COMMONS REGISTRATION ACT 1965

Reference No. 237/D/111

DECISION

On 9th April 2008, at the Village Hall, Chelwood Gate, East Sussex I held an inquiry under the Commons Registration Act 1965 into a registration of land as common land under register unit no. CL116 in the register of common land maintained by East Sussex District Council.

CL116 was registered on 27th February 1970 on the application of the Ramblers' Association. The application extended to a much larger area of land but the bulk of that land had been the subject of a different and earlier application and was duly registered under register unit no. CL108. Hence the only land which was registered in accordance with the application of the Ramblers' Association was that which fell outside CL108. It consisted of two tracts beyond either end of CL108, one to the north-west and the other to the south-east. No rights of common were ever registered.

I take the two tracts in turn.

I. The Plantation

Most of the hearing was taken up with the tract to the north-west, referred to in evidence as the plantation. It consists of an area in the shape of a kite. The tip of the kite points roughly south-east. Of the two long sides, one runs parallel to Beaconsfield Road and the other, running more southerly, adjoins CL108, which is there part of Ashdown Forest. The two short sides follow a substantial track. At each corner formed by the junction of one of the short sides with one of the long an irregular bite has been taken from what would otherwise be a perfect kite. That on the west accommodates a mission church and the Village Hall where I held the hearing. Across the plantation is a public footpath, running roughly north-east from a point opposite the junction of Stone Quarry Lane with Beaconsfield Road.

History and jurisdiction

The matter has a curious history, probably unique. In view of some of the submissions made at the hearing, and the evident scope for misunderstanding, I ought

to repeat what I said at the hearing about its purpose. The aim of the 1965 Act was to create a comprehensive register of common land. It therefore required all common land to be registered within a set period. If it was not registered, it lost its status as common land. Anyone could apply for registration with a minimum of formality. At that point, there was no investigation whether the land really was common land. The registration authority (the county council) made a provisional registration only. There was then a further period within which anyone interested – often but not always the landowner – could object to the registration on the ground that the land was not in fact common land. If no one made an objection within that period, then the registration became final; in other words, the land became common land even if in truth it had never been common land beforehand. If someone did object, that gave rise to a dispute whether the land was common land. The dispute would be referred to a Commons Commissioner for decision after hearing evidence. If he decided that the land was common land, he would confirm the registration, making it final just as if no objection had ever been made; if he decided that the land was not common land, he would refuse to confirm it, making it void.

As I have said, the plantation was registered as part of CL116 in 1970. No objection to the registration was made in the ordinary course. On the face of it, therefore, the registration became final on 1st August 1972 in accordance with the 1965 Act and the legislation made under it then in force, which fixed 31st July 1972 as the time-limit for making an objection. But the then owners of the plantation, Mr. Laurence Goodeve Smith and Prof. Dennis Butler Fry, challenged that conclusion, relying amongst other grounds on the fact that in the publicity required by the relevant regulations, in a prescribed form to be published and displayed locally, the land had been described as "addition to CL 108", itself described as Chelwood Beacon. The evidence for the then landowners was that the description was misleading and not apt to convey to anyone reading it that the plantation had been registered, so that they had been deprived of the opportunity to object. Templeman J., in a decision reported as *Smith* v. *East Sussex County Council* (1977) 76 L.G.R. 332, accepted that evidence and held that section 7 of the 1965 Act did not make final any registration where there had not been substantial compliance with the legislative requirements as to publicity. On 18th July 1977 he made an declaration, in an order produced to me, that,

> "the provisional registration of all that land adjourning [*sic*; *recte* adjoining] Beaconsfield Road Chelwood Gate in the County of Sussex outlined in red on the plan annexed hereto … has not become final".

What Templeman J. decided was that though no one had made a timely objection to the registration of the plantation, the registration had not become final because the publicity given to it had been inadequate. He did not consider whether the plantation was or was not common land, that being a matter for a Commons Commissioner. He merely decided that the point was still open, because the registration remained only provisional.

