

In the Matter of The Staithe, Barton Turf

DECISION

This reference relates to the question of the ownership of land known as The Staithe, Barton Turf being the land comprised in the Land Section of Register Unit No. CL.356 in the Register of Common Land maintained by the Norfolk County Council of which no person is registered under section 4 of the Commons Registration Act 1965 as the owner.

Following upon the public notice of this reference Barton Turf Parish Council claimed to be the freehold owner of the land in question and Mr R G Edwards claimed to be the owner of that part of the land hereinafter referred to as "The Black Shed". Various other persons claimed to have information as to the ownership of the land.

I held hearings for the purpose of inquiring into the question of the ownership of the land at Barton Turf on 11th April 1989 and 3rd October 1989.

Attendance at Hearings

The April hearing was attended by Mr K R Hounsome of Norfolk County Council (the registration authority), Mr R E Wilson Chartered Surveyor, (representing Barton Turf Parish Council), Mrs Ann Wilson, (representing The Friends of Barton Turf), Mrs I M Fiske, (Clerk to the Parish Council), Mr Percy Wilton, (a former Chairman of the Parish Council), Mrs Wilton, Mr & Mrs Moule, Mr M H Helliwell, Mr & Mrs A Sims, Mr & Mrs Marshall, Mr & Mrs G Neave, Mr F Allen, Mr A W Lamb, Mr & Mrs J Yaxley, Mr A Yaxley, Mr G Read, Mr P Salmons, Mr R A F Kemp, (a local historian assisting the Parish Council), Mr & Mrs R G Edwards, (claimants to the ownership of "The Black Shed") and various other persons.

The October hearing was attended by the majority of the same persons together with a few others. At the October hearing however the Parish Council had strengthened its team, being represented by Mr J G Ross Martyn of Counsel instructed by Mr A Stephenson, Solicitor of Stephenson & Stanger of Aylesham.

The Register

The land was registered as common land upon the application of the Parish Council. The application for registration was made on the 12th August 1968. The registration was undisputed and became final on 1st August 1972. There are no entries in the Rights Section of the Register, and none in the Ownership Section save for a reference to a previous Hearing before a Commons Commissioner which I shall mention in the next following paragraph of this Decision.

Previous Ownership Inquiry

On the 16th July 1976 the then Chief Commons Commissioner Mr G D Squibb held a Hearing for the purpose of inquiring into the ownership of the land at Norwich. The only claimant to the land on that occasion was the Barton Turf Parish Council. In his Decision dated 29th April 1977 Mr Squibb said as follows:-

"At the hearing the Barton Turf Parish Council was represented by Mr P Wilton, its Chairman.



By the Inclosure Award, dated 9 November 1810, made under the Barton Turf Inclosure Act of 1809 (49 Geo. III, C.8 (private not printed) the land the subject of this reference was allotted to Thomas Preston, James Wiggett and William Gun to be held by them and their heirs for ever in trust for the use and convenience of the owners and occupiers of lands and tenements in the parish of Barton Turf as and for a public staithe. Mr Wilton stated that the staithe passed from the trustees to the Parish Council by virtue of the Local Government Act 1894. The trustees were empowered to transfer the staithe to the Parish Council by section 14(1) of that Act, but only with the approval of the Charity Commissioners. The Charity Commissioners have no record of such approval having been given and prolonged research into the records of the Parish Council has produced neither the document of transfer nor any record of the approval of the Charity Commissioners.

In these circumstances I am not satisfied that any person is the owner of the land, and it will therefore remain subject to protection under section 9 of the Act of 1965."

Order of Charity Commissioners

The defect in the Parish Council's title was at that stage purely a technical one. In due course the Parish Council took steps to remedy the defect. An application was made to the Charity Commissioners, and by an Order dated 8th December 1987 they approved a Scheme appointing the Barton Turf Parish Council to be the Trustee of certain Charities, and vesting various properties including the Barton Turf Staithe in the Parish Council as Trustee. The Parish Council's title was thus perfected, and at the April Hearing I should have had little difficulty in concluding that the Parish Council was the owner of the land, had it not been for the intervention of Mr Edwards.

Staithes

Public and Parish Staithes are a common feature of the Norfolk Broads. They are wharves or landing stages for the use of the public or the local inhabitants. Until road transport became more common in the nineteen thirties wherries on the Broads were extensively used for the transit of goods such as coal, clay, stone, cut reeds for thatching, sugar beet and so forth, and these goods were loaded, unloaded and stored on the staithes.

