COMMONS REGISTRATION ACT 1965 Reference No. 225/U/252

In the Matter of Burgh Common,
Swanton Morley, Breckland
District, Norfolk

DECISION

Introduction

This reference relates to the question of the ownership of land (in the Register described as) known as Burgh Common, Swanton Morley, Breckland District being the land comprised in the Land Section of Register Unit No. CL387 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.

This reference is dated 12 February 1988. Before it, consequential on a similar reference dated 14 November 1973, I held a hearing on 17 July 1975 at Norwich about the question of the ownership of the said land; there was no appearance at this 1975 hearing and accordingly in a decision dated 23 July 1975, I said: "In the absence of any evidence 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". On 29 July 1976 an entry to this effect was made in the Ownership Section of this Register Unit.

In a letter dated 2 July 1987 and sent to the Commons Commissioners, Atlas Aggregates Limited ("AAL") said (by their Solicitors) that they were the owners of the land ("the Unit Land") in this Register Unit by virtue of a conveyance dated 17 March 1970, and requested rectification of the Register; the Clerk advised them (in effect) to write to Norfolk County Council as registration authority. The said February 1988 reference was accompanied by some correspondence between the Council and AAL. Following upon public notice of this 1988 reference, AAL (their Solicitors' letter dated 14 April 1988) claimed to be the owner of the Unit Land and referred to their July 1987 letter and to the March 1970 conveyance. No other person claimed to be the owner of the Unit Land or to have information as to its ownership.

The Unit Land was on 11 December 1969 registered in the Land Section of this Register Unit pursuant to an application on behalf of Swanton Morley Parish Council by their clerk Edward Tomlin, and such registration being undisputed became final on 1 August 1972. There has never been any registration in the Rights Section.

The 1988 Hearing

I held a hearing for the purpose of inquiring into the question of the ownership of the land at East Dereham on 28 June 1988. At the hearing: (1) Atlas Aggregates Limited ("AAL") were represented by Miss Alison Sarah Peach articled clerk with Daynes Hill & Perks ("DHP"), Solicitors of Norwich; (2) Swanton Morley Parish Council ("the PC") were represented by Mr H E Harris their chairman and Mr MacDonald Seymour Sparks their Clerk; and (3) Norfolk County Council as registration authority were represented by Mr J E Richardson of the solicitors branch of their Chief Secretary's Department. Present also was Mr Bruce Donald Seaman of Bedingham Hall Farm who had been concerned with a hearing about another (nearby) Register Unit held immediately before this hearing.

In the course of her oral evidence Miss A S Peach produced the 1965, 1970 and 1964 conveyances (AAL/1, 2 and 3) specified in Part I of the Schedule hereto; she understood from a colleague in the DHP office that the conveyances were held by her firm on behalf of AAL and that for them at this hearing no more was needed. Questioned by Mr H E Harris, she agreed that the 1969 conveyance (AAL/3) did not include the Unit Land. After Mr Harris had stated (shortly) some facts known to the PC about the Unit Land, Miss Peach indicated that she knew nothing about them.

Next, Mr B D Seaman volunteered to give evidence (oral) about some of the facts stated by Mr Harris, which he did by reference to the map (BDS/1) specified in Part II of the Schedule hereto. He said (in effect):- He was aged 56 years. His father, Mr Anthony Seaman used to pay rent for it (the Unit Land) to the Keith family; he thought in those days it was paid to Mr J A Keith; this was in the 1950s, possibly before. He thought that livestock before 1950 used the land; the land was from before the war grazed by cattle that forded the River from the south side where the Keith's had land, but he (the witness) had no idea who so grazed the land. There is also an additional access (to the Unit Land) from Billingford village (to the north); you can leave a car by the gravel workings. Mr Bain who lives at Bank Cop in Billingford is 80 years of age and knows all about it. His (the witness') father started grazing it in the 1950s, and paid rent (for it) to Mr Keith and then paid rent (for it) to the PC. He (the witness) used to pay the rent on behalf of his father and "at the present time I personally occupy the farm land (nearby); I personally occupy it (the Unit Land) as arable land. He had paid no rent for about 10 years. His father died in November 1986. It (the Unit Land) has been arable for the last 10 or 15 years; it is black peat land; this year wet.

Questioned by Mr Sparks about his father's 1972 request to sell the Unit Land and the legal advice received by the PC that they had no power to sell because the owner was unknown (28 April 1978, L), Mr B D Seaman said (in effect):- He could only say that his father occupied the land, that "we" paid rent to

the PC and after that "we" stopped paying rent and continued to occupy, but he did not have anything to do with the idea of purchasing; "my Company" took it on; previously occupied by "the old Company".

Questioned by Miss Peach, Mr B D Seaman said (in effect):- He agreed that initially his father paid rent to Keith family: "we are talking about (OS Nos) 19 and 10a and as far as I am aware he paid rent for both; the other land OS No. 20 was owned by Holker Estates to whom we paid rent". As to when rent stopped being paid, the rent last paid by the Seaman's to the PC was about 10 years ago (before giving this answer the witness said "at least 15 years ago", but corrected his statement after an informal discussion between him and Mr Sparks). "After we stopped paying rent to the Keith family we paid to the Parish Council". He (the witness) had no idea when they started paying rent to the Keith's. As to his being involved with it and with his father farming, he lived in Essex and Suffolk and in 1971 he became chairman of the family Company; before 1971 his brother was chairman and his father was involved personally; after 1971 as chairman he (the witness) was involved with the Unit Land. When he came in 1971, rent was being paid and afterwards continued to be paid to the PC, to begin with by his father and then by him (the witness) via the Company, up to about 10 years ago. They never queried the ownership of the PC; "I cannot remember my father talking about buying". "I just recall father paying rent to the Keith family, my father was a corn merchant and Mr Keith came to Elmham Mills, my father's office and my father paid rent to him then"; he had no idea when his father first paid Mr Keith and then the PC; "I don't know". As to whether his father thought Mr Keith owned the Unit Land when he paid rent to him, "Yes I am sure he did". As to the abstract of title (AAL/4) put to him by Miss Peach which showed that E C Keith in 1938 sold the Unit Land (with other land) and in April 1947 bought it back, he (the witness) knew nothing about them (the conveyances).

