984 decision which ought to be corrected

At line 4 of page 30 substitute "Reddaway Objection No. 498" for "Cooper Objection No. 276".

At line 36 of page 31 substitute "78 (J W Reddaway)" for "78 (J N Redway)".

I have this day corrected the original of my said 1984 decision. I suggest this correction is of sufficient importance for Devon County Council as registration authority and others having a copy of the decision to correct their copies likewise.

Part II: Errors discovered at or subsequent to the July 1985 hearing which should be treated as corrected

Lines 3 4 and 5 of the third pargaraph of page 1, substitute "as successor of" for "as owner of Coldstone (near to and north east of Ash Common) in succession to" and substitute "Fox & Sons" for "Cox & Sons".

Line 15 of the third paragraph of page 1 after "... Legal Department;" and before "(7) Lady Sylvia ..."insert "(6) South Tawton Parish Council who made Objection No. 865 were also represented by Mr F J Woodward;".

At line 36 (9 lines from the bottom of the page) of page 12 substitute "all other the rights" for "all other rights".

At line 42 (4 lines from the bottom of the page) page 12 substitute "407" for "40".

At line 37 of page 14 substitute "Disputed Part" for "Objection Part".

THIRD SCHEDULE

In pursuance of section 17(4) of the Commons Registration Act 1965 I HEREBY ORDER Christopher John Woide Godfrey of Wallon House, Drewsteignton, Devon EX6 6PZ to pay to Burd Pearse Prickman & Brown, Solicitors of 21 Fore Street, Okehampton Devon EX20 1AJ the costs of South Tawton Parish Council incurred by them in respect of these proceedings subject to the modifications hereinafter specified.

AND I DIRECT the said costs shall be taxed according to Scale 2 of the County Court Rules 1981 as amended.

The said modifications are:

(1) The costs shall be limited to things occasioned by the application referred to in a letter dated 18 March 1985 from the said C J W Godfrey sent to (among

others) Mr R J M Plant for himself and for W G Cann Esquire of South Tawton Parish Council enclosing a statement dated 1 February 1985 of the grounds of the application .

(2) The costs of things done by the said solicitors and others on behalf of South Tawton Parish Council shall be allowed in full without any apportionment notwithstanding they may have been done also on behalf of South Tawton Commoners Association or on behalf of any of their members except so far as such costs have been increased by having been done not only on behalf of South Tawton Parish Council but also on behalf of the said Association or one or more of its members.

(3) The Registrar shall have the discretion as to the fees payable to Mr Woodward solicitor for his attendance at the hearing which under the said Rules can be conferred on him by the Court.

Dated this 6th day of August 1985

A. A. Baden Fuller.

Commons Commissioner