The Black Shed

The Barton Turf Staithe has three jetties. On the middle one of these there stands a substantial brick and timber building, which has long been known locally as the Black Shed. It is a well known feature, illustrations of which may be found in several local handbooks produced at the April Hearing, e.g.:- Staithes. A Survey & Register, by Mr Kemp, published by the Broads Authority in 1986; Sweet Sedge and Swallowtails edited by Mrs Anne Wilson, 1981; and Wherries and Windmills also edited by Mrs Wilson, 1982. Both the latter reproduce old photographs, one of which is dated "about 1906". Various other illustrations and copies of old photographs showing the Black Shed were hanging on the walls of the Cricket Pavillion, where I held both hearings. The Black Shed was not shown on the plan to the Inclosure Award. It is however clearly shown on the plan to the Tithe Map of 1835 or thereabouts. I conclude therefore that it was built at some date between 1810 and 1835. It was a warehouse used for the storage of goods loaded or unloaded at the Staithe.



Mr Edwards' Claim

Mr Edwards' claim is that in June 1979 he bought the Black Shed and the land on which it lies for £1,000. The Vendors to him were not the Parish Council, but Lewis Alfred Salmon Cox and Timothy John Salmon Cox.

Mr Edwards' Intention

At the April Hearing Mr Edwards told me that his purpose in acquiring the Black Shed was to convert it into a "Barton Weekender". He and his family would come by boat and/or car to the Staithe and then stay for the week-end. The Black Shed would be used for the storage of all their boating and sailing equipment, for meals and for overnight use with sleeping bags.

Planning Permission

Soon after acquiring the Black Shed Mr Edwards applied for planning permission for the provision of new windows and a balcony, and the internal addition of a first floor. In spite of strong opposition by the Parish Council, permission was granted except for the balcony. The Broads Authority however made it clear that permission would not be granted for the use of the building for residential accommodation, either permanent or holiday.

Works done by Mr Edwards

Having obtained planning permission, Mr Edwards proceeded to carry out extensive works to the Black Shed. He made it wind and water tight, renovated the roof, put in new doors and windows, and added an internal upper floor over the end nearer the Broad, together with a staircase leading thereto. No water or electricity is laid on, however, and there is no sanitation.

Site Visit

At the conclusion of the April hearing, I made a formal site visit to the Staithe accompanied by representatives of the Parish Council and Mr & Mrs Edwards. Mr Edwards showed us over the inside of the Black Shed. There was a lot of boating equipment stored downstairs but almost nothing upstairs. I found the inside of the building and the view from the upstairs room very attractive.

The April Hearing

For reasons which I need not elaborate, Mr Edwards received short notice of the date of the April Hearing. The Office of the Commons Commissioners had originally been informed of Mr Edwards' claim by English Poll and Durrant Solicitors of Norwich acting on his behalf. The Commons Commissioners only learnt from the County Council a few days before the hearing that Mr Edwards had changed his Solicitors to Emmett and Tacon of Norwich. At the start of the April Hearing Mr Edwards told me that Emmett and Tacon were unable to attend on that day. I therefore agreed to an adjournment, but in order to avoid a wasted day I decided to divide the hearing into two parts; first, the claim of the Parish Council to the Staithe as a whole, and secondly, the claim of Mr Edwards to the Black Shed. Accordingly at the April Hearing I heard the Parish Council's claim to the whole, and adjourned to a later date Mr Edwards' adverse claim to the Black Shed, to enable his Solicitors to prepare the case on his behalf.



The Parish Council's Case

Prior to the April Hearing the Commons Commissioners received an Affidavit sworn by David George Hall an Higher Executive Officer to the Charity Commissioners, together with 4 Exhibits. The Exhibits included photocopy Extracts from the Inclosure Award of 1810, a surveyed plan of the Staithe, and a certified copy of the Scheme of the Charity Commissioners. At the April Hearing Mr Wilson produced the original Inclosure Award and the original Tithe Map of 1835, obtained from the County Record Office at Norwich. Mr Wilson also at the April Hearing read a Statement of the Parish Council's case which he had prepared in advance.

Conclusion on Parish Council's Claim

Apart from the adverse claim of Mr Edwards to the Black Shed, I am satisfied on this evidence that the Parish Council are the owners of the Staithe. There is one small point which did not arise until the October Hearing, but which it is convenient that I should mention here. In the Order of the Charity Commissioners the Staithe is described as containing 3 roods 31 perches or thereabouts. In the Inclosure Award the allotment to the Clerks of the Staithe comprised 3 roods and 36 perches. It follows that 5 perches or thereabouts have "gone missing" over the years. My first reaction was that these 5 perches might be accounted for as being the site of the Black Shed. Mr Wilson however gave evidence (at the October Hearing) that he was the Surveyor who prepared the plan exhibited to Mr Hall's Affidavit, and that it certainly included the Black Shed. He added that he was surprised that, after so many years, the measurements were still so close.