That decision was a qualified success on the part of the plaintiffs, because although the registration was declared to remain provisional only, the time for objecting to the registration under the regulations as they then stood (the Commons Registration (Objections and Maps) Regulations 1968 (S.I. 1968 No. 989)) had long passed. They

therefore could not lodge a new objection and no procedural means existed by which to obtain a binding decision from a Commons Commissioner on the status of the land.

There matters rested. Templeman J. had suggested that the administrative difficulties to which his decision would give rise could be resolved by new regulations providing for a new period within which objections could be lodged. Nearly 30 years went by before the suggestion was taken up. The Commons Registration (Objections and Maps) (Amendment) (England) Regulations 2007 (S.I. 2007 No. 540) provided for a new objection period, between 6th April and 6th August 2007 in certain circumstances. The current landowner, Mr. Christopher Goodeve Smith, made an objection on 10th May 2007 and the matter was referred to a Commons Commissioner in consequence.

The new objection period was expressed to apply to land or rights only if

> "(a) they were registered in the register of common land ... pursuant to section 4 of the 1965 Act either —
> (i) after 1st January 1967 and before 1st July 1968; or
> (ii) after 30th June 1968 and before 1st August 1970, and
> (b) the registration failed to become final in consequence of an order of the court made, in the case of sub-paragraph (a)(i), after 30th September 1970 and, in the case of sub-paragraph (a)(ii), after 31st July 1972".

The registration of CL116, having been made on 27th February 1970, fell within sub-paragraph (a)(ii). As to paragraph (b), the language is odd. The reference is clearly to a failure in consequence of a court order to become final, though the grammar is ambiguous. But it is not literally true here that the order of 18th July 1977 caused the registration to fail to become final. The court merely declared that the registration had not done so: the order identified an existing state of affairs and did not convert a final registration into a provisional one or prevent a registration from becoming final. To construe the 2007 Regulations, however, as excluding a declaration of the kind made in this case would leave them ineffective. The court never had any jurisdiction under the 1965 Act to make an order of the kind which the wording of the 2007 Regulations might appear to presuppose. Moreover, the Explanatory Memorandum accompanying the 2007 Regulations indicates that they were intended to cover this very case and that there might be no other of its kind. It would therefore be perverse to treat this case as outside the 2007 Regulations. Despite their wording, I conclude that I have jurisdiction to determine the dispute.

The dispute is whether or not the plantation is common land within the 1965 Act. Since no rights of common were registered, to maintain the registration it must be shown that the plantation is "waste land of a manor not subject to rights of common", the wording of the relevant part of the definition of "common land" in section 22(1) in the 1965 Act.

Appearances

As I have mentioned, the registration of CL116 was made on the application of the Ramblers' Association. In a letter of 1st April 2008, the Association's Head of Rights

of Way, Mr. Adrian Morris, stated that despite a search the Association had been "unable to find any evidence or detailed records relating to the original claim for this piece of land in 1969" and that they would not be appearing at the hearing; nor did they.

The current landowner, Mr. Christopher Smith, appeared personally and by counsel, Mr. Nigel Thomas, in support of his objection.

I heard also from the following, who wished to maintain the registration as to the plantation and some of whom gave evidence:

- Mr. Michael Wales, a councillor of Danehill Parish Council (the plantation falling within Danehill);
- Mrs. Helen Waugh;
- Mr. Christopher Marstrand;
- Mrs. Sylvia Martin, a councillor of Wealden District Council;
- Mr. John James;
- Mr. Christopher Sellier;
- Mr. Patrick Alcock;
- Mrs. Lesley Boase; and
- Mrs. Sally Dennett-Thorpe.

Evidence
For the registration

Mrs. Waugh gave evidence that her family had moved to a house on Beaconsfield Road, opposite the plantation, in 1971, when she was 13. It was then possible, she said, to wander round the whole of the plantation, where she walked dogs. She herself had left that house in 1983 but she had continued to walk the plantation at weekends ever since and her mother still lived there. She had never, however, gained access to the plantation from Beaconsfield Road; there were rhododendrons along the boundary of the plantation down that road. She referred to the public footpath across the plantation and agreed in answer to Mr. Thomas that the footpath had been fenced on either side and that the fencing had run its full length. She said that the plantation had not been cultivated, though trees may have been planted after the storm of 1987, which had brought down the trees then growing, and she did not recall the grass being cut.

