



In the Matter of Redhill and
Earlswood Commons, Reigate, Reigate
and Banstead Borough, Surrey

DECISION

These disputes relate to the registrations at Entry Nos 1, 2, 3, 4 and 5 in the Rights Section of Register Unit No. CL.39 in the Register of Common Land maintained by the Surrey County Council and ~~is~~ occasioned by Objection Nos 478, 480, 479, 482 and 481 made by Reigate Borough Council and noted in the Register on 15 January 1971.

I held a hearing for the purpose of inquiring into the disputes at Guildford on 8 November 1978. At the hearing (1) Reigate and Banstead Borough Council were represented by Mrs M G Wilcock, Senior Solicitor to the Council; and (2), (3) and (4) Miss E M C Isherwood (the registration at Entry No. 2 was made on her application), Mr David Saich (the registration at Entry No. 3 was made on his application jointly with his brother Mr Peter Saich) and Mr J R Hillier (the registration at Entry No. 4 was made on his application) all attended in person. Mr D Saich said that he had bought out his brother's share, so he is not now concerned.

The land ("the Unit Land") in this Register Unit comprises (according to the Register map): (1) a piece a little more than a mile long from east to west, having a variable width (in parts between $\frac{1}{4}$ and $\frac{1}{2}$ a mile), situated south of St Johns, west of the Brighton Road and north-east of Woodhatch Road and being (the main part of) Earlswood Common; (2) a piece a little more than $\frac{1}{2}$ a mile long from north to south, having a variable width (about $\frac{1}{4}$ of a mile or less) situated north of St Johns, west of Sandpit Road and south of White Post Hill, and being (the main part of) Redhill Common; and (3) numerous smaller pieces nearby which are enjoyed with or reputed to be part of one of these Commons.

The registration in the Land Section was made on the application of Reigate Borough Council, and they are in the Ownership Section registered as owners of all the Unit Land. There are no other Entries in the Rights Section.

I have a request signed by Mrs Brenda Mary Friling as successor in title of Mr F W Lewis (the registration at Entry No. 1 was made on his application) and on behalf of the Borough Council and the County Council requesting me to delete this Entry. And also a request signed by Miss R J E Price (the registration at Entry No. 5 was made on her application) and on behalf of the said Councils requesting me to delete this Entry. In the course of the hearing Mr Hillier said he withdraws his application (at Entry No. 4). So at the hearing I was concerned only with Entries Nos 2 and 3.

No. 2 (Miss Isherwood) is of rights attached to 26 White Post Hill of estovers, turbary, piscary and of common in the soil over the whole of the Unit Land. No. 3 (Messrs Saich) is of rights attached to 12 Pendleton Road to graze 2 horses or 2 cattle or 2 sheep, of estovers, turbary, piscary and of common in the soil over the whole of the Unit Land. The grounds of objection No. 480 (to Entry No. 2) are:- "(1) No evidence can be produced by the applicants to show the existence of the specific rights claimed in the application for registration of common rights; and (2) if such evidence



can be produced the rights have been abandoned since they have not been exercised for so long a period as to raise a presumption of abandonment". The grounds of Objection No. 479 (to Entry No. 3) are the same but with the addition: "(3) As to the right of grazing ... such rights are claimed as appurtenant to the property specified in the application, such rights cannot exist since their existence would be contrary to the common law rule of levancy and couchancy".