The October Hearing

The October Hearing took place almost 6 months after the April Hearing. Mr Edwards' Solicitors, Emmett and Tacon, were given 6 weeks notice of the precise date. This should have allowed them ample time to prepare Mr Edwards' case, and to arrange for him to be represented. When the Hearing opened on the 3rd October, Mr Edwards told me that he had learned earlier that morning that his Solicitors were not coming. I told him that I would be reluctant to grant him any further adjournment, to which he replied that he was not asking for an adjournment but was willing for the hearing to proceed in the absence of his Solicitors.

Mr Edwards' Own Evidence

Mr Edwards was sworn and gave evidence that he had bought a simple building. He had bought it from the Cox family. He had had no pleasure out of it. He had bought it innocently.

He first became aware it was registered as common land after he had purchased it. He used the same Solicitors as the Vendors. English Poll and Durrant had been Solicitors for the Cox family for many years - he didn't instruct separate Solicitors. He left it in English Poll and Durrant's hands. They gave him no advice.

He had known Barton Broad for 60 years. He had hired boats from the Cox family, since before the 1939/45 War. He knew various members of the Cox family.



He did not know who owned Barton Broad, but agreed that it was tidal- about 1 foot.

Before he purchased it the Black Shed was completely dilapidated - nobody used it. It had a broken front door, and anybody could get in.

In 1973 he had a motor cruiser with the Cox family moored on their staithe to the south. He well knew the Black Shed - always. It had always been dilapidated. He didn't think they used it much. There were tubs and barrels stored there for many years before 1979. He assumed the Cox family owned them.

Questioned by me as to whether any keys were handed over to him on the completion of the purchase, Mr Edwards said that there were no keys nor doors that would lock. I then asked him whether the following sentence at page 5 of the Statement which Mr Wilson had read out at the April Hearing gave an accurate picture:-

"By the 1950s the Shed was dilapidated, the doors open and broken, children played in it, and people sheltered in it from rain".

Mr Edwards replied "I should think so".

Absence of supporting Evidence

Apart from his own evidence, Mr Edwards produced no evidence in support of his case whatsoever. He called no witnesses and did not even produce the documentary evidence on which his claim depended. The title deeds to the Black Shed were, he said, with his Solicitors. I suggested that the oral evidence of a member of the Cox family might be of assistance, and (as the Hearing was listed for 2 days) offered (subject to any question of costs) to keep the Hearing open until the second day to enable him to produce further evidence. Mr Edwards did not accept this offer.

Mr Ross Martyn's Opening Submission

Mr Ross Martyn (on behalf of the Parish Council) first ran briefly through the case of the Parish Council. He submitted that as under the Inclosure Award the land was to be held by trustees for ever in trust as and for a public staithe, the rights of the public could only be lost by implied release.

He then (very properly) took me through copies of Mr Edwards' title deeds, which had previously been supplied to the Parish Council by Emmett & Tacon.

Mr Edwards' Title Deeds

Photocopies of the copies of Mr Edwards' deeds supplied to the Parish Council by Emmett & Tacon were delivered to me by Mr Wilson on the day following the October Hearing. These are as follows:-

1. Conveyance dated 6th May 1926 between (1) William Clarke and (2) John Mountford Wood
2. Conveyance dated 31st December 1935 between (1) R M Wood C B Wood and D L Bateson (2) A M Wood and (3) H E S Cox J E S Cox and L A S Cox
3. Mortgage dated 31st December 1935 between (1) H E S Cox J E S Cox and L A S Cox and (2) L H Storey
4. Legal Charge dated 25th July 1942 between (1) H E S Cox J E S Cox and L A S Cox and (2) Barclays Bank Ltd
5. Probate dated 1st August 1966 of Will of H E S Cox



6. Conveyance dated 9th April 1974 between (1) L A S Cox and J E S Cox and (2) T J S Cox
7. Statutory Declaration dated 28th August 1974 by L A S Cox.
8. Conveyance dated 2nd February 1974 between (1) J E S Cox (2) J E S Cox L A S Cox and T J S Cox and (3) L A S Cox and T J S Cox
9. Conveyance dated 7th June 1979 between (1) L A S Cox and T J S Cox and (2) Richard George Edwards.

