



COMMONS REGISTRATION ACT 1965

Reference No. 219/D/10

In the Matter of Cuxton Common Marsh, Cuxton  
Kent

DECISION

This dispute relates to the registration at Entry No. 2 in the Land Section of Register Unit No. CL.153 in the Register of Common Land maintained by the Kent County Council and is occasioned by Objection No. 121 made by The Associated Portland Cement Manufacturers Limited and noted in the Register on 20 September 1971.

I held a hearing for the purpose of inquiring into the dispute at Maidstone on 7 February 1979.

1 (a) At the hearing Mrs Anne Wilks, the applicant for registration, appeared in person and Miss Sheila Cameron, of Counsel, appeared on behalf of the Objector. Mr G Chalker, a member of Cuxton Parish Council, also attended.

(b) The land in question ("the Register Unit") lies between the River Medway and the former North Kent railway line and also includes a small strip on the other side of the railway line. The ground of the Objection is that the part of the Register Unit shown edged red on the plan accompanying the Objection was not common land at the date of the Objection. Ownership of the part objected to was acquired by the Associated Portland Cement Manufacturers Limited (APC) in 1967 and I will refer to it as the "APC LAND".

(c) There are no entries in the Rights Section of the Register.

2 (a) The documentary evidence produced by Mrs Wilks included the following:-

(i) A certified copy from the tithe map of and tithe award for, Cuxton Parish which showed the Register Unit as "Common Marshes" used for pasture, with no owner or occupier indicated.

(ii) A certified copy of two documents in the Kent County Archives which are abstracts of Deeds of Exchange both of 29 November 1855, by which the then Earl of Darnley took (inter alia) 7 common rights in gross over certain salts (i.e. the Registered Unit) and in which reference was made to "the whole of the common rights over the said Salts being 42 in number".

(iii) A certified copy from the same archives of a page in a book recording dealings with land, the page noting the purchase in November 1904 from the trustee of the late Earl of Darnley of certain 'intermixed lands' which included 7 Common Rights and all other interest (if any) in Common Marsh'.

(iv) A certified copy from the same archives of a statutory declaration by the Steward of the Darnley estates to the effect that before 1854 and continuously since then the Registered Unit had been let by successive Earls of Darnley to various tenants, that in 1854 the Common Marsh was enclosed with a sea wall by the Earl of Darnley and during the Steward's period of management (1895-1904) it had always been treated as forming part of the Darnley estates.



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(v/) Mrs Wilks's oral evidence dealt at some length with a missing Deed, which in 1969 she had seen and read in the County Archives Office; this Deed, she said, provided that the Common Marsh would remain as a common for 100 years from the date of the Deed (about 1900). She had obviously made every effort in conjunction with the officials in charge of the Archives Office to locate the Deed, but had not succeeded.

(b) Mrs Wilks also submitted that if the Registered Unit was not subject to rights of common it was waste land of the manor and as such common land within the meaning of the Act of 1965. On this aspect of her case she produced a copy of a letter dated 4 November 1975 from the County Archivist, which referred to records showing that the Bishop of Rochester was lord of the Manor until 1855, but leased his interest first to Lord Romney and then to Lord Darnley.

(c) Evidence was given by Mrs Patricia C Wilson, confirming Mrs Wilks's account of the missing deed, which they examined together in June 1969. She had visited the Register Unit on various occasions: it was unenclosed (except that in 1971 she noticed there was some new fencing with an iron gate round a very small part) and there was means of access by a track running under the railway near Factory Cottages. There were people walking round the seawall and children playing along the seawall and on the strand, and around the lagoon further inland.

(d) Mr Chalker who came to live in Cuxton in 1965, stated that there had always been rights of access to the land and it was always regarded as common land: he had never been turned off, nor had children playing there.

3 (a) The evidence adduced on behalf of the Objector was in the first place directed to the ownership of the APC Land. By an Indenture of 29 December 1854 there was assigned to the Earl of Darnley a term of years in land (which included the larger part of the APC Land), this term having been granted in January 1800 as security for money lent. By a Deed of Enlargement dated 24 October 1900, the term was enlarged by the then Earl of Darnley into a fee simple, and the land (including the larger part of the APC Land) conveyed in October 1925 by his successor in title to British Portland Cement Manufacturers Ltd ("British Portland"). The remaining (or smaller part) of the APC Land was subject to a Settlement made in 1850 and sold in 1898 by the Earl of Darnley, as tenant for life under the Settlement, to nominees of a company called Martin Earle & Co Ltd and by that company to British Portland in May 1926. All British Portlands properties were conveyed to its parent APC by Deed dated 5 April 1967.

(b) Agreements for letting on agricultural tenancies part of the APC Land were produced - the land comprised in these tenancies was that forming the South-eastern section of the APC Land and shown in the plan marked P 7. One of these agreements was dated 9 September 1918 and made by the then Earl of Darnley - the remainder which comprised successive lettings from 1935 to 1967 (the latest of which is still subsisting) were granted by British Portland or APC. None of these agreements made reference to rights of common.