Mr. Marstrand had lived in Tanyard Lane, some three-quarters of a mile south of the plantation, since 1963. His evidence was that he had always had dogs and walked across the forest locally every day. He knew the plantation well. All of it, he said, had appeared to be uncultivated land since he had lived there. The boundary along Beaconsfield Road consisted of a rough hedge of rhododendrons; the other long boundary was rather indeterminate; the other boundary – the short sides of the kite – was marked by the track and between the track and the woodland of the plantation was a ditch, which petered out towards the north-eastern end. Since 1987, the plantation had appeared more open. He confirmed Mrs. Waugh's evidence that there had always been fencing along the public footpath; it was not possible to get through

that fencing, which was of chestnut. Like Mrs. Waugh, he did not get access to the plantation from Beaconsfield Road but from its north-eastern boundary.

Mrs. Sylvia Martin had lived in the area since 1968, first at Fairplace Farm, called Stonemead on the maps, some way to the south-east of the plantation, and then since 1985 in Baxters Lane, off Tanyard Lane. Little had changed on the plantation in that time, except that 200 trees had come down in 1987. She had rarely walked on the plantation, though she had walked up the public footpath with the chestnut paling, which she thought had always been there. The rhododendron hedge along Beaconsfield Road had also always been there, only a rough hedge but with a "looked after" appearance.

Mrs. Boase had lived on St. Quay Road since 1967. She had walked the plantation with dogs and there had been no restrictions on her doing so in that time, during which the land had been uncultivated.

Mrs. Sally Dennett-Thorpe gave evidence that the rhododendrons along Beaconsfield Road were cut by the Council.

Against the registration

Mr. Christopher Smith derived title from Mr. Charles Smith, his grandfather. Mr. Charles Smith died in 1948. The trustees of his estate by 1975 were his son Mr. Laurence Goodeve Smith and Prof. Dennis Fry. In that latter year, Mr. Commissioner Squibb directed them to be registered as owners of the plantation in the Ownership Section of the register. Mr. Christopher Smith is the son of Mr. Laurence Smith and, as I have said, is the present owner of the plantation.

Mr. Thomas for Mr. Christopher Smith was able to rely on material assembled for the hearing before Templeman J. in 1977, notably an extract from instructions to counsel prepared by Mr. Laurence Smith in 1973 (he being one of the plaintiffs and a solicitor), an affidavit of Mr. Ernest Carter sworn on 10th March 1977 and a set of photographs. Taken together, they amount to this.

Mr. Charles Smith bought the plantation in 1934. Mr. Carter, who was born in 1902, could speak for its earlier history. He was born in Nursery Farm, called Nursery cottage by 1977, which is on Beaconsfield Road opposite the plantation, and lived there until moving elsewhere in Chelwood Gate in 1930. From Edwardian times until the Great War the plantation was covered with Scots pines, spruce and chestnuts, believed to have been planted in about 1880 by a previous owner, a Mr. Wormald. There was a post-and-rail fence all round the plantation. On both of the long boundaries were signs saying "Private. Trespassers will be prosecuted". The fence did not keep out Mr. Carter when a boy, or his friends, and from time to time they were chased off the plantation by a later owner, Sir Henry Clarke Jervoise or his employees. The same happened after Sir Henry sold to the Earl of Donoughmore in 1910. In the middle of the Great War, the trees were felled for pit props and Lord Donoughmore put up a new fence of iron posts and wire. In about 1926, according to Mr. Carter, the public began to use what later became the public footpath running

north-east from the junction of Stone Quarry Lane with Beaconsfield Road; at that time anyone using it had to crawl through the fence on both sides of the plantation.

