



In the Matter of Kingston North Common,
Ringwood, Hampshire (No. 1)

DECISION

This dispute relates to the registration at Entry No. 1 in the Land Section of Register Unit No. CL 181 in the Register of Common Land maintained by the Hampshire County Council and is occasioned by Objection No. 338 made by the Trustees of the Bisterne Estate Trust and noted in the Register on 7 October 1970.

I held a hearing for the purpose of inquiring into the dispute at Winchester on 21 March 1984. The hearing was attended by Mr E Mason, Assistant County Secretary, on behalf of the Hampshire County Council as registration authority, the registration having been made without application, Mr M J Rose, of counsel, on behalf of Mr W H Green, the applicant for the registration at Entry No. 2 in the Rights Section of the Register Unit, and Mr V Chapman of counsel, on behalf of the Objectors, who were also the applicants for the registration at Entry No. 7 in the Rights Section of the Register Unit. I also heard representations by Mr H G Hockey on behalf of Mrs N M Hockey, the applicant for the registration at Entry No. 1 in the Rights Section of the Register Unit.

There are three subsisting provisional registrations in the Rights Section of the Register Unit, all of them being deemed to be the subject of the Objection by virtue of Section 5(7) of the Commons Registration Act 1965 and two of them being the subject of Objection No. 337 made by the Trustees of the Bisterne Estate Trust. There is, however, no statutory provision whereby the registration the subject of this dispute can be deemed to be the subject of Objection No. 337, so that this registration is subject only to Objection No. 338.

The grounds of Objection No. 338 are that part of the land comprised in the Register Unit, identified on a plan attached to the Objection, was not common land at the date of registration. It was admitted on behalf of the applicants for the registration in the Rights Section of the Register Unit that there are no rights over the land shown on the plan attached to Objection No. 338, it was also agreed that a property known as "Little Moorhouse" should be excluded from the Register Unit, but it was contended that the Objectors were not entitled to argue that the remainder of the land comprised in the Register Unit is not common land. This question can only be resolved after a consideration of the legislation relating to my jurisdiction in this matter.

An objection having been made and not withdrawn or cancelled, the foundation of my jurisdiction is the requirement of Section 5(6) that the registration authority shall refer the matter to a Commons Commissioner. The Commons Commissioner to whom any matter has been referred under Section 5 is then required by Section 6(1) of the Act to inquire into it.

There is no definition in the Act of "the matter" into which the Commissioner is required to inquire, but since the existence of an objection is sine qua non of the reference to him, it is relevant to consider the form in which an objection may be made. The form of any objection made under the Act is prescribed by the Commons Registration (Objections and Maps) Regulations 1968 made under Section 19(1)(a) of the Act. Regulation 5(1) provides that every objection to a registration must be in Form 26. Form 26 opens with the words "I hereby object



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to the under-noted registration(s) on the grounds stated" and a space is provided for "Grounds of objection". The notes to Form 26 include the following:-

"9. In stating the grounds of your objection be as brief as possible, but "remember that you may be limited to these grounds at the hearing, so that it is "important to state them completely The following examples of possible "objections show the manner in which the grounds of objection should be stated:-

"(A) Example of an objection to a registration of land as common land.

"That the land, or some part thereof was not common land at the date of "registration

Regulation 5(4) provides as follows:-

"(a) Where an objection is of a type mentioned in sub-paragraph (b) below, the "objection form must be accompanied by a plan clearly defining by distinctive "colouring the land to which the objection relates

"(b) Paragraph (a) above applies to the following types of objection:-

"(i) an objection relating to the registration of land as common land

"relating to part only of the land comprised in a register unit;

Regulation 7(1)(a) requires the registration authority to give notice of an objection in Form 28, and Form 28 states

"Any objection to the registration which is not withdrawn will, unless the "registration has been cancelled, be referred to a Commons Commissioner "The Commissioner will inquire into all objections to the registration which ~~is~~ are "not withdrawn

The 1968 Regulations clearly contemplate that an objection may relate to part only of the land comprised in the register unit in question and that a Commons Commissioner will inquire into the objection, but what I have to determine is the meaning of "the matter" in Section 5(6) of the Act. It is provided by Section 11 of the Interpretation Act 1978 that expressions used in subordinate legislation made under powers conferred by an Act of Parliament have, unless the contrary intention appears, the meaning which they bear in the Act, but the construction of the Act cannot be governed by the subordinate legislation. The only relevance of the 1968 Regulations in a case such as the present is that they define the objection which is the sine qua non for a reference under Section 5(7) of the Act of 1965. The real question is what is "the matter" into which a Commons Commissioner is required by Section 6(1) of the Act to inquire in a case in which the foundation of his jurisdiction is an objection which, as permitted by the Regulations, is in a form relating to part only of the land comprised in the register unit. The part of the note to Form 28 quoted above stating that the Commissioner will inquire into the objection is drafted on the assumption that "the matter" referred to in Section 6(1) is the objection. This may be correct, but if it is correct, its correctness does not depend on the note to Form 28.