Observations on Paper Title

The following points arise on the documents enumerated above:-

1. The property conveyed in 1926 was "All That brick and tiled Warehouse with the land on which the said building is erected and containing by estimation 12 roods or thereabouts..... situate lying and being near the Staithe at Barton Turf". "Near The Staithe" is an odd description for a building clearly lying on the Staithe, and there was a suggestion that this referred to one of the other buildings alongside the Staithe, and not the Black Shed. It is to be noted that this Conveyance contained no recital of seisin.
2. The 1935 Conveyance was of a much greater area of land. Part 2 of the First Schedule repeats the description of the Warehouse contained in the 1926 Conveyance, with the addition of a reference to the premises being part of O S 196. On the plan O S 196 appears to comprise the Staithe.
3. 4. and 5. These documents give rise to no comment.
6. The Conveyance of 1974 was not a Conveyance on sale, but on a change of partnership in the Cox family. The property conveyed was simply described as pieces of land in part covered with water for purposes of identification only edged red and blue on the plan thereto "TOGETHER with the boatsheds and other buildings thereon TOGETHER with all the rights of staithage and any other rights ~~of~~ privileges belonging or in any way appertaining to the detached warehouse forming part of Ordnance Survey Number 196 on the said plan". The detached warehouse on O S 196 is clearly the Black Shed. Although this appears to be coloured red on the plan, the specific reference to the warehouse on O S 196 is only in respect of rights of staithage appertaining thereto. If it had been intended to convey the fee simple of the Black Shed, one would have expected the draftsman expressly to have said so.
7. In his Statutory Declaration of 1974 Mr Lewis Alfred Salmon Cox confirmed that the Cox family had been in undisturbed and undisputed possession of the area edged red on the plan since 1936. Again, the Black Shed appears to have been coloured red on the plan. Doubts about the accuracy of this declaration (so far as concerns the Black Shed) are expressed later in this Decision. In any event if Mr Edwards wanted to rely on the evidence of Mr Lewis Cox, he ought to have procured his attendance at the Hearing for cross-examination.
8. The Conveyance of 1976 is another partnership transaction in the Cox family, the parcels clause in which is in the same form as that in the Conveyance of 1974, and raises the same ambiguity as to whether it passes only the rights of staithage appertaining to the Black Shed, or the fee simple as well.
9. This is the Conveyance of the Black Shed to Mr Edwards.



Other Documentary Evidence

Amongst other documents put before me on behalf of the Parish Council were a copy of Auction Particulars relating to a Sale on 5th October 1935 (with the plan thereto), and a cutting from the Eastern Daily Press dated 7th October 1935 reporting the result of such sale. In the Auction Particulars Lot 2 comprised 5 acres of land adjoining Barton Broad, with the statement that there would be included in the sale of this Lot "The Large Shed on the Public Staithe" to the North of the Lot. It was also stated that part of O S 196 was let to H S Cox on a yearly tenancy. Lot 3 was Barton Broad itself. It appears from the press cutting that as a result of public protest both these Lots were withdrawn from the sale.

Other Witnesses

In addition to the statement on behalf of the Parish Council made by Mr R E Wilson (who was sworn at the October Hearing) the following witnesses were sworn and gave evidence in support of the Parish Council:-

1. Mrs Albina Sims.
2. Mr Percy Wilton.

In addition statements were handed in by two elderly local inhabitants who had died since their statements were made, namely Mr C H Neave and Mrs Ivy Long.

Mrs Sims' Evidence

Mrs Sims said she had known Barton Turf since she was born in 1903. Her father was William Edward Clarke. He used the Black Shed after the first World War; he was not using it before 1918. He used the end towards the road, not the water end. She was sure he did not own the Shed. He used it, but did not own it.

Her father was a wherryman. It was quite a business having a wherry. He used the Black Shed for a few years after the first World War for storing coal, wood and sacks of corn, and once a load of great blocks of ice, which went to the Ice house at Irstead.

Mrs Ivy Long's Statement

In July 1984 Mrs Long stated that she would be 89 that month, and had lived at Barton Turf all her life. She said that Mr Clarke never owned the Black Shed. He used part of it for coal. It was not his to sell.

Mr Percy Wilton

Mr Wilton said that he first came to Barton in 1923, and spent the Bank Holiday racing on Mr Clarke's wherry. In 1932 he married Elsie Cox, her grandfather owned the boatyard, her father F S Cox had a coal shed on the other side of the staithe, part of the boatyard.

