

Decision



Schedule 3 Commons Act 2006

Application 2856 to amend the register to record an historic event

1 Background:

Mr Christopher Alexander Key of Christopher Key & Co completed application No. 2856 on behalf of his clients William Thomas Yeo, Paul Miller, Celia Winifred Boden-Cummins and Union Pension Trustees Ltd (as successors in title of William Thomas Yeo and Charles John Yeo, deceased). The application claims a variation of a right of common, but the supporting evidence accompanying the application suggests a partial severance of the right from the land to a right held in gross.

2 Legislative requirements:

2a The Commons Registration (England) Regulations 2014, paragraph 42:

(3) An original registration authority may, subject to paragraphs (4) to (6) amend its registers in consequence of a qualifying event (as described in paragraph 2(2) of Schedule 3 to the 2006 Act) pursuant to an application made to that authority.

(4) For the purposes of determining an application made for the purposes of Schedule 3 to the 2006 Act to amend a register to record the severance of a right of common from land to which it was attached, a right of common attached to land is not to be treated as having been severed from that land in consequence of a qualifying event, unless the determining authority is satisfied that the severance was lawful and

(a) there is documentary evidence showing that the parties to the transaction or disposition which is a qualifying event intended the transaction or disposition to have the effect of severing the right of common; or

(b) there is evidence that the right of common has been treated since the qualifying event as having been severed.

(5) the determining authority may not determine that a register entry should be amended if it considers that, by reason of reliance reasonable placed on the register by a person since 1st October 2011, it would be unfair to do so.

2b The Commons Act 2006, section 9:

(2) A right of common to which this section applies is not at any time on or after the day on which this section comes into force capable of being severed from the land to which it is attached, except:

- (a) where the severance is authorised by or under schedule 1; or
- (b) where the severance is authorised by or under any other Act.

(7) This section and schedule 1 shall be deemed to have come into force on 28 June 2005.

3 Applicants supporting documentation

- 3.1 A copy of a Conveyance dated 1st September 1988 between A.T. Button (1) and A. Murray and G.D.G. Murray (2).
- 3.2 Land Registry Title and Plan for CL183897
- 3.3 Copy of a Conveyance dated 27th April 2005 between A.T. Button (1) and C.J. Yeo and W.T. Yeo (2).
- 3.4 Land Registry Title and Plan for CL216698.
- 3.5 Field map showing Heneward in red
- 3.6 Copy correspondence between the applicant and Messrs Brooks.

4 Representations:

- 4.1 Two representations were made, one subsequently withdrawn, which have been taken into account in reaching the determination below.

5 Compliance with the legislative requirements:

- 5.1 Application 2856 is made on the basis of a severance, or partial severance of the right from the land to which it attached at Heneward Farm to the applicant, by means of a Conveyance dated 1st September 1988 and a Deed of

Transfer dated 22nd April 2005, thus meeting the requirement set out in paragraph 2(2) of Schedule 3 to the 2006 Act.

5.2 The 1988 Conveyance conveyed part of Heneward Farm, 8.288 hectares including the farmhouse, expressly excepting and reserving 'all rights of common now or formerly attaching to the property hereby conveyed'.

5.3 The anomaly here is that the registered right is not only a right of pasture, but also a right of turbary. Whilst rights of pasture can be severed from the land and become rights held in gross, rights of turbary, as with estovers, are strictly annexed to the dwelling house of the dominant tenement (*Sir Henry Nevil's Case, 1570, and Attorney General v Reynolds 1911*).

5.4 Land Registry Title No's CL183897 and CL216698 refer to rights reserved by a Transfer of other land dated 22nd April 2005.

5.5 The copy of the Conveyance of 22nd April 2005, not 27th April as described by the applicant in part 9 of his application, makes no reference to the transfer of any land. It states that (1) the Vendor is owner of Heneward Farm, St. Breward which is shown edged blue on the annexed map ("the Farm"); (2) the Vendor is entitled to rights of common of pasture for cattle, ponies or sheep on Hamatethy Common; and (3) the Vendor has agreed to sell the rights of common to the Purchaser for the sum of £1.00.