Mr B D Seaman agreed my statement to him: "in 1971 when you came your company was paying rent to the Parish Council so you went on paying rent".

Next oral evidence was given by Mr M S Sparks in the course of which he produced and read or summarised the documents specified in Part III of the Schedule hereto and in the first column identified as 24, 25, 27, 28, 38 to 43 inclusive and A to T inclusive. He said (in effect):- He is now and has been for about 15½ years clerk of the PC and has lived in the Village for 25 years. He "came into the picture" after the registration of common land had taken place and all the documentation had been done. Resulting from the registration "we" were notified that no ownership "could be established, so under the 1965 Act we were made custodian (notification of my 1975 decision sent out on 31 July 1975)". On 26 September 1972 Mr Anthony Seaman wrote his letter (24). As to Mr Seaman forwarding the rental for 1973-74 (2 July 1974, 38), he paid the rent and it "goes into a separate book". As to his letter asking for £4 rent 1975-76 (1 March 1977, H), that was paid; at the time he (the witness) did not "know it was illegal if you do not own". As to the letter suggesting a meeting and looking through the PC records (27 August 1982, Q), he telephoned

and said that the PC were no longer going ahead with the sale because at that time they had been advised by the Parish Council Association that "we" should not be taking rent. Every time "we" asked Seaman to pay the rent they paid. They paid as requested on 28 January 1982 (M) but not afterwards; this last rent was paid shortly after January 1982. Nothing happened (about the Unit Land) after the letter of 15 November 1985 (S); there was no further correspondence until "we" knew an inquiry (June 1988) was to be held.

Questioned by Miss Peach as to why the PC applied for the registration of the Unit Land, Mr Sparks said (in effect):- At that time the ownership was not yet established. The PC made inquiries in the area, particularly of Francis Horner who acted for Vice-Admiral Sir Edward Evans-Lombe. They the PC were completely ignorant of the documents (AAL/1-4). "My Council at the time believed they owned the land and that is why they registered it". When rent received, "I did not know I was breaking the law. As to Vice-Admiral Sir E Evans-Lombe, he was a local owner; the PC was asking about all the owners of common land in question, whether he had ownership of any (such) land. As to the reasons why the PC applied for registration, that was before his time. As to rent being paid to Mr Keith, he (the witness) thought (his personal views) things had been mixed: the rent from the adjoining land, meaning OS No 19 (not registered) was paid with the rent for CL387.

Next Mr Seaman said that he thought that "we", meaning his father or his Company, always paid rent for 10a and 19 together.

Next Miss Peach made submissions in the course of which I requested comment on the possibililty that the paper title of AAL deducible from the documents produced on their behalf had been extinguished by the Limitation Act. After Miss Peach had addressed me, it appearing that she had by my comment been taken by surprise, on her application for an adjournment I noted:-

> "If within six weeks AAL or their Solicitors write to the Clerk of the Commons Commissioners saying they wish the hearing to be continued so that they can offer further evidence and/or argument and indicate what such further evidence or argument will be and send a copy of such letter to the Parish Council, the proceedings will be adjourned to a day and place to be fixed. If they do not so write, I will give my decision on what happened today (28 June) and on my inspection."

Inspection

As arranged at the end of the hearing, on 29 June I met Mr B D Seaman at Billingham. Mr Peter H Charlton, director and general manager of AAL said he wished to accompany us on our inspection and to show me documents. I explained that at

the end of the hearing it had been agreed by those representing the PC and AAL that neither should attend my inspection and that I should go alone with Mr Seaman who without any comment would show me round; accordingly if Mr Charlton accompanied us on my inspection, I should feel obliged by what happened at the hearing to pay no attention to what he said. After a discussion in my absence, I understood from Mr Seaman that Mr Charlton was agreeable to my inspecting attended only by Mr Seaman as had been agreed at the hearing.

I spent some time with Mr Seaman inspecting Billingford Common being Register Unit No. CL96 with which he was concerned and about which I held a hearing immediately before my Unit Land hearing. Next approaching the Unit Land from the south-west corner of the CL96 land, with Mr Seaman I inspected the Unit Land and much of the land situated to the east of it north of the River. The land south of the River is from the Unit Land inaccessible. The best way to the Unit Land and its surroundings is not obvious, and even when guided by Mr Seaman was in places not easy; for his help, which saved me much time and effort, I am grateful.

Following my inspection the possible relevance of Burgh Common on the south of the River, to me became apparent. So on our return to Billingham Mr Seaman explained that it was easily accessible by road and that although in the absence of a nearby bridge the journey was long, his guidance was unnecessary; accordingly I inspected the land near to the Unit Land on the south of the River unattended.

After the hearing

After the hearing and before November, the letters specified in Part IV of the Schedule hereto were received in this office. With their letter of 26 July DHP enclosed an opinion of Counsel, and their August letter concludes:-

> "We do not ... see the need for a further hearing - we are of the opinion that it would only increase our client's costs in the matter, and we would be grateful if the Commons Commissioner would make his decision as to ownership without a further hearing".