On Mr. Charles Smith's purchase, he had a fence of chestnut palings put up round the whole plantation. He also fenced each side of the footpath (not yet public), which had not been previously fenced. There were gates at either end of the footpath and they were padlocked once a year on Good Friday. The fence round the plantation had another gate in each of the long boundaries and a third along the track, with two more on either side of the footpath, all kept continuously padlocked. The footpath was left open for the public to use. Maintenance was carried out by a Mr. Hanscombe, Mr. Carter's brother-in-law, from 1934 to 1967. Mr. Hanscombe was engaged to look after both the plantation and a cottage, Goodeve, and garden on the other side of Beaconsfield Road which Mr. Charles Smith owned. Mr. Hanscombe had been unemployed when introduced to Mr. Charles Smith, who regarded him as capable of turning his hand to anything. Mr. Hanscombe built a stone bridge across the north-eastern end of the footpath, so that someone in one half of the plantation could pass to the other without the need of opening the gates in the fences along the footpath. He planted hedges, kept paths in order, mended fences kept grass and undergrowth down, prevented ponds from silting up, built a pumphouse near them, together with a water tank and a pipeline from the pumphouse to the tank, and erected two small wooden hand-bridges; over the years he planted rhododendrons, azaleas and trees. According to Mr.Carter, Mr. Hanscombe visited the plantation at least once a day. He ceased to work on the plantation in 1967, the year of his death according to the instructions to counsel, and Mr. Carter took over his work until himself obliged to give up the job in 1976 by ill-health.

The photographs, taken for the most part in 1975 in connexion with the application heard by Templeman J., bear out much of that evidence. They show in particular the chestnut palings forming the fences on either side of the public footpath, together with an open kissing-gate giving access to the south-western end of the footpath and a gate at the other end. They also show padlocked gates in the fences along the public footpath and the padlocked gate opposite Goodeve which gave access to the south-eastern half of the plantation. It is clear too that grass had been cut in the north-western half of the plantation. (Mrs. Waugh and Mr. Marstrand saw the photographs of the fencing along the public footpath and agreed that that was how it had looked. Mr Marstrand had only a vague recollection of the gate opposite Goodeve and could not remember whether it had been padlocked.)

Giving evidence, Mr. Christopher Smith said that he had been born in 1944 and recalled going to the plantation in 1946. He and his brother lived with their parents 15 or 20 miles away in Henfield, Sussex but the family regularly visited the plantation in the 1950s and 1960s, perhaps a dozen times a year, though as he was away at school he would not always be there. They entered it by way of the gate off Beaconsfield Road, opposite Goodeve, his father having a bunch of keys to unlock it. Mr. Hanscombe would meet them there. While Mr. Hanscombe and then Mr. Carter were in charge the fence of chestnut palings had been constantly maintained, though along Beaconsfield Road it had been subsumed in holly or rhododendrons. The public footpath had been registered as such in 1971 on the application of his father, whereupon the padlocks on the gates at each end were removed.

Mr. Laurence Smith died in 1985. Since his death the resources available for maintenance had been less ample and the plantation had changed, particularly after the destruction of 1987. An aunt of Mr. Christopher Smith's who lived in Eastbourne used to come over once a week and mend fences but she had to give up in 1996 because of ill-health. Mr. Mark Carter, Mr. Edward Carter's grandson, was now employed on maintenance, at a cost of £2,000 a year. Mr. Smith acknowledged that there were a good many holes in the fence round the plantation; as fast as it was repaired, he said, it was broken down again. Over the last 20 years no one would have had any difficulty in entering the plantation and walking round it. The boundary on the north-east side of the plantation had become seriously overgrown, though in his childhood there had been a broad track along much of its length. Today the plantation looked very untidy compared with the 1950s and 1960s. A small area was still mown, about two acres immediately east of the car park next to the Village Hall.