He went to the Auction in 1935 with a crowd from Barton. They paid a shilling each to form a fighting fund and paid a Solicitor to raise objections to the sale of Lots 2 and 3. The Objectors said that they had had free fishing and shooting on the Broad for generations, and the Shed belonged to the Parish and they couldn't sell it. There was quite a row at the Auction, and Lot 2 and 3 were withdrawn.



He served for 30 years continuously on the Parish Council until he retired when he was 75. For the last 10 years he was Chairman. He retired in April 1976.

Before the Second World War the Black Shed was used as a coal store. After the War it was used for reeds. Fishing rods were kept there. From about 1947 to 1950 Mr Howell stored gas, petrol and oil there for boats. After he left the doors fell off, and there were no doors from that time. The doors went for firewood.

Children played in the Shed. There was a hole through the dividing wall.

Mr Lewis Cox (L A S Cox) was on the Parish Council in 1976 at the time of the Commons Commissioners' inquiry into ownership of the Staithe. He raised no objection to the Council's claim to ownership, and made no claim himself to ownership of the Black Shed.

Mr Ross Martyn's Further Submissions

Immediately after Mr Edwards concluded his own evidence, Mr Ross Martyn submitted that the burden of proving the claim made to the Black Shed was on Mr Edwards. He had to prove adverse possession, and this on his own evidence he had failed to do. The relevant period was 12 years before action, and if an action were started on that day he wouldn't have 12 years. Mr Edwards had not made out a case, having regard to the condition the premises were in when he purchased.

Mr Ross Martyn cited Powell v MacFarlane (1977) 38 P. & C. R. 452 at page 472, and submitted that the Parish Council didn't have a case to answer. I did not accept this submission, and pointed out that the title of the Council's predecessors could have been extinguished under the Limitation Acts at some earlier date. I therefore heard the further evidence on behalf of the Council which I have summarised above.

As an alternative submission Mr Ross Martyn said that where public rights are created the public cannot lose its rights by change of title to the land by adverse possession. Public rights can only be taken away by Parliament, or lost by express or implied release (i.e. abandonment). The period for loss of rights was 20 years.

Findings of Fact

1. The claim of Mr R M Wood to own the Black Shed was publicly challenged by local inhabitants at the Auction in 1935.
2. L A S Cox and T J S Cox were not in possession of the Black Shed when they purported to sell it to Mr Edwards in 1979. At that date it was not secured in any way, and anyone could enter it.
3. By the 1950s the Black Shed was dilapidated, its doors were open and broken, children played in it, and people sheltered in it from the rain. It remained in this condition until Mr Edwards secured it at some date after 7th June 1979.
4. Between 1945 and 1950 or thereabouts various persons made use of the Black Shed for storage purposes. There was no evidence that members of the Cox family ever made any use of it, or excluded others from doing so.
5. Mr L A S Cox made no claim to ownership of the Black Shed at the time of the Ownership Inquiry in 1976, of which he must have been aware.



Conclusion

On the evidence before me as a whole I am not satisfied that Mr Edwards has acquired a good title to the Black Shed. His claim to be registered as owner of the Black Shed and the land on which it is built therefore fails.

In reaching this conclusion I would add that Mr Edwards seems to have been the victim of unfortunate circumstances. I have no reason to doubt his evidence that nobody told him before he purchased that the Staithe was registered as common land. If this is correct, the parts played by the Vendors (L A S Cox and T J S Cox) and their Solicitors (English Poll & Durrant) leave something to be desired. So far as concerns the Solicitors, the copies of Mr Edwards' title deeds supplied to me did not include any Search Certificate. If proper searches were made, they should have disclosed that the Staithe was registered as Common Land. The inference is either that such searches were not made, or that their result was not reported to Mr Edwards. So far as concerns Mr L A S Cox, the evidence before me was that, as a Parish Councillor, he must have been aware that the Staithe was registered as Common Land, but did not disclose this to Mr Edwards. Furthermore, in so far as he swore in his Statutory Declaration of 1974 that the Cox family had been in undisputed possession of the Black Shed since 1936, this is not in accordance with the clear evidence to the contrary adduced before me.

Public Land

Whether the Staithe is public land of such a character as to make it inalienable, with the consequence that the Limitation Acts are inapplicable in any event, is a difficult question of law on which I would hesitate to reach a conclusion without full argument on either side. This I did not have. I therefore leave this question open. It is unnecessary for me to decide it as Mr Edwards' claim fails on other grounds.

On this evidence I am satisfied that Barton Turf Parish Council is the owner of the land and I shall accordingly direct the Norfolk County Council, as registration authority, to register Barton Turf Parish Council as the owner of the land under section 8(2) of the Act of 1965.

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

31st

day of

October

1989

Commons Commissioner