About this request I gave an interlocutory decision dated 30 November 1988, saying I would if the conditions therein set out were fulfilled give a final decision without any further hearing considering as argument the points of law made by Counsel in his opinion and the submission in the 26 July DHP letter:

> " ... the Parish Council did not produce any evidence or written lease between themselves, Messrs A Seaman and Sons, we submit that our clients title is not barred"

And also keep in mind the statement in the August Parish Council letter:

"My Parish Council has studied the contents (of Counsel's opinion) and are not prepared to concede on this matter, ...".

Since the publication of this November 1988 decision, there has been received in the office of the Commons Commissioners the letters specified in Part V of the Schedule hereto; among them are two letters from Mr B D Seaman in which he although not objecting to my not continuing the hearing somewhat amplifies the evidence he then gave; a letter dated 15 December from Mr M S Sparks as clerk of the PC in which he submits as "the following argument in support of ownership of the parcel of land Register Unit No. CL387 "various facts set out in 5 paragraphs; and a letter dated 28 December from DHP in which after agreeing unconditionally to my giving a decision without a further hearing comments on the said December PC letter and sets out the effect of a telephone conversation about it the sender had with Mr Sparks.

Without a further hearing

I adhere to the opinion expressed in my November interlocutory decision that I can properly give a decision without a further hearing with the agreement of the PC and AAL and in the absence of any objection by Mr Seaman and the County Council. Their letters specified in Part IV of the Schedule hereto show such agreement and absence of objection. Notwithstanding that the letters from the PC, AAL and Mr Seaman contain additions amplifying, explaining or qualifying what was said at my June 1988 hearing, I feel no difficulty in making any necessary finding of fact without regard to these additions; no alterations to such finding consequent on a further hearing dealing with these additions could affect the result of these proceedings. In this decision I disregard the additions save where it below appears that I can accept them without injustice and it would be confusing to do otherwise.

The question

By section 8 of the Commons Registration Act 1965, a Commons Commissioner "shall inquire into the matter", meaning the question of the ownership of land in a register unit, and "shall if satisfied that any person is the owner of the land" direct registration of such person accordingly.

AAL clearly claimed ownership; indeed there would have been no June 1988 hearing if they had not prompted the County Council to make their February 1988 reference.

I have no note or recollection of either Mr Harris or Mr Sparks at the hearing actually claiming that the PC owned the Unit Land; as I understood Mr Sparks upon receiving the April 1977 letter from NCALC (L) saying the PC could not sell the Unit Land "when the owner is not known" and notwithstanding his January 1982 demand for rent up to 1981 (M) and its actual (? as to this see below) payment, he had concluded by September 1982 that it would be illegal for the Parish Council to accept rent as owners, and he was accordingly giving evidence and producing documents becuase they might help me at my inquiry. What he was doing accords with paragraph (5) of regulation 23 of the Commons Commissioners Regulations 1971 which expressly provide that any person may give information in this way; further the PC is a "concerned authority" within the Regulations and as such entitled to be heard at any hearing.

Mr B D Seaman gave his oral evidence on the basis that happening to be present at this Unit Land hearing because he had been concerned with the CL96 hearing and finding things talked about with which he had been personally concerned, was willing to help. He too acted in accordance with the said regulation 23(5).

In the register the Unit Land is described as containing 0.217 hectare (0.53 acres); at the hearing it was treated as identical with OS (1906 edition) 10a containing 0.735 acres (0.297 hectares); perhaps the OS area includes half the adjoining River; however this may be, I consider that for all purposes with which I am concerned there is no relevant difference between it and the Unit Land.

Miss Peach in her final address suggested (among other things) the Unit Lane was not common land and the position might have been different if AAL had had notice of my 1975 hearing. The Land Section registration in the absence of objection became final on 1 August 1972; so I had no jurisdiction either at my 1972 hearing or at my 1988 hearing to consider the correctness or otherwise of the registration. But because I am concerned with the effect of conveyances made before this finality, the appearance of the Unit Lane as it is deducible from what I saw on my inspection and from the plans and maps I have is relevant to a conclusions of the information before me.

Appearance and maps

The description of the Unit Land in the Register as "the piece of land known as Burgh Common" is for the following reasons misleading and perhaps absurd.

"Burgh Common" marked on the 1906 OS map (as I infer it to have been from the plans based on it which I have) is the land ("the CL164 land") wholly south of the River Wensum, being a strip OS No. 10 containing 2.223 acres, about 500 yards long bounded on the north by the River Wensum (which here flows eastwards) and on the south by the C218 road (from Mill Street to Worthing) and having an average width of about 10 yards; this strip is open on the one side to the River and on the other side to the road; it is now much overgrown, but it is still possible in places to walk from the road to the bank of the River; it appears to be land which might when motor traffic was less have been regularly grazed; it also appears to be public land such as might be beneficial to those south of the River working or living not too far away (I did not notice any dwellinghouse nearby). In short the CL164 land is and probably for a long time has been common land within one of the recognised popular meanings of these words; anybody asking the way to "Burgh Common" without explaining his purpose would be directed to the easily accessible CL164 land south of the River rather than to the not easily accessible Unit Land north of the River.