Findings on evidence

I bear in mind that both what Mr. Carter said in his affidavit and what Mr. Laurence Smith said in his instructions to counsel could not be tested by cross-examination. Nonetheless I accept it because it tallies with the photographs taken in 1975 and with Mr. Christopher Smith's evidence, which I also accept. He was plainly an accurate witness and was willing to concede a point, as when he agreed that in recent years walkers had had no difficulty in gaining access to the plantation. The effect of all that evidence is clear. From 1934 the plantation was actively maintained, cultivated and enclosed down to the time of registration of CL116 and beyond. The fence round the plantation left it inaccessible to the public, except for their use of the fenced footpath. The stone bridge connecting one half of the plantation with the other would have been pointless if access had been free. The gates, other than those at either end of the footpath, were padlocked. The photographs show that in 1975 the fence was still intact. They mostly show the fencing along the footpath, which was in good order, and less of the boundary fence, though the latter can be seen; but it would have been useful to maintain the fencing along the footpath only if the boundary fence was also maintained.

I therefore do not accept that the public could walk freely over the plantation at the time of registration, so far as any of the local inhabitants suggested that they could. I am sure that anyone sufficiently determined could have entered the plantation despite the chestnut palings but at that time they constituted a significant obstacle and the plantation remained enclosed. It may be that after Mr. Hanscombe ceased work in 1967 the maintenance of the plantation became less vigorous; Mr. Carter was 65 when he took over and he ceased to do the job in 1976. At any rate after 1985, when Mr. Laurence Smith died, the effort put into maintenance diminished and the fencing deteriorated to the point at which anyone wishing to enter the plantation to walk round it would encounter no difficulty, at any rate on the north-eastern boundary. The evidence from the inhabitants that access was available I accept so far as it covered the period from the 1980s onwards. I accept also that apart from the mowing of a small part of the plantation and apart from such minor maintenance as Mr. Christopher Smith's aunt was able to achieve, there was no cultivation of the plantation over that period.

Submissions and discussion

Mr. Wales on behalf of Danehill Parish Council provided me with a written submission and addressed me in support of the registration. I should pay tribute to the care and thoroughness which he had evidently brought to the task.

He queried the decision of Templeman J. in 1977, saying that anyone local would have recognised the plantation from the description which the judge held to be inadequate. In my view that point is not now open. Subject to any appeal, which would have had to be brought 30 years ago, the decision is conclusive. The court declared that the registration had not become final and that is that. I have no power to say that the judge was wrong and contradict his decision by saying that it has in fact been final all the time. Templeman J.'s decision left the status of the land open. My task is to decide whether on the evidence the plantation is common land and hence whether I should confirm the registration.

Turning to that, Mr. Wales said that I should assume that acceptable evidence must have been provided at the time of registration, otherwise the application would have been rejected then, and that I should act on that presumed evidence. That also is a point I cannot accept. An application to register land as common land had to be made in a prescribed form, with a statutory declaration in support which required no detail of any evidence relied on. If the application was made in that form, the registration authority had no power to reject it: provisional registration followed automatically and it was for a Commons Commissioner, if objection was made to the registration, to rule whether the evidence in support was adequate. Although the original application of the Ramblers' Association, so I understand, was destroyed in a fire when the original register maintained by the East Sussex County Council and supporting documentation were lost, a copy of the application survives in the papers prepared for the hearing before Templeman J. The application, as usual, is wholly uninformative, merely asserting without any particulars that in the belief of a deponent on behalf of the Association the land was common land and describing it as manorial waste. That was the only evidence presented at the time. The guess that members of the public must have made statements which would have been included in the original application is simply not correct. Nor was there such evidence before Templeman J.

Mr. Wales also pointed to the passage of time since Templeman J.'s decision. He said that the inference should be that the owners of the plantation had accepted the registration and I think he also meant to suggest that more evidence might have been available to support the registration if the matter had been investigated earlier. Mr. John James also complained that the passage of time had reduced the amount of evidence which could have been available. As I have already mentioned, however, no procedural means existed by which the landowners could have brought the status of the plantation to a hearing until the 2007 Regulations were introduced, whereupon Mr. Christopher Smith acted promptly. There can be no inference that the registration has been accepted. The suggestion that more evidence might have been available if this hearing had been held 20 or 30 years ago is a probable one but that difficulty cannot be laid at the door of the Smith family. I simply have to decide the matter on the evidence actually available.

