



COMMONS REGISTRATION ACT 1965

Reference Nos 219/D/23 to 29

In the Matter of Wilgate Green,
Throwley, Swale District, Kent

DECISION

These disputes relate to the registrations specified in the Schedule hereto in the Land Section and Rights Section of Register Units No CL. 98 and No VG. 168 in the Register of Common Land and of Town or Village Greens maintained by the Kent County Council and are occasioned by the Objections and the conflicting registrations in such Schedule summarised.

I held a hearing for the purpose of inquiring into the dispute at Sittingbourne on 18 May 1976. At the hearing (1) Sir Walter Leslie Farrer and Mr Joseph Frederick Burrell, the Executors of George Henry (4th) Earl Soudes, (they made Objection Nos 81 and 86) were represented by Mr S J Sher of counsel instructed by Farrer & Co, Solicitors of London; (2) Mr Patrick John Cronin and Mr Richard Walter Chetwynd, the Trustees of a settlement made in 1966 by Lord Harris (they made Objection Nos 89 and 90) were represented by Mr G Pike, solicitor of Lee Bolton & Lee, Solicitors of London; and (3) Mrs Anne Wilks (she applied for the VG registration) attended in person. Mrs L Dossett on whose application the Entry in the CL. 98 Rights Section and the consequential Entry in the CL. 98 Land Section were made, neither attended nor was represented.

The land ("the Unit Land") comprised in Register Unit CL. 98 is the same as that comprised in Register Unit No VG. 168. It contains just under 5 acres, is near a group of houses and buildings on the OS map called "Wilgate Green" (it was not agreed that the Unit Land could properly be so called), and is bounded on the north by a public highway (a minor metalled motor road) leading westwards to South Wilderton. The north side is (as I scale the OS map) about 200 yards long, and the other four sides are a little less. The Unit Land is now divided into two pieces by a fence; one piece ("the West Piece") approximately rectangular is OS no 186 containing 2.322 acres, and the other ("the East Piece") approximately triangular is OS no 185 containing 2.103 acres.

The greater part of the hearing was concerned with the question whether or not the Unit Land is a town or village green within the definition in section 22 of the 1965 Act, which so far as relevant is: "land on which the inhabitants of a locality have a customary right to indulge in lawful sports and pastimes".

The original or extracts from the following histories or historic documents were produced:-

(a) The History of Kent by Edward Hasted (1782):- At page 766: "Present State of Throwley...The Parish of Throwley is situated...There are several greens or forstals throughout the different part of this parish, and a larger one called Wilgate green, round which are several houses, two of which are farm houses, the estate of which belongs to Mr Philereis Willis of London and a third to a considerable farm belonging to the Right Hon Lord Vane".



(b) The History of Kent, Hasted (2nd edition 1797/1801: recently reprinted):- At pages 445 and 446: " Throwley...There is no village except the few houses in Abraham Street may be so called, the rest of the houses which are mostly cottages, standing dispersed throughout it, either single or built round the little greens or fostalls, of which there are several in different parts of the parish. On a large one of these called Wilgate-green, there is a house belonging to Mr Philerinis Willis's heirs, and another large antient one which with the estate belonging to it was formerly the property of..."

(c) Throwley Parish Tithe Award (1841):- On the map the East Piece is numbered 56 and the West Piece is numbered as to a small part at the northwest corner 54 and as to the remainder 55. In the Schedule, 54 and 55 are both described as "part of Wilgate Green: pasture (-.-.37 and 2.2.1.)" and are shown as part of lands owned by "Harris Right Honourable George William Lord" and occupied by "Ashbee Thomas"; and 56 is described as "Part of Wilgate Green; Pasture (2.-.13)", and shown as part of lands owned by "Sondes Right Honourable George John Lord" and occupied by "Kemp John". All these numbers with others similarly owned and occupied are treated as tithable.

(d) OS map (1906 edition 1/2500 and ?1908 edition 6 inches = 1 mile):- The words "Wilgate Green" apparently apply either to the buildings to the north and east of the Unit Land or to such buildings and the area generally surrounding them and not to the Unit Land particularly.

