



COMMONS REGISTRATION ACT 1965

Reference No 236/D/46

In the Matter of Ellens Green
Common, Ewhurst, Waverley District,
Surrey

DECISION

This dispute relates to the registration at Entry No 1 in the Land Section of Register Unit No CL. 135 in the Register of Common Land maintained by the Surrey County Council and is occasioned by Objection No 347 made by the said Council and noted in the Register on 13 October 1970.

I held a hearing for the purpose of inquiring into the dispute at Guildford on 11 January 1977. At the hearing (1) Surrey County Council were represented by Mr F G B Aldhouse solicitor of their Legal Department; (2) Waverley District Council as successors of Hambledon Rural District Council, on whose application the registration was made, were represented by Mr A R Hart their solicitor; and (3) Mrs Pamela Margaret Chambers of Sunny Corner, Ellens Green, was represented by Mr S R Marshall solicitor with Stephenson Harwood & Tatham, Solicitors of London.

The land ("the Unit Land") comprised in this Register Unit is an L-shaped strip in most places between 20 and 30 yards wide, but in some places more and in many other places much less. For the purposes of exposition it is convenient to consider the Unit Land as divided into four parts:- (1) a part ("the East-west Part") which going eastwards begins at the T-junction where Furzen Lane meets the Guildford-Horsham road B2128, (this runs through or by the Village of Ellens Green), which continues eastwards by Furzen Lane for about $\frac{3}{4}$ of a mile to end not far from Aylwins Cottage being one of the most easterly houses of the Village; (2) a part ("the B2128 South Part") which going northwards begins at the said junction and continues by the B2128 road for about 600 yards to end at Pollingfold Bridge; (3) a part ("the B2128 North Part") which going northwards begins at Pollingfold Bridge, continues by the B2128 road for about $\frac{1}{2}$ a mile and ends where the B2128 road is joined by Somerbury Lane (there the B2128 road runs northwestwards); and (4) the remaining part ("the Somerbury Lane Part") which going northwards begins at the said turning and continues by Somerbury Lane for about 1 mile to end at Cobbler's Brook. Along the whole length of the Unit Land there is a strip of tarmacadamed made up roadway suitable for motor traffic, and at least to the extent of this strip the Unit Land appears to be public highway.

The grounds stated in the Objection are: "That at the time of registration the land was not common land".

At the beginning of the hearing Mr Aldhouse said that the Objection, although expressed generally was intended to extend only to the part of the Unit Land which was (as shown on the plan annexed to the Objection) highway. Mr Hart said



that he and Mr Aldhouse were agreed (a) that the whole of the B2128 North Part was highway and should not have been registered as common land; (b) that as regards the Somerbury Lane Part, the B2128 South Part, and so much of the East-west Part which is west of a line ("the Sansomes Farm Line" more precisely defined below) passing through Sansomes Farm, the made up carriageway and three feet on either side of it was highway and should not have been registered as common land; and (c) that all the rest of the Unit Land west of the Sansomes Farm Line, except the below mentioned Smithy Piece, was properly registered as common land.

Mr Marshall produced the Land Certificate (last examined 4 February 1975) of the property therein called Sunny Corner garage registered at HM Land Registry under Title No SY 312153. The land so registered ("the Smithy Piece") is about 30 yards long and about 15 yards wide and is on the Register map marked "Smithy". The Certificate shows Mrs P M Chambers as having been registered on 4 December 1974 as owner in succession to Mr C R Rashbrooke. The Smithy Piece, which is part of the B2128 South Part, was, so Mr Hart said, included in the application for registration by mistake. He and Mr Aldhouse both agreed that it was not properly registered as common land and ought if possible to be removed from the Register.

So at the hearing I was only concerned to hear evidence concerning the part ("the Disputed Land") of the East-west Part which is east of the Sansomes Farm Line. Mr Aldhouse, while not disputing that the Waverley District Council as successors of Hambledon Rural District Council are the owners of the Disputed Land, contended that it was all highway. Mr Hart, while conceding that the made up carriageway running along the Disputed Land was highway, contended that the remainder was properly registered as common land.

Mr Hart who started in 1967 as assistant Solicitor to and in 1968 became the Solicitor of Hambledon Rural District Council in the course of his evidence produced the Land Certificate Title No SY 358745 showing the District Council to be the owners of the Disputed Land and a conveyance dated 24 February 1967 by which Mr G W Gotto and Mr J D Kerr as personal representatives of Sir Jocelyn Bray (he died 12 February 1964 having been entitled under a vesting assent dated 8 March 1951 made by the personal representatives of Mr Reginald Arthur Bray) conveyed to the Rural District Council of Hambledon the "greens or commons described in the First Schedule". The First Schedule included: "6; Ellens Green; (Parish) Ewhurst; (Manor) Gumshall Netley; (approximate area in acres) 6.06" subject to "an agreement dated 27 March 1936 whereby the Lords of the Manors of Westland Baynards and Gumshall Netley let Ellens Green to the Parish Council, Ewhurst on a yearly tenancy from Lady Day 1936 at a yearly rent of three shillings". The attached map shows the Ellens Green land thereby conveyed to be all (except the north end) the B2128 South Part and all the East-west Part (including the Disputed Land).