No evidence was offered at the hearing as to how the Unit Land came to be or could be called "Burgh Common". There are two indications on the maps and plans I have. First the 1906 OS map shows the parish of Swanton Morley all (at least so far as I am concerned) south of the River Wensum middle line with the exception that the parish boundary runs along the northwest and northeast sides of the Unit Land being thereon marked "C.O.C.R. (Centre of Old Course of River)" and "C.D. (Centre of Ditch)"; secondly the plan attached to the October 1938 conveyance in the abstract produced (AAL/4), shows the Unit Land as an island at a point where the River Wensum divides with a not inconsiderable part of it flowing along the northwest side. So from Mr Seaman's recollection of having seen cattle crossing the River there (now apparently impossible the River being confined within well made banks in good repair) and from how I can infer the River would have been in the past if the banks were lower or less well repaired, I guess that the Unit Land and the CL164 land were in the past one piece of land known as Burgh Common belonging to the parish in the popular sense of that expression and as such common land in a like sense. Whether or not my guess is correct as local history, I decline to infer from the use of the Unit Land being now much the same as that of OS No 19, that in the 1960s Mr Keith or anybody else would be extraordinary if they were persuaded or for themselves concluded that the Unit Land was historically part of parish lands known as Burgh Common (situated now for the most part south of the River) of which the Parish could reasonably be regarded as the lawful owner. Any such conclusion would have accorded with the law applicable to land "belonging" to a parish "in the popular sense of that expression" as applicable to the churchwardens and overseers in old times and to a parish council as their successors in modern times; see the Overseers Order 1927 (SR&O 1927 No. 55), and the comments on section 17 of the Poor Relief Act 1819 made in Doe v Hiley (1830) 10 B&C 885, Doe v Terry (1835) 4 A&E 274, recognised as still authoritative in Haigh v West 1893 2QB 19 at page 31 and Wylde v Silver 1963 1Ch 243 at page 271.

Claim of AAL

As made at the hearing it rested on their custody of the December 1965 and March 1970 conveyances (AAL/1 and 2).

In the context of a supposed sale of the Unit Lane under an open contract, the 1965 and 1970 conveyances are by law an acceptable good paper title. But under such a contract a vendor is by law obliged to give vacant possession on completion, or at least show that the person in possession acknowledges the vendor's title by paying rent or has no reasonable defence to an action to recover possession; if he is unable to do this the sale goes off whatever may be his paper title.

As to possession, I have the evidence of Mr B D Seaman that since 1971 when he first became directly concerned with the Unit Land it has been arable cultivated by him and he mentioned his Companies; at my CL96 hearing Mr Seaman gave some evidence about them as being formed or controlled by his father alone or with him and possibly other members of the family. At my June 1988 Unit Land hearing he was not questioned about these Companies. As far as the claim of AAL is concerned, it is enough for me to find as I do (there being no contrary evidence) that Mr Seaman is now occupying and has ever since 1971 occupied the Unit Land adversely to AAL; it is irrelevant in this part of this decision whether he did so for himself or his father or on behalf of a family company and whether he or they paid rent for such occupation to anyone other than AAL. His evidence is in no way supports the claim of AAL. At the hearing he neither acknowledged nor was asked to acknowledge the title of AAL. Apart from the 1965 and 1970 conveyances, the ownership evidence adduced on behalf of AAL was an absolute blank.

The law applicable to the evidentiary value of the 1965 and 1970 conveyances against "anybody whoever they may be" was stated in Blandy-Jenkins v Dunraven 1899 2Ch 121; such a conveyance is "an act of ownership". The usual way of showing ownership is by evidence of acts of ownership, and one act may be of such significance and may be done in such circumstances as to be satisfactory proof of ownership. If for example grazing is the only profitable use which can be made of a piece of common land, and such use is of persons with registered rights of grazing and the piece is not capable of any other occupation, then two conveyances such as those of 1965 and 1970 produced by AAL might be, perhaps normally would be, satisfactory evidence of ownership. But here I have the extraordinary circumstance that the land is capable of being profitably occupied and has at least since 1971 been continuously so occupied contrary to these two conveyances.

Balancing as best I can the conflicting evidentiary considerations applicable to the conveyances and the contrary possession and keeping in mind what I myself saw during my inspection and limiting myself to matters mentioned under this heading, I conclude that AAL are not now the owners. But even if I had concluded that AAL were on balance more likely than the PC to be the owners, this would not be reason enough for my being "satisfied" (in the sense in which this word is used in section 8 of the 1965 Act) that AAL are now the owners; these proceedings under section 8 are not adversarial. So whatever criticism may be made of the case made by the PC, my conclusion that AAL are not or reasonably might not be the owners is reason enough for my refusing (as I do) to be satisfied that they are the owners.

But in case my refusal upon a consideration only of the matters mentioned under this heading is mistaken under the next two headings I deal with questions expressly or impliedly raised after the hearing in the July 1988 opinion of Counsel and otherwise.

Limitation Act, defence

After the hearing AAL have relied on the July 1988 opinion of Counsel, to the effect that any claim by AAL to recover possession,a defence by the PC or anyone else based on the 1939 or 1980 Act would fail.

Below under another heading, I deal with the question whether apart from the Limitation Acts 1939 and 1980, a claim by AAL to recover possession of the Unit Land would succeed.

As to the Limitation Act 1980 and the Limitation Act 1939 which is replaced, any payment of rent is relevant. About rent, AAL offered no evidence and must therefore rely on that of Mr Seaman and Mr Sparks, which evidence in some respects conflicts and in some respects is uncertain.