Oral evidence was given as under:-

(1) By Mr R P Dixon who is Land Agent and member of the firm which now and has from some time before 1931 (when he joined it) acted as Agents for the Belmont Estate (Lord Harris); in the course of his evidence he produced: (a) OS map (1908 edition, 6 inches = 1 mile) marked for the purpose of the Tithe Act 1936 to show the extent of Lord Harris' lands as shown in the 1840 Award map; (b) two books of "Lord Harris Rentals" from 1874, showing a letting in 1874 to M Ashbee of a farm now called Wilgate Farm (not to be confused with the below mentioned Wilgate Green Farm); (c) an agreement (very dilapidated) dated 1 July 1886 by which Lord Harris let Wilgate Green Farm (meaning Wilgate Farm now so called) to Lewis Ashbee on a yearly tenancy with memoranda endorsed thereon dated 1915 and 1928, in the Schedule to which numbers 54 and 55 are described as "Part of Wilgate Green: Arable: 2.2.38.; and (d) an agreement dated 1930 by which Lord Harris let the same Farm, numbers 54 and 55 being similarly described.

(2) By Mr T R W Moore who is employed by Land Agents who manage the Lees Court Estate (Lord Sondes) and who has lived in the area since 1973; in the course of his evidence he produced (a) a vesting deed dated 8 July 1926 by which land was declared to be vested in L A (3rd) Earl Sondes (he died 17 January 1941) and (b) an abstract examined in 1975 of the title of the personal representatives of G H (4th) Earl Sondes (he died 30 April 1970) to the old Lees Court Settled Estate; (c) an agreement dated 5 May 1942 by which Earl Sondes let Wilgate Green Farm to Mr J E Scutt, and in which the East Piece is described as "185. Part of Wilgate Green: Pasture: 2.103"

(3) By Mr J E Scutt who has been the tenant farmer of Wilgate Green Farm since October 1942.



(4) By Mr F Reynolds who is 63 years of age, who from 1930 lived at Meadow Cottage (just east of the Unit Land) and who now works for Mr Scutt.

(5) By Mrs Wilks who produced a copy of particulars of an auction held on 12 September 1962 of two lots of cottages (one being Meadow Cottages) and a memorandum prepared by herself in which she set out considerations in favour of the Unit Land being a village green in accordance with the registration for which she had applied.

(6) By Rev E A Marsh who is and has been for the last 18 years vicar of Sheldwich, rector of Badlesmere and rector of Leaveland; his evidence I took pursuant to paragraph 23(5) of the 1971 Regulations.

Additionally, Mr Dixon handed me a letter from Brigadier A C C Wilway of Wilgate Farm House as to the local opinion.

The evidence of the recreational use of the Unit Land within living memory was to the following effect:- By Mr Dixon: The surrounding dwelling houses are so few that there is now and as far as he knew never had been any need for a village green; the West Piece has always been let with Wilgate Farm belonging to the Estate; he had never heard of any sports or pastimes on it. Mr Scutt did not know of any recreational activities (meaning sports or things of that nature) or of any local inhabitant claiming a right to do any such thing. Mr Reynolds said there were no games or anything else done on the East Piece; it was just cows and sheep. Mrs Wilks had no personal knowledge of the use of the land but she suggested to the other witnesses that fairs had been held there, tinkers had used it, motor cyclists had ridden over it and persons had ridden horses over it. Mr Marsh said that he had volunteered to give evidence because he was disturbed by what he had heard about the Unit Land never having been used for recreational purposes; he knew that both the daughter of Mr Scutt and the daughter of Mr Cooper (they were tenants of Wilgate Green Farm and Wilgate Farm respectively) had ridden horses over both the East Piece and the West Piece, and he also wished to give me some information about buildings which used to be on the west and south of the Unit Land because (strange to say) he had driven tractors over Mr Cooper's land and knew of the remains of foundations of a building which had been turned up by agricultural equipment.

