COMMONS REGISTRATION ACT 1965 Reference No. 83/D/1

In the Matter of Silverhill Park Pleasure Ground, Old Roar Road, St.Leonards-on-Sea, Hastings, East Sussex

DECISION

This dispute relates to the registration at Entry No 1 in the Land section of Register Unit No.VG. 1 in the Register of Town or Village Greens maintained by the former Hastings County Borough Council and is occasioned by Objection No. 1 made by S M P Estates Ltd and noted in the Register on 12 October 1970.

I held a hearing for the purpose of inquiring into the dispute at Lewes on 17 November 1978. The hearing was attended by Mr J W Lester, solicitor, on behalf of Mr F M P Boorman, Miss M F.Jarvis, Mr and Mrs J W Lester, and Dr W B Young, whose applications for the registration are noted in the Register, and by Mr R F D Barlow, of Counsel, on behalf of the Objector

The land comprised in the Register Unit lies on the south-eastern side of an unadopted private road known as Old Roar Road (originally called St.Leonards Road) and is otherwise surrounded by a subsidiary road communicating at each end with Old Roar Road. The remainder of the land on either side of Old Roar Road, known as the Silverhill Park Estate, was laid out as a building Estate at some time before 11 April 1859, the land comprised in the reference, then known as and hereafter referred to as "the Rowndel", being intended to be used as a pleasure ground.

The Silverhill Park Estate was originally laid out in large plots, most of which were developed by the erection of substantial houses in a woodland setting. As the years went by some of the plots were sub-divided and additional houses were built on them, and some of the original houses were pulled down and their plots fragmented for the laying out of secondary roads and the erection of smaller houses. In 1946 the site of the roadway of Old Roar Road together with the Rowndel "intended to be used as a pleasure ground" were sold to a predecessor in title of the Objector for £75.

When the plots into which the Silverhill Park Estate was originally divided were sold, the parcels of the conveyances included the use of the Rowndel (described as "the pleasure ground") at all times in common with the owners and occupiers of adjoining properties together with the free use and enjoyment of St.Leonards Road and of all roads formed upon or over the estate for the general use of the purchasers, lessees and occupiers of properties abutting on those roads. The conveyances of some or possibly all of the sub-divisions of the original plots were in similar terms, but it appears that the conveyances of the small plots in the more recent re-development, some of which more or less surround the Roundel, do not contain any reference to it.

It seems from the plan on some of the nineteenth century deeds relating to houses on the estate that it was intended to layout the Rowndel as pleasure gardens with a formal pattern of paths. There is no evidence that this was ever done, and no witness remembered it otherwise than it now is, an area of dense scrub and rough mixed woodland with several well-defined tracks suitable for foot passengers running through it.

During the last thirty years and presumably long before that the occupiers of the houses built on the Silverhill Park Estate have used the Rowndel for exercise and recreation and their children have played on it. In its present state it is unsuitable for organised games and there is no evidence of its ever having been used for that purpose. It has been used by the occupiers of the new houses, as well as by those living in the older houses, without any objection and without any express permission being either sought or granted.

The facts relating to the Rowndel are thus simple. The application of the law to the facts is less simple.

Mr Lester relied on the third limb of the definition of "town or village green" in Section 22 (1) of the Commons Registration Act 1965, arguing that it is land on which the inhabitants of locality have indulged in lawful sports and pastimes as of right for not less than twenty years. Mr Lester contended that the "locality" to be considered in this case is the area of the Silverhill Park Estate consisting of the plots as originally laid out on either side of Old Roar (formerly St. Leonards) Road; that the use made of the Rowndel by the occupiers of the houses in this "locality" and their children is indulging in lawful sports and pastimes, and that this has been done "as of right".

Mr Barlow argued that the words on which Mr Lester relied cannot be construed in isolation, but must be read in the context of the preceding parts of the definition of "town or village green" and in particular with regard to the second limb of the definition: "land... on which the inhabitants of any locality have a customary right to indulge in lawful sports or pastimes". The second limb differs from the third only in that for the second it is necessary to prove user from time immemorial, while for the third limb it suffices to prove user for twenty years. Therefore, said Mr Barlow, the word "locality" should be given the same meaning in each limb of the definition. Mr Barlow further argued that the use made of the land was not for sports or pastimes and that in any case such use was not "as of right", which means some form of prescriptive right.

In order to understand the definition of "town or village green" in the Act of 1965 it is necessary to have in mind the general law relating to land set apart for enjoyment by persons having no proprietary right to such enjoyment. Such land can be broadly divided into three classes. Class I comprises land over which there is a customary right for the inhabitants of a particular locality to indulge in lawful sports and pastimes - the common- law town or village green.