As to when rent was first paid to the PC, Mr Sparks read his letter of 28 December 1972 (25) which contains the words: "It should be noted that Mr Seaman has been renting this land from the Parish since the mid 1930s."; Mr Sparks mentioned that the PC had documents meaning (as I understood him) accounts such as are normally kept by a parish council, but not then particularly referring to his 1972 letter. Contra Mr Seaman said that his father was paying rent in the 1950s to Messrs Keith and that in 1971 when he became directly concerned rent was being paid to the PC but he was unable to specify when the change too place. Neither at the hearing was asked to explain this conflict, which seems then to have been overlooked, possibly because, as I recollect, I had the only copy of the December 1972 letter (25). On what happened at the hearing on this point I think the evidence of Mr Seaman more reliable and that Mr Sparks when writing the December 1972 letter shortly after he had been appointed the parish clerk, may have relied on what someone told him without checking the accounts, and that accordingly up to the end of the 1950s rent for the Unit Land had been paid by Mr Anthony Seaman to Mr Keith. On the evidence given at the hearing and on the balance of probabilities I would find that the changeover from Mr Keith to the PC took place in the early 1960s. Mr Sparks in his after-hearing letter of 15 December says "4. Rent from Mr A Seaman and Sons has been received from March 1961 until 1978". BDP in their 28 December letter,although commenting on another matter in the 15 December letter say nothing about "March 1961". Because Mr Sparks in his December 1988 letter refers particularly

to "the official minutes and Receipts and Payment books", I think no injustice would be done to AAL if I assume March 1961 to be the correct beginning date.

As to the date when payment of rent to the PC ceased, as above recorded at the hearing while I had in front of me the PC letter of 28 January 1982 (M) asking for "the rent of £8 covering the period 1979 to 1981", I noted that Mr Sparks stated such rent was paid. If I confine myself to what was said at the hearing I would have accepted this statement of Mr Sparks as being correct. However in his 15 December 1988 letter he says rent was received "until 1978". This statement was picked up by DHP in their said 28 December 1988 letter saying that the sender spoke telephonically to Mr Sparks who confirmed that "rent ... has not been received by the ... Parish Council from anyone since 1978". The documents I have do not include any demand for the years 1977/78, so it may be that Mr Sparks at my hearing did not intend me to understand that rent had been paid for 1979-1981.

As to the said telephone conversation mentioned in the DHP letter, there was no suggestion by Mr Sparks or anyone else that the PC had ever received from anyone other than Mr Seaman or one of his Companies any rent in respect of the Unit Land, and I shall I think be doing no injustice to the PC if I so find.

Counsel in his July 1988 opinion begins by saying he is asked to advise whether the title of AAL to the Unit Land has been extinguished because the PC for more than 12 years have demanded and received rent from A Seaman and Son in respect of their occupation of the property, and after referring to Limitation Act 1980 Schedule I para 6 reenacting the Limitation Act 1939 section 9 subsection (3) concludes by saying if there was no properly drawn lease in writing in existence by which A Seaman and Sons occupied the land then the claim of the PC must fail and the title of AAL is accordingly not barred.

I agree with Counsel that the PC have made written demands on rent does not show that they receive rent under a lease in writing. On the evidence put before me at the hearing and on the balance of probabilities I find that there was never any lease in writing within the meaning of the paragraph and subsection referred to by Counsel. Such finding is consistent with Mr Sparks' said December 1988 letter: "3. No lease between Mr A Seaman and Sons was considered necessary, as the decision to rent CL387 had been recorded in the Official Minutes ...".

But I disagree with Counsel's opinion which he gives without reference to anything in either of the Acts or to any authority that it necessarily follows from the inapplicability of the said para 6 and subsection (3) that the title of AAL is not barred by these Acts. Counsel seems to assume that apart from the Acts, AAL as successor of Aggregate Holdings Limited under the 1965 conveyance became and but for the possible operation of the Acts continued to be and still is landlord of Mr Anthony Seaman and whoever can now be regarded as the successor in title to his tenancy. On this assumption (as below appears I doubt it) the lease supposed must be "a tenancy from year to year" within subsection (2) of section 9 of the 1939 Act (identically replaced by paragraph 5 of Schedule I of the 1980 Act). Clearly for the purposes of the Acts any such supposed tenancy is to be treated as being determined unless "any rent has subsequently been received in respect of the tenancy". In my

opinion any rent received by the PC was not received by them in respect of any tenancy to which subsection (2) has any application. The proviso at the end of the subsection has no application to a tenant who has ceased to pay rent to his former landlord, and it is not made applicable to him or anyone else merely because he or anyone else happens to pay rent to some other person. My opinion has I think some support from Hayward v Chaloner 1968 1QB 107 where the Court in considering the said Section 9(2) gave effect to it on the basis that its meaning was free from any ambiguity, see page 122.

I had no evidence as to the circumstances in which the PC in 1961 started to receive rent from the Unit Land. So I decline to infer that the tenancy under which they received it was in any way which could now be relevant a continuation of the tenancy under which Mr Anthony Seaman or any of his Companies was in the 1950s paying rent to Mr Keith.

My decision is therefore that any title AAL had under the 1965 and 1970 conveyances was by section 16 of the Limitation Act 1939 extinguished 12 years after some date in the early 1960s, and consequentially in any proceedings by AAL to recover possession of the Unit Land from the PC or Mr B D Seaman or one of his Companies a defence by them relying on the Act would succeed.