There was I think no real conflict between the evidence about the use made of the Unit Land. I do not regard any riding by the daughters of the tenants of Wilgate Green Farm and Wilgate Farm as being of any significance in this case. There was no evidence that there had ever been any fairs on the Unit Land (I cannot treat statements made to Mrs Wilks as evidence, and Mr Reynolds was emphatic that he had never heard of any such); there may have been some use by gypsies and tinkers, but nothing which could be regarded as indulgence by the inhabitants of the locality in sports or pastimes. Mr Scutt and Mr Reynolds had heard about boys motor cycling, but I am not persuaded that any such use was in any sense as of right. The present appearance of the Unit Land and of the surrounding buildings is against it ever having been used for recreational purposes as of right; the buildings are so few that the number of persons residing would always have been too small to use the Unit Land for sports or pastimes as generally understood.

There was at the hearing some considerable discussion as to the inferences if any to be drawn from the Unit Land having been described in the histories and historic documents and in the tenancy agreements as a "green" or "forstal", or "Wilgate Green"; and also from the Unit Land having been in the past more extensively built around (and therefore more like a village green) than now.



As to the past, I accept that there was for many years until a short time ago a cottage near the midpoint of the west side of the West Piece; such a building is marked on the Tithe map, and the general appearance of the land now is consistent with there having been a building there until recently. As to there being some other building on the south or southwest: no such building is marked on the Tithe map, and I can get no clear picture from what Mr Marsh said about the remains of foundations which he saw unearthed. Whether or not any such building existed, the existence of the cottage on the west side would have been enough to give the Unit Land an appearance very like those open spaces covered with turf, traversed generally by one or more footpaths and situated in the midst of or on the outskirts of a village, being open spaces popularly called "Greens".

Nobody at the hearing could give a meaning to forstal or fostall; these words do not appear in the Oxford English Dictionary. However the conclusion I have reached in the preceding paragraph accords with one of the examples given in Wright's English Dialect Dictionary 1900: "a forstal was a piece of waste land about and on which cottages have been built: in some cases a hamlet or parish: this applies to many parishes near Faversham" (H Mathwin is quoted).

But it is not enough that the Unit Land could in popular language be called a "Green"; I am concerned whether it is within the above quoted definition in the 1965 Act. Although the circumstance that land known as or called a "Green", may with other circumstances be enough to indicate that proved recreational use on the land was as of right, such circumstances cannot I think by itself establish that the land has been used recreationally as of right, when nobody now living gives evidence of any such use and there are indications that such use is unlikely. Balancing the evidence of the historic and other documents produced and the present appearance of the Unit Land, and what I infer it must have been like in the past, my conclusion is that the Unit Land was never subject to any such customary right as is mentioned in the section 22 definition.

Accordingly the Objection Nos 86 and 89 succeed; and I record that under rule 26 of the 1971 Regulations, I think it just to disregard the mistaken colouring on the plan annexed to Objection No 86.

The right registered on the application of Mrs Dossett in the Rights Section is attached to Meadow Cottages, to graze either (a) 6 ponies, 12 cows and 12 pigs or (b) 24 sheep. There was no evidence to support this right. Mr Reynolds said that the Unit Land had never been grazed otherwise than by tenants of Wilgate Farm and Wilgate Green Farm. Mrs Wilks gave me some information about conversations she had had with Mr & Mrs Dossett, but I do not regard what they told her as supporting their case. In the absence of evidence I conclude that the registration in the Rights Section should not have been made, and that Objection Nos 81 and 90 succeed.

As is apparent on the Schedule hereto there has never been any objection to the Entry in the CL. 98 Land Section, so that such Entry is challenged only by the conflicting VG. 168 registration. It may be that as a general rule when a CL registration becomes the subject of a dispute by reason only of a conflicting VG registration, it should follow from a refusal to confirm the VG registration that the CL registration should be confirmed. However the circumstances of this case are I think exceptional in that: (a) the CL. 98 Land Section registration was made in



consequence of the registration in the Rights Section which I am not confirming; and (b) many of the considerations indicating that the Unit Land is not properly registered in the VG Register also indicate that it is not properly registered in the CL Register. Under the 1965 Act the conflicting VG 168 registration is deemed to be an objection to the CL 98 registration without any qualification, so that in the proceedings before me I have jurisdiction if I think fit to refuse to confirm the CL. 98 registration. The evidence I have shows that such registration should not have been made, and accordingly whatever may be the general rule about conflicting registrations, in the particular circumstances of this case I conclude that I should not confirm it.