I have stated above my findings of fact and I turn to the law. Mr. Thomas reminded me of the familiar description of waste land in *Att.-Gen.* v. *Hanmer* (1858) 27 L.J.Ch. 837 at 840 as being "the open, uncultivated and unoccupied lands parcel of the manor, or open lands parcel of the manor other than the demesne lands of the manor", a description followed and elaborated in *Re Britford Common* [1977] 1 All E.R. 532. Slade J. in *Britford* held that for the purpose of the 1965 Act waste land of a manor must be (a) parcel of a manor (a requirement now modified by *Hampshire County Council* v. *Milburn* [1991] 1 A.C. 325), (b) open and uncultivated, (c) unoccupied and (d) not comprised in the demesne lands of a manor. The submissions centred on requirements (b) and (c).

At this point I ought to mention the point in time at which those requirements have to be satisfied. It was held in *Re Merthyr Mawr Common* [1989] 1 W.L.R. 1014, following *C.E.G.B.* v. *Clwyd County Council* [1976] 1 W.L.R. 151 and *Re Burton Heath*, unreported, 12th May 1983, that the relevant date was the date of the hearing before the Commons Commissioner and not the date of registration. Those, however, were all cases in which land which had been (or might have been) common land at the date of registration had ceased to be common land between that date and the date of the hearing. The decision in each was that the Commons Commissioner should refuse to confirm the registration, even though the registration had been correct when made. Hence if waste land is enclosed after registration but before the hearing, the registration should not be confirmed. I do not think it follows that one looks *solely* at the date of the hearing. It seems to me that if land was not common land when it was provisionally registered, it cannot be right to confirm the registration merely because it later became common land. The point was debated briefly at the hearing, when Mr. Thomas invited me to take that view. Moreover, the point would be material here only if it were possible for land to become waste land of a manor when it had not had that status at the time when it was registered. I am not aware that the possibility has ever been raised and it seems to me unlikely that as a matter of law it exists. I conclude, therefore, that if the plantation was not waste land of a manor at the time when it was registered, I should not confirm the registration.

So I turn to requirements (b) and (c) identified by Slade J. in *Britford*. Mr. John James made brief submissions on those requirements. On the question of enclosure he said that though there were fences alongside the public footpath and a hedge along Beaconsfield Road, the fences were intermittent and rhododendrons were self-sown in the area; the north-east boundary was undifferentiated from the forest. Local residents had been able to use the plantation for recreation for the last 20 years. Mr. Thomas relied on the fencing of the plantation, on which I have stated my findings. I am quite clear that the plantation has at no material time been open in the relevant sense, *viz.* unenclosed. The fence of chestnut palings was a substantial enclosure at the time of registration and for some time afterwards. Mr. Jones' points concerned the state of the plantation more recently. Even if I were looking at the state of the land at the date of the hearing, I do not think that it would qualify as open. When a fence which has ceased to be an effective barrier by a combination of damage and neglect, that does not of itself make the land open.

That is enough to decide this matter but I deal briefly with the other requirements identified in *Britford*. As to cultivation, Mr. Jones said that there had been none since

1987 and Mr. Thomas accepted that. There had previously been planting by Mr. Carter of rhododendrons, azaleas and trees which Mr. Thomas submitted, and I accept, was cultivation. Since planting of long-lived plants is necessarily intermittent, I doubt that I would have held the plantation to be uncultivated even if I had been considering its status only at the date of the hearing.

As to occupation, the reference is not confined to use as a dwelling but must extend to use of the land for any significant purpose. Even on that approach, it is difficult to see that there has been any occupation since Mr. Laurence Smith's death. Though Mr. Mark Carter is now retained at a modest wage, it was not clear to me what he did beyond (I assume) the mowing of the small area still mown. Before Mr. Laurence Smith's death, however, the plantation was certainly occupied, though the family were not constantly present on the land. Mr. Thomas described it as a pleasure ground, occupied in the way such land could be occupied, and given the evidence as to the work done by Mr. Hanscombe I think that a fair description.

Conclusion

In my judgment, therefore, the plantation fell outside the description of waste land given in *Hanmer* and *Britford* at the time of registration and would have done so at the date of the hearing even if that were the relevant time. It is not common land.