In the course of his evidence Mr Saich produced: (1) a copy of a deed dated 11 January 1900 and made between the widow, children and daughter in law of William Verrall (he died 15 August 1891 and was the great great grandfather of the witness) by which the parties agreed that the benefit of a deed dated 21 September 1899 by which the Rt Hon I C Somerset (Lady Henry Somerset) enfranchised certain lands, should be held on trusts corresponding to those of the will of William Verrall; (2) a loose leaf book of documents and photographs compiled by himself to show his family history; and (3) a printed book "Reigate through the ages" by Wilfred Hooper (1945 Surrey Archaeological Society). In the course of her evidence Miss Isherwood produced: (1) a conveyance dated 25 March 1949 by which 26 White Post Hill (formerly known as 3 White Post Cottages) was conveyed to her; and (2) an abstract dated 1920 of the title of the trustees of the will of W Allingham to Nos 24, 25 and 26 White Post Hill, which abstract included a deed of enfranchisement dated 14 September 1891 made by Lady Henry Somerset. Mrs Wilcock produced: (1) a copy of the 1899 (Verrall) deed of enfranchisement which had been sent to the Town Clerk by Messrs P and D Saich under cover of a letter dated 21 July 1970, (2) the Commons Regulation (Redhill and Earlswood Commons) Provisional Order Confirmation Act 1884 (47 & 48 Vict. c. 1.); (3) a conveyance dated 9 November 1922 by which H C S Somerset conveyed to the Mayor Aldermen and Burgesses of Reigate the Manors of Reigate and all other Manors if any in Surrey to which the grantor was entitled under the will dated 18 May 1880 of the Rt Hon C S Earl Somers and all waste and common lands including (among others) Redhill and Earlswood Commons; (4) a copy of the byelaws applicable to Redhill and Earlswood Commons; and (5) an affidavit sworn on 7 November 1973 by Mr R Mendham who was employed by Reigate Corporation as groundsman/park keeper from 1946 to 1969 (the latter 2 years he was Assistant Park Keeper).

As I understood them, Mr Saich and Miss Isherwood when they applied for these registrations were not so much concerned to establish the rights so that they could themselves actually exercise them but rather to preserve local rights for the benefit of local inhabitants generally. However this maybe, I must determine whether these rights exist in accordance with the established legal principles applicable.

Both Mr Saich and Miss Isherwood each relied on the 1891 deeds which formed part of their titles. These deeds are almost identical (one for Mrs M A Verrall and the other for W Allingham) being grants of land formerly copyhold of the Manor of Reigate to the grantee and his heirs discharged from copyhold tenure: each included an express grant of "all such commonage and rights of Common in or upon and over the respective waste and commonable lands of the said Manor of Reigate as the said M A Verrall/W Allingham or any person through whom she/he held enjoyed or was entitled to in respect of or as appurtenant to the said hereditaments and premises thereby enfranchised ...".

That words of this kind in a grant of freehold land are not to be considered as evidence that there are any rights of common attached to the land thereby granted has



long been accepted, see *Baring v Abingdon* 1892 2 Ch 374. Before 1882 and for some time afterwards, some such words were included in every conveyance of land, and since 1881 they are deemed to have been so included, see Conveyancing Act 1881 section 6 now replaced by Law of Property Act 1925 section 62. The 1891 deeds of enfranchisement are in the form then common, see *Davidson Conveyancing Precedents* (4th edition 1877) volume 2(1) pages 386 et seq. In my opinion these 1899 deeds do not support the registration except to the extent that I can infer from other evidence that the copyhold owner (*Verrall* or *Allingham*) was entitled to or enjoyed the rights.

As to the history of the Manor; - *Hooper*, supra thought that it had ceased to exist as an agricultural unit before the middle of the 16th century, see pages 39 and 40; he mentions a survey of 1623 as indicating the commons or wastes properly belonged to the Lords of the Manor for the soyle and the woods and to the tenants for the herbage and a survey of 1771 as indicating that the tenants rights were proportional to the value of the tenants holdings. Having regard to the extensive building developments around the Unit Land on what must I suppose have been formerly copyhold, it is unlikely that any herbage rights proportional to value could have continued. The 1884 Act shows that in 1882 proceedings were commenced in the High Court to establish rights of herbage and that the Act followed a compromise of such proceedings. Although both the 1884 Act and the 1922 conveyance contemplate that there might then be persons with rights of common, they do not I think provide any evidence that there were any rights such as now claimed by Messrs Saich and Miss Isherwood or at all.

In Mr Saich's book there is a manuscript of his grandmother Mrs Mabel Shergold (she died 4 or 5 years ago and would now be over 80 years of age and was the daughter of Emily Heaysman party to the 1900 deed) to the effect that she was born in a little stone cottage opposite to St John's Church which belonged to her grandfather and that next door was a barn where he kept sheep which used to graze on the Common. Even if I could treat this manuscript (it is not signed) as evidence, the barn referred to was not (so Mr Saich said) on the land now owned by him.