The 1965 conveyance

When it was made, the Seamans were in occupation of the Unit Land and were paying rent to the PC. So the conveyance was irregular; somebody made a mistake. I decline to infer that anyone consciously acted irregularly. One possibility is that those acting for Aggregate Holdings Limited in their 1965 purchase of the Unit Land failed to inquire (as a prudent purchasor should) whether the land they were buying was occupied by anyone and to whom any such occupier was paying rent. Another possibility is that those so acting did inquire and were misled by a mistaken answer given by or on behalf of Mr E C Keith and/or Mr A Seaman. Mr E C Keith must at some time have known that the Seamans after the 1950s were no longer paying him rent for the Unit Land, and it is difficult to suppose that he did not also know that they were paying rent to the PC. It is strange that the Unit Land in 1964 held by Mr Keith under the same title as the 29.014 acres he sold under the 1964 conveyance (AAL/3) should have been conveyed separately unless both parties recognised that the Unit Land was in some way peculiar. Any criticism which can be made of Mr Keith in mistakenly executing the 1965 conveyance at a time when the Unit Land was occupied by someone paying rent to the PC is equally applicable to those acting for Aggregate Holdings Limited for failing to discover that this was happening. Their registered office was in Worthing a short distance from the Unit Land, and Mr Keith lived in Swanton Morley; maybe being so near, both assumed that the other knew the Unit Land well enough not for either to ask any questions of the other or anyone else.

On the balance of probabilities, I would find that Mr Keith in the early 1960s thought that the Unit Land was historically part of Burgh Common (mostly south of the River), being parish property to which he had not either then or when he made the 1938 conveyance any title better than that of the PC, and accordingly allowed the PC to take possession of it by accepting rent from the Seamans, that Aggregate Holdings Limited made no inquiries as to occupation and that Mr Keith executed the conveyance assuming all was regular. I realise such a finding involves a deal of guessing; but that I can so guess in reason enough for my not being "satisfied" (as the word is used in section 8 of the 1965 Act) that Aggregate Holdings Limited could immediately after the 1965 conveyance have recovered possession from the PC who were then in possession by their tenant.

So the detailed consideration I have given under this and the preceding heading to the Limitation Acts and associated matters, leaves unaltered what I have decided in the part of this decision headed: Claim of AAL.

Claim of the PC

On the undisputed evidence of Mr B D Seaman, I find that he for himself or one of his Companies is now in possession of the Unit Land. Such possession is some (not conclusive) evidence that he or one of them is the owner for an estate in fee simple.

I have no note or recollection of any ownership claim at my June 1988 hearing being made on behalf of the PC or by Mr B D Seaman for himself or any of his Companies. Since my June 1988 hearing an ownership claim has been made by the PC in their letter of 15 December 1988, but no ownership claim has been made by Mr Seaman. From the Solicitor's 1982 letters (P&Q) and Mr Seaman's attitude at the hearing, I am under the impression that he then had no intention of making a claim against the PC, and that if I were now to adjourn these proceedings for a further hearing so that he could give further evidence and make submissions, I should be involving him and others in unnecessary trouble and expense.

So I now give my decision on the PC claim; but because it would be unjust to decide finally against Mr Seaman on my impression, all under this heading should be regarded as subject to the liberty to apply by me granted below under the heading: Final.

Apart from the contrary claim by AAL and the circumstance that the PC have not since 1978 received any rent from the Unit Land, their claim to ownership is straightforward. For 17 years they have received rent from the Unit Land paid by persons in possession; this is enough to rebut any presumption which might be drawn in favour of Mr Seaman or any of his Companies from their possession, since by paying rent they are estopped from denying the title of the PC, and their possession is evidence in favour of the PC being the owners for an estate in fee simple. Further the matters set out above under the heading: Appearance and maps, are some evidence in favour of the Unit Land "belonging" to the parish in the "popular sense of that expression", which belonging was treated in Doe v Hiley and Doe v Terry supra as showing the ownership of the churchwardens and overseers of whom parish councils under the 1927 Order supra are the successors. There was no evidence at the hearing that the PC claim was or could be challenged by anyone except AAL or Mr Seaman or one of his Companies, and I conclude that except as aforesaid it is practically certain that the possession of the PC will not be disturbed, and I should therefore be satisfied as to their ownership.

As to a possible claim by AAL, what I have said above about the 1965 and 1970 conveyances relied on by AAL and as to the extinguishment of their title if any under such conveyances by the Limitation Act 1939 is against their claim. Additionally the Unit Land has under the 1965 Act since 1972 been finally registered as common land pursuant to an application of the PC (having local knowledge) as "known as Burgh Common" (part of land south of the River apparently public land); circumstances consistent with it having been land popularly belonging to the Parish. So the PC title is essentially immemorial, independent of anything done or omitted by Mr E C Keith. That this 1988 hearing resulted from the DHP July 1987 letter written on behalf of AAL does not preclude the PC from taking advantage of it.

As to a possible claim by Mr Seaman or one of his Companies, their possession without paying any rent since 1978 has not been for long enough to effect an extinguishment of the PC title under the Limitation Act 1980. Merely by saying that they would not claim rent, the PC did not transfer to Mr Seaman or one of his Companies the title they had acquired by being in possession by their tenant for 17 years. It may be that as a general rule a person is acting illegally, as Mr Sparks thought, if he receives rent for property which he does not own; but the Limitation Acts show that a person who has mistakenly been in possession of, or received rent from land which he does not own for 17 years can properly claim to be the owner. Apart from their possession, I had no evidence that Mr Seaman or any of his Companies had any title at all to the Unit Land. So I conclude that the title of the PC is better than any which Mr Seaman either has produced or could produce.

Upon these reasons, I am satisfied that Swanton Morley Parish Council are the owners of the Unit Land.

Final

Upon the considerations set out under the headings: Claim of AAL, Limitation Act defence, and the 1965 conveyance, I am not satisfied that AAL is the owner of the Unit Land and accordingly I refuse pursuant to section 8(2) of the 1965 Act to direct Norfolk County Council to register them as owners.