II. The South-eastern Part

The other part of CL116 with which the hearing was concerned was a smaller tract, roughly the shape of a rhombus, to the south-east of CL108.

I have mentioned above that Mr. Laurence Smith and Prof. Fry were registered as owners of the plantation in 1975 by direction of Mr. Commissioner Squibb. The hearing leading to that direction was held on 20th November 1975 and I have seen a copy of the Commissioner's decision dated 16th December 1975. At the hearing it was said that the south-eastern part had been sold in 1972 by Viscount Gage to a Mrs. D. O'Brien but she had not then been traced. But it appears that the O'Brien family did later emerge, since a Mrs. Joan Elizabeth Mary O'Brien of Nutley, Sussex, was registered as owner on 28th April 1977.

History

The present status of the land is slightly curious. As I have mentioned, no objection was made to the registration of any part of CL116 as common land by 31st July 1972, the last date for objection until the 2007 Regulations were introduced. The apparent finality of the registration was challenged by Mr. Lawrence Smith and Prof. Fry only as to the plantation. The grounds they relied on did not extend, or did not obviously extend, to the south-eastern part. The order of Templeman J. made in 1977 made it clear that the decision that the registration had not become final extended only to the plantation.

Nonetheless, when effect came to be given to that order in the Land Section of the register, it was treated as extending to the whole of CL116. There are three entries.

No. 1 identifies the two tracts comprised in the register unit, namely the plantation and the south-eastern part, and records that they were registered pursuant to the application of the Ramblers' Association. No. 2 reads, "The registration at entry No 1 above, being undisputed, became final on 1 August 1972". That was later struck through in 1977 and entry no. 3 added, which reads, "The registration at entry No.2 above was overruled." There is also a reference to a note, which refers to Templeman J.'s decision. It is not clear why the south-eastern part was treated as benefiting from that decision. If the treatment was deliberate, it may be that there was thought to be an analogy with the rule that an objection to the registration as common land of part only of the land in a register unit puts the entire registration in issue, though if so the registration authority was remarkably prescient, since the rule was not authoritatively laid down until *Re Sutton Common, Wimborne* [1982] 1 W.L.R. 647 and *Re West Anstey Common* [1985] Ch. 329.

No doubt it is not possible for a registration to be final as to part and provisional as to part. I am nonetheless unsure that it would have been open to me to decide that the south-eastern part was not common land. I assumed at the hearing that the status of the south-eastern part was properly before me and, as will appear, the point does not in the event make a difference.

Appearances

At the hearing, no one attended for the Ramblers' Association. Nor did anyone attend claiming to be the owner in succession to the O'Briens. Mr. Patrick Alcock, who had earlier said that he could speak about the south-eastern part, had left by this stage of the hearing.

I heard from the following:

- Mrs. Pamela Smith;
- Mr. Christopher Sellier; and
- Mr. John James.

Evidence

Mrs. Smith had no knowledge of the state of the south-eastern part but said that she wishes to retain any square inch of common land.

Mr. Sellier said that he had lived in the area since 1972. The south-eastern part was unfenced and entirely open. It was also uncultivated.

Mr. James, who had lived locally since 1996 and was a member of the local footpath group, said that there was a footpath across the south-eastern part. There were trees, rhododendrons and brambles. It was unfenced and unused.

Conclusion

Land which is now unfenced, uncultivated and unused is unlikely to have become so since registration. I have also the statutory declaration from the Ramblers'

Association and I bear in mind what was said in *Re Sutton Common, Wimborne*, which I have already cited. I therefore hold that the south-eastern part was common land at the time of registration and still is.

III. Disposal

I confirm the registration of the land comprised in CL116 as common land modified so as to exclude the plantation.

I am required by the Commons Commissioners Regulations 1971 (S.I. 1971 No. 1727), reg. 30(1) to explain that a person aggrieved by this decision as being erroneous in point of law may, within 42 days from the date on which notice of the decision is sent to him, file an appellant's notice after requiring me to state a case for the decision of the High Court.

Dated this 27th August 2008

Nicholas Le Poidevin
Commons Commissioner