(c) Following a compulsory purchase order made in 1960, British Portland conveyed to the Minister of Transport, ten separate areas of the APC Land, each of 350 square yards area, for the erection of supporting pillars to the bridge carrying the Motor Road over the land.

(d) Evidence of Witnesses called by the Objector was to the following effect:-

1 Mr W C Simmonds, aged 71, who had lived in Cuxton most of his life and had worked for the cement companies during his working life (apart from the period of



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the 1939-45 war), said that the company had dug clay on the river bank for some years before 1940, which had left a hole: this formed a lake or pond which has since remained in the north-east section of Common Marsh. In the 1930's this was fenced to keep back the cattle of the tenant farmer. Clay digging finished before the war: but factory waste was dumped up to the pond.

2 Mr J Carpenter who was works engineer at the cement works at Cuxton from 1961 onwards, said that waste was tipped on Common Marsh in 1961 and this was added to be by waste from the construction of the motor road bridge. The waste spread over the land but when the construction work finished some attempt was made to clean it up and it was used to backfill the pond. The Company stopped tipping its own waste, as the land was not suitable for lorries.

Both these witnesses agreed that the tenant farmer (since 1967 the Lingham Brothers) grazed their cattle on the south-eastern side of the pond, and that local children fish in and play around the pond: and Mr Carpenter said that local people take walks on the seawall and towpath.

3 Mr S M Howe, a divisional surveyor to the cement company produced an overlay map (P 9) based on the OS 1938 map. This shows a fence line marked between 'Shakehole' and 'Stone'. There was in his time no sign of an actual fence on that line (nor had either of the two previous witnesses, any recollection of such a fence), and the line could have shown a boundary. He agreed that the Lingham's grazed cattle beyond the limits of the land let to them: this was by verbal permission, and the cattle could not graze beyond the pond, at the northerly end of which a fence had been erected.

### 3 Conclusions

(a) There being no registered rights of common, Mrs Wilks's contention that the APC land qualified for registration as common land under S 22(1)(a) of the 1965 Act cannot, in my opinion, succeed: see *Central Electricity Generating Board v Clwyd County Council* 1976 1 W L R 151. Mrs Wilks sought to distinguish the present case on the ground that common rights had been guaranteed for 100 years by the missing deed (see para 2 (a)(v) above). Without knowledge of the parties to, and the provisions of, this deed it is not possible to consider the effect of such a guarantee, but it seems most unlikely that it could have affected the application of the decision in the Clwyd case (cp *Re Turnworth Down* 1976 33 P & C R 192). On this part of the case my decision is that the APC land was not common land as defined in S 22 (1) (a) since there was no registration of any rights of common over it.

(b) Having heard the evidence as to the existence of common rights (though unregistered) I should state my findings, which may be relevant if this case goes further. The only positive evidence as to the existence of common rights is that contained in the documents referred to in para 2 (a) (ii) and (iii), which I accept as establishing that there were 42 common rights in gross in 1855 of which at least 7 were considered to be subsisting in 1904. But there is no evidence as to the origin or extent of such rights, as to the persons entitled to exercise them or as to the exercise at any time of any such rights. Furthermore the evidence given on behalf of the Objector established that for at least 60 years part of the APC land has been let for agricultural purposes and that other parts have from time to time in the period from the 1930's to the 1960's been used for commercial purposes. Upon the evidence as a whole, I find that at the date of registration of the land as Common Land, there did not exist rights of common within the meaning of the 1965 Act.



(c) Mrs Wilks made the alternative submission that the land was common land by reference to the definition in S 22 (1) (b) of the 1965 Act i.e. as waste land of a manor not subject to rights of common.

There is no evidence as to the manor of which the APC land formed any part, and as I understood Mrs Wilks's submission, the relevant manor was that of which Lord Darnley was the lord. Assuming this to be so, on the evidence I do not find that the APC land as a whole answers the description of waste land as "open, unoccupied and uncultivated". But, more importantly, when (see para 3 (a) above), the smaller part of the APC land was sold by the Earl of Darnley in 1898 and the larger part to British Portland in 1925, there was nothing in the documents or otherwise to suggest that the lordship of the manor was being transferred with the land sold or has passed to the Objector; and I find that, if indeed the APC land was land of the manor, the land and the lordship were severed on the sales made in 1898 and 1925 and accordingly it was not at the date of registration land of a manor within the meaning of S 22 (1) (b) of the 1965 Act. (see *Re Box Hill Common* 1979 2 W L R 177).

For these reasons I refuse to confirm the registration of the APC land as common land.

Miss Cameron asked for an order for costs, should the Objector succeed. The practice at hearings is not to award costs against a party who is acting reasonably in seeking to uphold a registration. Mrs Wilks was clearly not without experience of the hearing of disputes by Commissioners or of the relevant law and decisions (including the *Clwyd* and the *Box Hill* Cases). Having regard to the meagre nature of the relevant evidence she was able to produce and more particularly of the formidable difficulties presented by the two cases cited, I consider that it was not a reasonable course of action to seek to uphold the registration of the APC land as common land and accordingly award Miss Cameron's clients their costs on Scale 4 with the Registrar's discretion.

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

20<sup>th</sup> August

1979

*L. J. Harris-Smith*

Commons Commissioner