For the reasons set out above, I refuse to confirm any of the registrations the subject of these proceedings.

Mr Sher contended that I should order Mrs Dossett to pay the whole or some part of the costs of these proceedings, and he produced a letter dated 14 October 1970 written by his instructing solicitors to her inviting her to withdraw her registration in order to avoid costs having regard to it being clear from their enquiries that at no time have any rights been exercised for the benefit of Meadow Cottage. In my opinion an application under the 1965 Act for the registration of a right is not equivalent to the commencement of legal proceedings so as put the applicant at risk of paying all costs which may result from the application; to make an order for costs I must find some other unjustifiable act or omission. In my opinion Mrs Dossett upon receiving the 1970 letter could reasonably refuse to take any action until Lord Harris' Trustees had actually made an objection; No 81 dated 6 January 1971 is the only objection with which Mrs Dossett was concerned, and such Objection is to the Entry in the Rights Section only. Mrs Dossett on receiving such Objection could I think reasonably assume that the correctness of the registration in the Land Section was conceded. If the Unit Land was common land, she could I think without being at risk as to costs reasonably persist in her claim that she was a person (or one of the persons) who have a right of common over it. Those represented by Mr Sher and Mr Pike have only succeeded in avoiding the CL. 98 Land Section registration by the accident that Mrs Wilks happened independently of Mrs Dossett, to have made a conflicting registration which is a deemed objection of which they can take advantage. Upon these considerations 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.

SCHEDULE

<u>File No</u>	<u>Disputed Entries</u>	<u>Objection</u>
219/D/23	Land Section Entry No 1 of CL. 98 Register Unit	Deemed objection occasioned by conflict with Land Section Entry No 1 of VG. 168 Register Unit made on application of Mrs Wilks



- 219/D/24 Land Section
Entry No 1 of
VG. 168 Register Unit
Deemed objection occasioned by conflict with Land Section Entry No 1 of CL. 98 Register Unit made consequentially upon registration in Rights Section made on application of Mrs L Dossett
- 219/D/25 Land Section
Entry No 1 of
VG. 168 Register Unit
Objection No 86 made by Sir W L Farrer and Mr J F Burrell and noted in the Register on 12 January 1971. Grounds:- "OS no 185 on the Ordnance Survey Map (Revision of 1907) and shown edged red on the plan annexed hereto was not a Village Green at the date of registration."
Note: The West Piece (OS 186) is so edged.
- 219/D/26 Land Section
Entry No 1 of
VG. 168 Register Unit
Objection No 89 made by Mr P J Cronin and Mr R W Chetwynd and noted in the Register on 25 January 1971. Grounds:- Part of the land was not a village green at the date of registration, the part referred to being OS no 186 on the Ordnance Survey map (Revision of 1907) and shown edged red on the plan annexed hereto.
Note: The West Piece is so edged.
- 219/D/27 Rights Section
Entry No 1 of
CL. 98 Register Unit
Objection No 81 made by Sir W L Farrer and Mr J F Burrell and noted in the Register on 12 January 1971. Grounds:- "The Right referred to above does not exist in respect of OS no 185 on the Ordnance Survey map (Revision of 1907) and shown edged red on the plan annexed hereto."
Note: The East Piece is so edged.
- 219/D/28 Rights Section
Entry No 1 of
CL. 98 Register Unit
Objection No 90 made by Mr P J Cronin and Mr R W Chetwynd and noted in the Register on 25 January 1971. Grounds:- "The right referred to above does not exist in respect of OS no 186 on the Ordnance Survey map (Revision of 1907) shown edged red on the plan annexed."
Note: The West Piece is so edged.
- 215/D/21 Rights Section
Entry No 1 of
CL. 98 Register Unit
Deemed Objection occasioned by conflicting registration at Entry No 1 in the Land Section of VG. 168 Register Unit

Dated this 16th day of August 1976

needed by substituting "circumstance"
"circumstances" on page 4 para
para 5. a. a. Baden Fuller
aa Baden Fuller
18 October 1976

Commons Commissioner