COMMONS REGISTRATION ACT 1965 Reference Nos 216/D/3 - 5

In the Matter of Common Moor, Croxley, Hertfordshire (No. 2)

DECISION

These disputes relate to the registrations at Entry Nos 1 to 7 in the Rights Section of Register Unit No CL 36 in the Register of Common Land maintained by the Hertfordshire County Council and are occasioned by Objections Nos 22 and 117 made by the former Rickmansworth Urban District Council and noted in the Register on 6 November 1969 and 1 February 1972 respectively and Objection No. 83 made by the British Waterways Board and noted in the Register on 18 November 1970.

I held a hearing for the purpose of inquiring into the dispute at St Albans on 5 March 1981. The hearing was attended by Mr J E Hudson, solicitor, on behalf of Mr J G Foster, the applicant for the registrations at Entry Nos 5 and 6, and Mr and Mrs S J Cox, the successors in title of Dr R H Leach, the applicant for the registration at Entry No.7, and by Mr A R Hignett, solicitor, on behalf of the Three Rivers District Council, the successor authority of the former Rickmansworth Urban District Council. There was no appearance by or on behalf of any of the applicants for the registrations at Entry Nos 1 to 4. There was no appearance on behalf of the British Waterways Board, but Objection No. 83 was met by a modification of the registration at Entry No. 1 in the Land section of the Register Unit.

Mr Hignett stated that he was instructed not to pursue Objections Nos 22 and 117 in so far as they related to the registrations at Entry Nos 5 and 6.

The registration at Entry No. 7 is of a right to graze 2 cows attached to Hollow Tree House, formerly known as Hollow Tree Farm.

The present curtilage of Hollow Tree House is 120 ft by 185 ft, the whole of the part not built upon being used as the garden of a private residence. When known as Hollow Tree Farm it also comprised some agricultural land, being described as "an active little farm". The only evidence of rights of common attached to the farm was that it was let in 1916 with common for sheep on Croxley Green and for cows on Common Moor, no numbers being specified.

The agricultural land was disposed of many years ago, but the owners of Hollow Tree House were included in lists of commoners drawn up in 1931 and 1961 by the Commoners of Croxley Green, the applicants for the registration at Entry No. 1 in the Land section of the Register Unit, and on 31 January 1967 Dr Leach attended a meeting of the Commoners. This meeting was held for the purpose of agreeing how many animals each commoner should include in his application for registration under the Commons Registration Act 1965. It was then decided that Dr Leach could apply for a registration in respect of 4 cattle and 4 sheep. Having regard to the terms of the 1916 lease, this agreement was presumably intended to cover 4 cattle on Common Moor and 4 sheep on Croxley Green.

Mr Hignett did not dispute that a right to graze cows on Common Moor was attached to Hollow Tree Farm as it was in 1916. Prima facie the quantification of that right would be governed by the doctrine of levancy and couchancy and would have been apportionable on the division of the property. There was no

evidence as to the area of Hollow Tree Farm in 1916, so Mr Hudson called evidence as to the capacity of Hollow Tree House. Evidence, which was not disputed, was given by Mr J H Foster, who has farmed at Croxley for over half a century. His opinion was that if the garden of Hollow Tree House was given over to the production of hay and roots, just enough could be grown to keep two cows through the winter. He said that it would be wise to supplement this by purchased concentrates, but that it would be possible to keep the two cows alive on the home-grown produce. In my view, what one might call this medieval standard of animal husbandry is sufficient to satisfy the requirements of levancy and couchancy.

As an alternative to levancy and couchancy, Mr Hudson relied on the agreement between the commoners made at the meeting on 31 January 1967, and in support of this limb of his argument he referred me to Harris and Ryan on Common Land, p.64, where it is stated that the number of animals may have been fixed between the commoners. However, it is also stated that no commoner would have been bound by the agreement unless he had been a party to it. I see no reason to differ from this proposition, which is fully supported by the citation of Bruges v Curwin (1706), 2 Vern. 575. If a commoner who has not been a party to such an agreement is not bound by it, it must follow a fortiori that the owner of the soil cannot be bound by the agreement unless he has been a party to it. Here the agreement was made between Dr Leach and the commoners who were present at the meeting. The owner of Common Moor, the former Rickmansworth Urban District Council was not a perty to the agreement, which could therefore give no right to Dr Leach against the Council.

Therefore, if Mr and Mrs Cox are to succeed, it must be on the basis of levancy and couchancy. Mr Hignett argued that the doctrine of levancy and couchancy can have no application in this case, where the alleged dominant tenement is a private dwelling-house and garden, which would not be capable of supporting any livestock in its present condition. He said that it would be difficult to convert the garden back to a condition in which it could sustain two cows, and he also suggested that this would be a change of use which would require planning permission, which might be refused. Dealing with the latter point first, it does not appear to me that a right of common could be destroyed by legislation relating to town and country planning in the absence of an express provision to that effect. Furthermore, it is provided by s.22(2)(e) of the Town and Country Planning Act 1971 that the use of land for the purpose of agriculture does not involve development of the land for the purposes of the Act.

If one accepts, as in my view one must, that a right of common was attached to Hollow Tree Farm as a whole, the fact that it might be difficult or uneconomic or even foolish to use some part of the farm for the production of animal feeding stuffs does not deprive the owner of his right to do so, should he be so minded. Mr Hignett very properly did not contend that the right had been abandoned: he relied on the present state of the land - either it had never been suitable for animal husbandry or its change into a garden had rendered it unsuitable for that purpose.

The facts of this case are indistinguishable from those in Carr v. Lambert (1866), L.R. 1 Ex. 168, where the dominant tenement consisted of a cottage and a stable with a garden and orchard. This, Willes J. said, was not the case of a dominant tenement so changed in character that cattle might not be fed off its produce. The learned judge said that it was in a state in which it

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might easily be turned to that purpose. Mr Hignett described that process as difficult, but that does not, in my view, make Carr v. Lambert a precedent inapplicable to this case. The same change would have to be made in the dominant tenement to make it suitable for the keeping of cattle in each case. The fact that to Mr Hignett it seemed difficult, while Willes J. said that it might easily be done, does not appear to me to be a material distinction between the two cases. One can envisage cases where some major change in the dominant tenement might be required, such as the importation of top-soil into an exhausted gravel pit. This, however, is not such a case. All that would be required would be to cultivate the land for agricultural purposes instead of continuing to use it as an amenity for a dwelling-house, which is exactly the change which would have been required in Carr v Lambert.

For these reasons I confirm the registrations at Entry Nos 5, 6 and 7. In the absence of any evidence regarding the other registrations, I refuse to confirm them.

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 11th day of March 1981

Chief Commons Commissioner