Class II comprises land allotted by an inclosure award for exercise and recreation; usually for the inhabitants of a parish and neighbourhood. Class III comprises land provided by a local authority for public walks and pleasure grounds. Class I is brought within the ambit of the Act of 1965 by the second limb of the definition of "town or village green". Class II is brought in by the first limb of the definition. Class III has not been included in the definition. Instead, in the third limb of the definition Parliament has brought in land which had no previous juridical classification.

The first two limbs of the definition have been brought together by what may be termed legislative scissors-and-paste work. Each had a well-known meaning before the Act of 1965, and uniting them in that Act cannot be taken to affect the meaning of either. So far as the third limb is concerned, it is necessary to interpret it de novo, for as Lord Denning, M R. observed in New Windsor Corpn v Mellor, (1975) Ch.380, at p 392, at common law twenty-year user gives no right.

On reading the third limb one is struck immediately by the similarity of the wording to that of the second limb. As Mr Barlow pointed out, the only difference is that to bring land within the second limb there must have been user from time immemorial, while for the third limb only twenty years' user is required. In my view, Parliament must be taken to have intended that the phrases which are repeated in the third limb the same meaning as they have in the second limb.

The phrases which are common to the second and third limbs are "the inhabitants of any locality", "sports and pastimes", and "as of right".

To my mind, the meaning of the phrase "the inhabitants of any locality" in the second limb of the definition is indicated by the requirement that they should have a customary right. A customary right must have existed from time immemorial, i.e. from before the year 1189. It therefore follows that the locality must also have been in existence before 1189. Accordingly, the Silverhill Park Estate, which only came into existence as an entity in the nineteenth century, cannot be a "locality" within the meaning of the definition.

This interpretation of the word "locality" is in accordance with the decision in Edwards v Jenkins, (1896) 1Ch. 388. There the word being considered was "district", but in this context the words " district" and "locality" can be regarded as synonymous. Kekewich J said at p.313:-

"I do not, therefore find in any of the cases anything that would justify me in saying that the use of the word 'district' means more than the particular division known to the law in which the particular property is situate. It may be situate in a parish, or in a manor or there might be some other division".
Kekewich J went on to hold that three parishes could not constitute a "district" for this purpose. This was doubted in New Windsor Corpn v Mellor, Supra, at p.387, but the correctness of the statement quoted above was not questioned.

I have therefore come to the conclusion that the Rowndel does not fall within the third limb of the definition in the Act of 1965 because the Silverhill Park Estate is not a "locality" within the meaning of that definition.

That is sufficient for my decision in this case, but I ought also to say something about Mr Barlow's other two points, namely, that the user proved was not for sports or pastimes and that it was not "as of right".

I was at first of a mind to contrast the words "exercise or recreation" in the first limb of the definition with the words "lawful sports and pastimes" and to say that Parliament having used different phrases must have intended them to have different meanings and that since the user proved constituted, as Mr Lester agreed, exercise and recreation, it could not also constitute lawful sports and pastimes. On further consideration I have come to the conclusion that this is not so. If I am correct in regarding the first and second limbs of the definition as relating to existing classes of land, the difference in the wording of the two limbs cannot throw any light on the interpretation of either limb. What must be sought is light on the nature of customary rights over town or village greens. Such rights have never been the subject of statutory definition, and it seems to me that the correct approach to the construction of the definition in the second limb is to see how the judges who have had to deal with rights over town or village greens have described them. There does not appear to have been any rigid adherence to "lawful sports and pastimes" or any other definite formula. For example, in Hall v Nottingham (1875), 1 Ex.D.I it was held to be a lawful custom for the inhabitants of a parish to erect a maypole and dance round and

about it and "otherwise enjoy any lawful and innocent recreation" on the land in question, and in Bourke v Davis (1889), 44 Ch.D.110, at p.120 Kay J referred to "a right of recreation by custom". In the light of such cases, it seems that it would be wrong to construe the words "lawful sports and pastimes" in the second and third limb of the definition as excluding recreation not involving organised games.

On the other hand, I accept Mr Barlow's contention that the user proved in this case has not been "as of right". Those words imply a user of which the origin is unknown, and such user is to be distinguished from the user in this case, which is founded upon an express grant of a right. Although it has not been proved that there was such an express grant in respect of each of the original plots into which the Silverhill Park Estate was divided. I am satisfied that there was a building scheme, and I draw the inference that the right to use the Roundel as a pleasure ground was granted to the purchaser of each of the plots on the Estate.

For these reasons I refuse to confirm the registration. Mr Lester and Mr Barlow agreed that costs should follow the event. I shall therefore order Mr Lester's clients to pay the Objector's costs on County Court Scale 4.

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 4th day of December 1978

Chief Commons Commissioner