Upon the considerations set out under the heading: Claim of the PC, and subject to any order which may be made by a Commons Commissioner under the liberty to apply hereinafter contained, I am satisfied that the PC are the owners of the Unit Land and I shall accordingly pursuant to section 8(2) of the Act of 1965 direct the Norfolk County Council as registration authority to register Swanton Morley Parish Council as the owner of the land in this Register Unit.

I give liberty to Mr Bruce Donald Seaman and to Bruce Seaman Farms Limited, Anthony Seaman & Sons Limited and any other company formed by Mr Anthony Seaman or Mr B D Seaman or any member of their family to apply to a Commons Commissioners to set aside this decision so far as it relates to the ownership or possible ownership of Swanton Morley Parish Council, such application to be made in writing (it may be by letter to the Clerk of the Commons Commissioners) within TWO MONTHS of the day on which this decision is sent out to those concerned or such longer time as a Commons Commissioner may allow.

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.

SCHEDULE OVER

SCHEDULE
(Documents produced or referred to)

Part I: by Miss A S Peach

AAL/1	14 December 1965	Conveyance by Edward Charles Keith ("Vendor") to Aggregate Holdings Limited of OS No. 10a containing .735 of an acre "being part of the property conveyed" by a conveyance of 25 April 1947 made by Edith Leetham Hedley to the Vendor.
AAL/2	17 March 1970	Conveyance by Aggregate Holdings Limited to Atlas Aggregates Limited of the property described in the Second Schedule thereto being land containing about 74.870 acres delineated on plan annexed and edged red. Note: red included .735 acres conveyed by AAL/1 above and 29.014 acres conveyed by AAL/3 below.
AAL/3	13 April 1964	Conveyance by Edward Charles Keith to Aggregate Holdings Limited of land in Swanton Morley and Bellingford containing about 29.014 acres delineated on plan annexed and "being part of the property conveyed" (1947 above). Note: includes in Billingford OS No. 19 containing 1.973 acres: remainder in Swanton Morley south of the River Wensum.
AAL/4	14/12/65	Examined abstract of title to property at Swanton Morley:- Commencing with a conveyance dated 11 October 1938 by Edward Charles Keith to Oswald William Edward Hedley of "Secondly" Land in Swanton Morley and Billingford comprising 297a.1r.27p. and called The Waterfall Farm as described in 2nd Schedule and delineated on the plan coloured pink and hatched blue together with farmhouse &c. Second Schedule as abstracted comprised only "10a: Pasture: 0(A) .2(R).27(P). And concluding with a conveyance dated 25 April 1947 made by Edith L Hedley as personal representative of OWE Hedley (he died 24 December 1945) to the said E C Keith of "... premises as set out in last abstracted conveyance of 11 October 1938 set out in the plan annexed thereto ...".

"... Schedule ... Waterfall Farm ... As abstracted in the conveyance of 11 October 1938".

Part II: Mr B D Seaman

BDS/1 Copy County Council map based on OS XXV 11.14. (scale 1/2,500) showing Unit Land (CL387) and to the North Billingford Common (CL96).

Part III: by Mr M S Sparks

24	26 September 72	Letter from Anthony Seaman of Billingford Hall to Wm Sparks: "... would your Council consider selling the small piece of land that we rent from them near the River Winsum".
25	28 December 1972	Letter from M S Sparks (Parish Clerk) to Norfolk County Association of Parish Councils) (NCAPC): "... The facts are as follows:- (a) Burgh Common comprises two portions of land, (1) a strip which runs parallel between the River Wensum and the C.218 road (Registered No. CL.164), (2) The Triangular portion opposite this strip on the other side of the river (Registered No. CL.387). No access to portion CL.387 is provided across the river by bridge or stepping stones, and on its remaining two sides, is bounded by grazing land owned by Mr A Seaman of Billingford Hall. At a recent Parish Council Meeting the letter was read from Mr Seaman requesting that he be allowed to purchase this portion of CL.387 from the Parish. This request to a sale was agreed in principle by the Council members. It should be noted that Mr Seaman has been renting this land from the Parish since the mid-1930s. The land concerned was registered in the name of the Swanton Morley Parish under the Commons Registration Act 1965. Could you please advise ...
27	9 January 1973	Letter from National Association of Parish Councils (of London) to Norfolk APC.

38.	19 February 1974	Letter from Swanton Morley Parish Council (M S Sparks Parish Clerk) to District Valuation Officer enclosing copies of correspondence "dealing with the sale of the land in question ... the rental paid by Mr A Seaman for this land is the sum of £2.00 per annum."
39	15 March 1974	Letter from District Valuer to Mr M S Sparks: "... enquiries ... our Mineral Valuer ... it would appear that the Mineral rights to this land are not in your ownership ... it does not appear that the Mineral Rights have any substantial value ..."
40	25 March 1974	Letter from the PC (M S Sparks Parish Clerk) to District Valuer: "... to whom the Mineral Rights ... belongs (?)".
41	28 March 1974	Letter from District Valuer to M S Sparks: "... not free from doubt ... may be owned by Atlas Aggregates Ltd. This Company also bought adjoining land from the Trustees of ... who could conceivably be the mineral owner for all common lands ...".
42	1 July 1974	Letter from the PC (M S Sparks Parish Clerk) to NCAPC "in a letter of 9 January 1973. You kindly sent me a copy of a reply from the National Association of Parish Councils ... could you please advise ... to ascertain the actual ownership of the Mineral Rights ...".
43	2 July 1974	Letter from the PC to A Seaman: "... doubt as to who owns the mineral rights ... grateful if you would forward your rental of £4 to cover the period 1973-1974".
A	15 July 1974	Letter from NCAPC to M S Sparks: (not relevant).
B	26 July 1974	Letter from M S Sparks to NCAPC: (not relevant).
C	22 August 1974	Letter from NCAPC to M S Sparks enclosing advice (copy letter 13 August 1974) of National Association of Local Councils in London.