Mr B J Young who is assistant to the Countryside Officer of Waverley District Council and was in 1968 Countryside Officer of Hambledon Rural District Council, produced a scheme made under the Commons Act 1899 by the Rural District Council on 29 December 1950 and approved by the Minister of Agriculture and Fisheries on 21 February 1951 for the regulation of the commons set out in the Schedule thereto, including (among many others) Ellens Green having an approximate area of 12.2 acres. He also produced the deposited plan referred to in the scheme, which plan showed that the scheme applied to all the Unit Land except the Somerbury Lane Part.



Mrs S Corke who is Assistant Archivist in the Surrey Record Office, Guildford Museum Room produced a copy (certified on 2 January 1843) of the Tithe Award dated 31 December 1842 for the Parish of Ewhurst. On the Tithe map a number of strips of land are coloured brown and left unnumbered; such strips are not mentioned in the Schedules to the Award. The whole of the Disputed Land is on the Tithe map coloured brown, but as regards the remainder of the East-west Part and of the B2128 South Part, only a strip (corresponding a little more or less with the now existing carriageway) is so coloured.

Mr J W Amys who as an officer of the Surrey County Council is the County Area Engineer for the Waverley District (he held a similar appointment from 1966 until 1974 in respect of the Hambledon Rural District) produced two 1915 OS maps 1/2500 (reprints 1934 and 1936) which had been partly coloured light yellow, dark yellow, light green and dark green. He said that these two and a number of other maps were prepared so he understood in 1956 by Mr John Whiteley to show the amount of work for which the County Highway Department was responsible; the dark yellow showed the carriageway; the light yellow, the highway verges, the light green the manorial wastes; on these maps the B2128 North Part is coloured light yellow and dark yellow and the B2128 South Part and the East-west Part including the Disputed Land is coloured dark yellow and light green. He said that in his office he had always regarded the light yellow part of the B2128 North Piece as highway verge and the light green part of the B2128 South Part and the East-west Part as manorial waste but in practice they were treated in the same way for highway purposes; they had carried out maintenance for both sections equally; as regards the Disputed Land, on either side of the carriageway, they cut right up to the fences until recently (5 or 6 years ago) when they reduced expenditure in this field by cutting only up to 6 feet; they also maintained the ditches on or bounding the Disputed Land which contributed to the highway drainage.

Mr R G Thoday who is employed by the County Council as a general foreman in the Haslemere-Farnham area gave oral evidence as to what the maintenance gangs did.

On 19 February 1977 I walked over the East-west Part (including the Disputed Land) and motored along the rest of the Unit Land.

By section 22 of the 1965 Act common land is defined as not including "any land which forms part of a highway", but the Act provides that the conclusiveness of a final registration of common land established by section 10, shall not apply "for the purpose of deciding whether any land forms part of a highway". This proviso facilitates the registration as common land of large areas crossed by numerous tracks and paths which may or may not be highway, because those concerned need not bother to exclude these tracks and paths from the registration. However the County Council are I think under the Act entitled to object to the registration in this case on the grounds that the land is highway, even although the resulting dispute may be somewhat unreal in that if I decide that the Disputed Land is not highway, I shall not establish this (at any rate conclusively) against everybody. But if I decide that the Disputed Land is not commonland, I shall (so it seems to me) establish this conclusively against everyone; accordingly the District Council clearly have an interest in resiting the Objection.

Mr Aldhouse (as I understood him) first contended that the 1842 Award and map showed that the Disputed Land was highway in 1842, and accordingly must still be highway. The Sansomes Farm Line is intended to be a north-south line going through



the extreme east end of plot no 241 shown on this map; in case as a result of this decision it becomes necessary to fix this line precisely, I define it as a north-south straight line joining the letters "a" in the word "Sansomes" where such word twice appears on the most recent OS map 1/2500. The Schedule to the Award includes a number of plots under the headings: (Owners) "Lord of the Manor"; (Occupier) "Tenants of the Manor"; (Description) "Waste"; (Cultivation) "Waste"; among these plots is one numbered 241 which from the Award map appears to include part of the Unit Land (the East-west Part) which is north of the brown strip and west of the Sansomes Farm Line; this plot also comprises land on which now stands or which now forms part of land held with the old School House and some dwelling houses to the west.