Mr Saich said that his family (meaning his wife, mother, grandmother or himself) had "exercised the rights". But as a result of questions put to him, I am unable to accept this very general statement having regard to the way he subsequently explained it. He said (in effect):- He was born in 1941 and first went to 12 Pendleton Road about 25 years ago when his grandmother inherited the property. It is about $\frac{1}{4}$ of an acre. There had never been any animals on it (except a dog). He had never (personally) taken any turf off the Commons for fuel. He had taken stone to use in the garden and to support a garden wall. He had never fished although he believed his grandmother and brother (nobody else) had fished. He had at various times taken sticks for the garden and leaf mould for manure.

Miss Isherwood said (in effect):- When they (she and her mother) went there in 1936, the common keeper told her mother (she died in 1951) first of all and later herself that they were entitled to go to the little wood by the road leading to St Johns and take any of the leaf mould and this they did; there use to be a big heap of leaf mould where the road menders had deposited it; the heaps are not now



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there anymore. She cut bracken for the garden. She picked up stones when she came across them; in the little wood there was a sand quarry where there is some very hard rock embedded in the side; after heavy frost, pieces broke away and obstructed the footpath through the wood unless somebody takes them away. She had stone for the rockeries around the edge of their front gardens (there was a lot already there) and the late common keeper (now deceased) frequently met her doing these things. Unless she was starving she would not eat fish from the lake! There is nothing in the way of turf you could put on a fire! She cut dead horse and sometimes used it to light her own fires; she cut it primarily to prevent it causing a fire near her house (if any person threw a match into it). When they cut wood on the Commons, she asked (if it was of a size to keep) whether she could have it; otherwise they have a bonfire.

Mr Mendham said generally that none of the rights claim "were lawfully exercised" between 1946 and 1969. Mrs Wilcock contended that by reason of the byelaws (those relevant were made in 1886) the things done on the Unit Land as described by Mr Saich and Miss Isherwood therefore could not be use as of right.

The evidence given as summarised above, in my opinion provides no support at all for a right of grazing as claimed by Messrs Saich or any other such right. It is unlikely that such a right would have survived from some earlier time so as to end up uniquely attached to 12 Penderley Road; if it had ever existed, it would I think either have been mentioned in the 1884 Act or be locally known in some identifiable way. ~~Quite~~ quite apart from Mr Mendham's evidence and Mrs Wilcock's byelaws contention, my decision is that no such right has ever at any relevant time existed.

There was no evidence to support right of turbary or piscary. As regards estovers common in the soil, I have some evidence as indicated above that for the benefit of 26 White Post Road and 12 Penderley Road, wood, leaf mould and stone were sometimes taken. But I am not persuaded by the evidence of Mr Saich that he or his family ever did anything to an extent and with a frequency or regularity which could amount to a taking and enjoyment claiming right thereto within section 1 of the Prescription Act 1832 or an enjoyment as of right on which I could presume a grant to him. And I am not persuaded by the evidence of Miss Isherwood that the persons employed by the conservators with whom she may have conversed or who may have seen her doing what she described ever intended to acknowledge a right or to do anymore than indicated (as must at the time have been obvious) that there could be no reasonable objection to what she described; the doing of small things which are "unobjectionable" is not evidence in support of rights such as she claims, see *Beckett v Evans* [1967] 1 Ch 450 at pages 469 and 475.

From the considerations set out above my decision in ~~the~~ paragraph 1⁴ the grounds of objection Nos 480 and 479 succeed; and I need not therefore consider paragraphs 2 and 3. Accordingly I refuse to confirm the registrations at Entries Nos 2 (Miss Isherwood) and No. 3 (Messrs Saich). In view of the request and withdrawal above mentioned, I also refuse to confirm the registrations at Entry No. ~~4~~ 1 (Mr Hillier) and No. 5 (Miss Price).

No 4



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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 29th day of January 1979

a. a. Baden Fuller

Commons Commissioner