It is arguable that "the matter" referred to a Commons Commissioner is the registration as a whole, since by Section 6(1) he is required either to confirm the registration, with or without modifications, or to refuse to confirm it. I do not, however, find such an argument attractive, since the Commissioner's duty to deal with the registration only arises after he has inquired into "the matter" and is capable of performance irrespective of whether he has formed a view of the correctness of the registration in so far as it relates to the land not the subject



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of the objection. If that is not part of the matter into which he has to inquire, his duty in respect of the registration in so far as it relates to that land is administrative rather than judicial.

Were the question devoid of authority, a lawyer might well say that the purpose of requiring the grounds of an objection to be stated was to define the issue between the applicant for the registration and the objector, so that the applicant would know what case he had to meet and particularly so when the objection relates to part only of the land comprised in the register unit. However, in Corpus Christi College, Oxford v Gloucestershire County Council, [1983] Q.B.360, at p. 367 Lord Denning, M.R. said: "I cannot think it correct for the Commons Commissioners to treat these cases as if they were pieces of civil litigation, such as a lis inter partes The hearing by the Commissioner should be regarded more as an administrative matter - to get the register right - rather than as a legal contest".

The way in which a Commons Commissioner should treat cases in which objections relate to part only of the land comprised in a register unit was considered by Walton J. in In re Sutton Common, Wimborne, [1982] 1 W.L.R.647 and by Whitford J. in In re West Anstey Common, [1984] 2 W.L.R.281. In the first of these cases there were objections relating to parts of the land comprised in the register unit, and a person who had not objected to the registration sought to argue that it should not be confirmed in so far as it related to a part of the land which was not the subject of the objections. Walton J. held that the objections put in ^{the} validity of the registration and, therefore, that the matter referred to in Section 5(6) of the Act of 1965 was the validity of the registration as a whole and not specific parts thereof and that the applicant for the registration had the onus of proving its validity. It has, however, to be observed that the question of what was "the matter" into which inquiry had to be made was not argued in that case, since counsel for the applicant for the registration accepted that "the matter" was the validity or invalidity of the registration as a whole, but argued that the Commissioner had a discretion whether or not to proceed to consider the validity of the registration in so far as it was not directly challenged by the objections. The learned judge held that the Commissioner had no such discretion, saying at p. 658:-

"I cannot accept that any judicial tribunal, of whatever nature, unless expressly "constrained thereto by statute, has any discretion to shut out from its "consideration evidence which it is aware is available to be given, and which, if "established, would be directly material to the issue in hand".

In effect, therefore, this decision is authority only for the proposition that the Commissioner had no discretion to exclude evidence material to the issue in hand, and not for the definition of "the issue in hand" as the validity of the registration as a whole, that having been admitted.

The facts in In re West Anstey Common were indistinguishable from those in In re Sutton Common, Wimborne in that there was an objection relating only to a part of the land comprised in the register unit and that the Commissioner refused to hear evidence relating to the remainder of the land tendered by a person who had not objected to the registration. In In re West Anstey Common Whitford J. said at p. 290:-

"The extent to which any particular objection may put in question the status of "the whole area is going to depend upon the particular circumstances of individual "cases, but I adopt the view of Walton J., that it is only when a question of "registration is bound to require confirmation by the Commissioner that the question



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"of onus of proof arises. In this case, all that was referred to the Commissioner, "was the question as to whether or not Woodland Common ought to have been included "within the land registration. On that the Commissioner was able to come to a "conclusion which is amply justified in the reasons given in his decision.

"In my judgment I cannot accept, no other objection having been taken to the entry "in the land section, that there was any justification let alone any need for the "Commissioner to inquire into the validity of the registration, other than its "validity in respect of this small part of the land, as a whole".

It appears from the first paragraph of this passage that Whitford J. was of the opinion that all that was referred to the Commissioner was the question as to whether or not the land the subject of the objection ought to have been included within the land registration, while, as noticed above, Walton J. proceeded on the admission that "the matter" the subject of the reference was the registration as a whole. Since it appears from a passage on p.286 of his judgment that this point was argued before Whitford J., I feel bound to follow his decision and to hold that there is no justification for me to inquire into the validity of the registration, other than its validity in respect of the land coloured yellow on the plan attached to the Objection.

I ought to observe that the present case differs in one respect from each of the two cases above-cited in that the question of the status of the land not covered by the objection was ^{not} raised by the Objector, but I cannot see that an objector who has excluded a part of the land comprised in a register unit from his objection should be in any better position than a person who has not objected at all.

For these reasons I confirm the registration with the following modification, namely, the exclusion of the land shown coloured yellow on the plan attached to Objection No. 338 and the property known as Little Moorhouse.

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

1984

Chief Commons Commissioner