D	21 November 1974	Letter from District Valuer to M S Sparks: "... any further developments since then (28 March 1974).
E	23 December 1974	Letter from M S Sparks Parish Clerk to District Valuer (interim reply to end of January 1975).
F	31 July 1975	Letter from Clerk of Commons Commissioners to the PC enclosing copy of July 1975 decision; also copy of Land Section and Rights Section and "map 2 (Mitford & Launditch RDC) based on OS, scale 1/2,500".
G	29 September 1975	Letter from M S Sparks Parish Clerk to A Seaman summarising 1975 decision and concluding: "until further evidence of ownership is forthcoming present renting of this land to you will have to continue".
H	1 March 1977	Letter from M S Sparks Parish Clerk to A Seaman: "... the rent of £4 is now overdue for the years 1975/76 ... forward a cheque at your earliest convenience ..."
I	27 March 1977	Letter M S Sparks Parish Clerk to Norfolk County Association of Local Councils (NCALC): "advise this Parish Council if they are permitted to sell common land where no person has claimed to be the owner and its protection is only vested in the Parish Council under Section 9 of the Act of 1965."
J	4 April 1977	Letter from NCALC to M S Sparks: "I very much doubt if the Parish Council would be permitted to sell common land ... let me know CL registration No. ...".
K	26 April 1977	Letter from M S Sparks Parish Clerk to NCALC enclosing map of CL387.
L	28 April 1977	Letter NCALC to M S Sparks "... the Parish Council has no power to sell the land and when you come to think of it, how could a conveyance be prepared when the owner is not known."
M	28 January 1982	Letter from M S Sparks Parish Clerk to A Seaman and Sons Limited: "... the rent of £8 covering the period 1979-81 is out standing, could you please forward a cheque ...".

N	30 April 1982	Letter from Hood, Vores & Allwood, solicitors of Dereham to M S Sparks: "we understand that Anthony Seaman & Sons, Limited, for whom we act, have been tenants of the piece of land CL387 which was referred to in your letter of 22 March 1982 for a large number of years. We also understand that the rent has been paid to your Parish Council, which we assume considers itself to be the owner of this land. We should be grateful if you could confirm if this is so since Mr Bruce Seaman has been given to understand by a third party that the land may be owned by someone else, and Mr Seaman has asked us to check the position ...".
O	24 May 1982	Letter M S Sparks Parish Clerk to Hood Vores & Allwood enclosing copies "of all the correspondence which has taken place since 1972".
P	7 July 1982	Letter from Hood, Vores & Allwood to M S Sparks: "... I understand from the Seaman family that Anthony Seaman and Sons Limited had been paying rent to your Council for a number of years ... Section 9 of the 1965 legislation, but prior to this legislation the Council have been receiving rent from the Company I would have thought that the Council must have assumed the piece of land belonged to it ... get to grips with this problem by me meeting with you."
Q	27 August 1982	Letter from Hood Vores & Allwood to Mr Sparks: "... agreeable to us meeting ..."
R	13 Nov 1985	Letter from M S Sparks Parish Clerk to Chief Planning Officer, Breckland District Council headed Atlas Aggregates Ltd: extension of existing Quarry Operations at Swanton Morley: "... common land ... therefore this land is to remain in its existing state ... I attach relevant correspondence and map."
S	15 Nov 1985	Letter from Norfolk County Council to M S Sparks headed 'Extension of sand and gravel quarry: Atlas Aggregates Ltd" ... my purpose in writing to you is to ask for your help in trying to ensure that local people are made aware of the application ..."

T 13 May 1988	Notice by Clerk of Commons Commissioner of intended hearing on 28 June 1988.

Part IV: After the hearing and before November 1988

20 July 1988 26 July 1988	Letters from DHP enclosing copy of Counsel's opinion dated 25 July 1988 and saying "in respect of this evidence as the Parish Council did not produce any evidence of a written lease between themselves and Messrs A Seaman and Sons, we submit our client's title is not barred."
3 August 1988	Letter from M S Sparks, Clerk to the Parish Council: "My Parish Council have studied the contents (of the opinion) and are not prepared to concede on this matter."
2.8.88	Letter from Bruce Seaman concluding "I will be very happy to help in any way ...".
15 August, 12 October and 17 November 1988	Further letters from DHP. "We do not ... see the need of a further hearing ..."

Part V: After November 1988

9 December 1988 and 4 January 1989	Letters from Mr Bruce Seaman containing facts and arguments, some of them new.
12 December 1988	Letter from Norfolk County Council raising no objection to an ownership decision without a further hearing.
15 December 1988	Letter from Swanton Morley Parish Council (M S Sparks Clerk) containing information "submitted in order to support the PC's claim to ownership of the parcel of Common Land Register Unit No. 387.

28 December 1988	Letters from DHP referring to the said PC 15 December letter, and agreeing unconditionally to a decision without a further hearing.
11 January 1989	Letter from PC saying a further hearing is not required by them "unless the Commissioner should decide otherwise".

Dated this 17th day of March 1989

A. A. Baden Fuller

Commons Commissioner.