The evidentiary value of a tithe award and map is discussed in *Knight v David* 1971 1 WLR 1671. The 1842 Award is I think some evidence that plot 241 was in 1842 considered to be waste land of the Manor and that the brown strip including the whole of the Disputed Land was then considered to be highway. But it is not conclusive evidence; it is I think no more than an item of evidence which I must balance against any contrary evidence; so balanced it is not I think of any great weight, because neither the valuer who prepared the Award nor those who paid or received tithes were concerned to distinguish between waste land and highway land because neither was tithable.

Mr Aldhouse secondly contended that where a highway runs between fences there is a presumption that the highway extends up to the fences and that accordingly the carriageway along the Disputed Land being highway, it follows that all the Disputed Land was also highway.

That there is such a presumption and that it may be rebutted is shown by *Attorney General v Beynon* 1970 Ch 1; in considering whether the presumption is rebutted, the first question is whether the fences were put up with reference to the highway, and in deciding this question the fences are to be taken to have been put up by reference to the highway in the absence of a contrary indication, see SC. Whether in relation to alleged waste land of a manor there was sufficient evidence to rebut the presumption and provide a contrary indication was considered in *Neeld v Hendon* 1899 81 LT 405 and in *Evelyn v Mirrielees* 1900 17 TLR 152, but in both these cases the circumstances were different from those of the Disputed Land.

The appearance of the Disputed Land regarded in isolation provides so it seemed to me when I walked over it, no ground for rebutting the presumption. But if regard be had to the appearance of the remainder of the East-west Part and of the B2128 South Part and the agreement that they are properly registered, and therefore can properly be regarded as waste land of a manor, when walking over the Disputed Land, I found myself wondering whether the Sansomes Farm Line had any reality at all. I infer from the maps produced that the general lay-out of the Disputed Land in relation to the Unit Land and to the Village generally has been as it is now for a very long time. On appearance along, although the Disputed Land might be different from the rest, it seems to me that it is more likely that it would always have been reputed to be the same.

By the 1967 conveyance the Disputed Land is treated in the same way as the remainder of the East-west Part and nearly all the B2128 South Part. The ownership of the District Council of the Disputed Land is distinct from the ownership of the lands to the north and south; if the fences had been erected by reference to the highway,



I should expect (the present layout having existed for so long) the ownership of the Disputed Land up to the middle line of the made up carriageway to be the same as the ownership of the land adjoining it on either side; but this is not so. I regard the 1967 conveyance and the agreed distinct ownership as weighty evidence that the fences surrounding the Disputed Land were put up by reference to the ownership of the adjoining manorial waste and not by reference to the nearby but not adjoining made up highway.

I regard the maintenance described by Mr Thoday and Mr Amys as of little weight in favour of the Disputed Land being highway; it could not be to the public advantage for the County Council to be too careful as to what they could cheaply do for the public benefit as regards land owned by another local authority, particularly as both public authorities' only concern in relation to it was to make it more conveniently usable by the public. The possible significance of the maintenance work is diminished by the 1956 map prepared by Mr Whiteley, on which the Disputed Land is shown as manorial waste.

I regard the 1951 scheme^{as} neither supporting nor detracting from the contentions of the County Council, because the waste land of a manor may also be wholly or partially also highway, and whether or not it is, such a scheme regulating it could be made under the Commons Act 1899, see the definition of "common" in section 15.

The evidence was presented with commendable brevity; the whole proceedings only lasted a little more than 2 hours. I have no reason to suppose that any significant fact has been omitted. Balancing the conflicting considerations outlined above as best I can, I conclude that the fences of the Disputed Land were put up by reference to the land being manorial waste and that as regards all questions with which I am concerned, the Disputed Land, and the rest of the East-west Part and the B2128 South Part should all be regarded as one piece of land in the same ownership and subject to the like highway rights or lack of highway rights. Accordingly my decision is that the Disputed Land is not highway.

I have no note or recollection of any arguments about the three feet on either side of the made up carriageway along the Disputed Land; it seems to me I should treat this three feet in the same way as has been agreed between Mr Hart and Mr Aldhouse as set out above in respect of the Somerbury Lane Part, the B2128 South Part and the rest of the East-west Part.

For the above reasons I confirm the registration with the modification that there be removed from the register (1) all the land registered at HM Land Registry under Title No SY 312153; (2) all the land which is both north of Pollingfold Bridge and south of the junction of Somerbury Lane with the B2128 road; (3) the carriageway as now made up suitable for carrying motor traffic; and (4) the three feet on either side of the said made up carriageway.

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 14th day of June —

1977

a. a. Borden Fuller

Commons Commissioner