5.6 The difficulty I have with the Conveyance is that there is no land edged blue on the accompanying plan. The plan shows the eastern part of Heneward Farm, comprising some 14.9 hectares edged red, and 0.052 hectares of land coloured blue. I queried with the applicant whether the plan attached to the 2005 Conveyance had been coloured correctly, but have received no reply. I am therefore of the opinion that the Conveyance only relates to the land coloured blue, and therefore, in the absence of any specific numbers of cattle, ponies or sheep mentioned in the Conveyance, an apportionate proportion of the original rights of pasture attaching to the 0.052 hectares of land coloured blue, or 0.152% of the original right, has been severed from the land and conveyed to C.J. and W.T Yeo.

5.7 No evidence has been supplied concerning the conveyance of the westerly part of Heneward Farm, comprising some 5.054 hectares, and consequently, in the absence of any evidence, I am of the opinion that the rights remain attached to this part of the original dominant tenement.

5.8 Comment has been made that a partial severance of the right of common attached to land may be a severance of all those rights. Professor Gadsden in his book, 'The Law of Commons' says at paragraph 6.39: "If the transaction is a conveyance of the land without the right, there is no reason in principle why the vendor should not contract to convey some of his property retaining in part, and the transaction itself is not unlawful. The result, however, is that the part

retained, i.e. the excepted appurtenant right, is not lawfully exercisable without the land and is thereby extinguished.”

5.9 This is quantified in ‘Gadsden on Commons and Greens’ by Edward Cousins and Ricard Honey, where paragraph 3.113 states: “The courts therefore adopted a rule that any purported severance of unquantified rights from the holding to which they were attached would extinguish the rights”, but goes on to say at paragraph 3.114: “In *Bettison v Langton* the House of Lords determined that a consequence of the quantification of appurtenant grazing rights, as required by section 15 of the Commons Registration Act 1965, was to enable a commoner to dispose of the rights of common independently from the land to which they were traditionally attached. Alternatively the commoner could sell the land and retain the rights.” It seems that the 2002 *Bettison v Langton* case has clarified that quantified rights may be treated differently from the historical approach to appurtenant rights, and therefore, in this case of quantified rights, it does not result in a severance of those rights.

5.10 Whilst the owners of part of the dominant tenement placed reliance on the register showing an attached right of common and made an application declaring an entitlement to that right, the application was made in January 2011, and according to the applicant, consent to the current proposed amendment to the register.

6 Method of determining the application

6.1 The Commons Regulations (England) Regulations 2014 states that:

27(1) The determining authority must, in determining any application or proposal, take into account:

(d) any oral representations made by any person in accordance with paragraph (7)

27(6) Paragraph (7) applies in relation to any application which the determining authority decides to determine without holding a public inquiry or hearing in accordance with regulation 32.

27(7) the determining authority:

(a) May not refuse an application without first offering the applicant an opportunity to make oral representations; and

(b) May not grant or refuse an application without first offering any person (other than the applicant) for whom the grant or refusal would represent a determination of that person’s civil rights an opportunity to make oral representations.

6.2 The Registration Authority, being minded to refuse part of the application, offered opportunity to the applicant to present oral information, but this offer was not taken up.

7 Decision:

The application is approved in part.

A proportionate apportionment for the grazing rights attached to 8.288 hectares of land in the 1988 Conveyance and for the 0.052 hectares of land coloured blue in the 2005 Conveyance/Deed of Transfer (24.315% of the rights) are severed from the land to which it attached and become rights held in gross.

The remainder of the rights (75.685%) remain attached to the land.

Name: Martin Wright

Position: Commons and Greens Registration Officer

Date: 12 July 2016