



Application Decision

Hearing held on 24 August 2016

By Alan Beckett BA MSc MIPROW

An Inspector appointed by the Secretary of State pursuant to Regulation 4 of The Commons Registration (England) Regulations 2008 to determine the application.

Decision date: 4 October 2016

Application Ref: COM 783 Kirkby Malzeard Moor

Register Unit: CL 73

Registration Authority: North Yorkshire County Council

- The application, dated 13 August 2015, is made under Section 19 (2) (a) of Schedule 2 to the Commons Act 2006 ('the 2006 Act') to correct a mistake made by the commons registration authority in making or amending an entry in the register.
 - The application is made by Mr D Harrison ('the applicant')
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Decision: The application is not granted.

Preliminary Matters

1. I held a hearing into the application at County Hall, Northallerton on 24 August 2016. As the evidence in this case is documentary I did not consider a site visit would assist in the determination of the application. At the hearing the Applicant represented himself with the assistance of Mr C Harrison, Mrs L Harrison and Ms Norris of the NFU. The objectors, Air Cdre Bostock and Lord Masham were represented by Mr Cox of Dacre, Son & Hartley. Mr Stanford, Mr Pannell and Miss Davis were present on behalf of the Commons Registration Authority as non-participating observers. Mr Lobely was also present as an interested party.

The Application land

2. The land at issue in this case is the small triangle of land shown coloured red on the plan attached to this decision. It is recorded in the register as being part of CL 73 Kirkby Malzeard Moor although the register noted that this land lay in the Parish of Grewelthorpe and not in the parish of Kirkby Malzeard.
3. It was the applicant's case that the CRA were mistaken in amending the register in relation to entry no. 2 of CL 73 by making entry no. 16 on 19 July 2013. The applicant claims that the right to graze sheep over CL73 set out in entry no. 2 had not been objected to, had not been the subject of a commons commissioners determination and had become final on 21 June 1971. In 1975 the applicant had bought part of the land of Ellershaw Farm (to which the grazing right attached). The applicant acknowledged that the grazing rights over CL 168 attached to Ellershaw Farm had been retained by the Swinton Estate; however, he argued that the rights over CL 73 had not been retained and were transferred as part of the conveyance. The applicant argued that as

entry no. 16 of CL 73 extinguished the rights which he benefitted from, the entry was mistaken and should be removed.

The Main Issues

4. The application has been made in accordance with the provisions of section 19 (2) (a) of the 2006 Act.
5. Section 19 (2) (a) of the 2006 Act provides that a Commons Registration Authority (CRA) may amend its register of common land to correct a mistake made by the CRA in making or amending an entry in the register.
6. The main issue is whether the amendment made by the CRA as entry no. 16 in the rights register for CL 73 was mistaken and requires correction.
7. The onus of proving the case in support of the correction of the register rests with the person making the application and it is for the applicant to adduce sufficient evidence to merit granting the application. The burden of proof is the normal civil standard, namely, the balance of probabilities.

Reasons

Whether a mistake had been made by the Commons Registration Authority in making an entry in the register

8. Entry no. 16 in the rights register for CL 73 reads "*In pursuance of Section 6(2) of the Commons Registration Act 1965 in accordance with a notice of Final Disposal of Disputed registration dated 20 March 1985 made by L.J. Morris Smith, Commons Commissioner the registration at Entry No. 2 became VOID on 14 March 1985*".
9. The decision of Commissioner Morris Smith related to the objection made by the Swinton Estate to the registration of the grazing rights recorded in entry no. 1 of CL 168. In the CRA's view, the rights recorded in entry no. 1 of CL 168 were one and the same rights as claimed in entry no. 2 of CL 73. Although rights entry no. 1 of CL 168 had become void following the Commissioners decision in 1985, that decision had not been cross-referenced to entry no. 2 of CL 73. As the rights in entry no. 1 of CL 168 and in entry no. 2 of CL 73 were one and the same, the Commissioner's decision with regard to entry no. 1 of CL 168 was also applicable to entry no. 2 of CL 73.
10. The answer to the question of whether the CRA were mistaken in making entry no. 16 to the rights register of CL 73 is dependant upon an analysis of the documentary evidence adduced by the parties.
11. In March 1968 the West Riding of Yorkshire County Council (WRYCC)¹ received an application (No. 424) from a Mr Richmond (as owner of Ellershaw Farm) and a Mr Banks (as tenant) to register grazing rights on common land. The application described the rights claimed as the "*right of the owner and tenant of Ellershaw Farm to graze 200 sheep on moorland known as Ellershaw Wham and Grewelthorpe Moor*". The land over which this right was claimed to be exercisable was shown on the plan attached to the application and was described as "*Ellershaw Wham surrounded by a red verge line and*

¹ WRYCC was the commons registration authority at the date of the application

- Grewelthorpe Moor surrounded by a blue verge line*". The land to which the rights attached were the 155 acres of Ellershaw Farm, Grewelthorpe.
12. The majority of the land over which the grazing right was claimed to be exercisable was recorded in the commons register map as CL 168 with that part of the land north of Haylands Cross being shown as part of CL 73. It is not known why the boundary of CL 73 was recorded as crossing the parish boundary into Grewelthorpe when there was no mention of a right to graze Kirkby Malzeard Moor in the application made by Mr Richmond and Mr Banks. Form CR12 completed by WRYCC as part of the administrative process states that "*the right of common described in the application has been provisionally registered under the following No (s); Register Unit CL 168 Entry No. 1 CL 73 Entry No. 2*".
 13. Entry No. 1 in the rights register for CL 168 stated "*To graze 200 sheep over the whole of the land comprised in this register unit and over that part of register unit CL 73 lying to the north of Haylands Cross and being within the parish of Grewelthorpe*". Entry no. 2 in the rights register for CL 73 stated "*To graze 200 sheep over the small triangle of land to the north of Haylands Cross and being within the Parish of Grewelthorpe in this register unit and over the whole of the land comprised in register unit CL 168*". These entries describe the rights claimed by Mr Richmond and Mr Banks in relation to how the servient land had been shown in the commons register map.
 14. The provisional registration of rights claimed under application 424 was objected to by the Swinton Estate as owner of Grewelthorpe Moor on 29 September 1970. Mr Harrison is of the view that the objection made by the Swinton Estate related solely to grazing rights over CL 168 on the grounds that the objection made no mention of CL 73.
 15. Whilst I accept that the objection form only made mention of CL 168, the objection form states that it relates to application 424; application 424 was, as noted above, the application made by Mr Richmond and Mr Banks. It is evident therefore that the objection by the Swinton Estate related to the whole of the land over which grazing rights were claimed by Mr Richmond and Mr Banks and not just to the land shown on the register map to be CL 168.
 16. The objection was made on the grounds that "*the right to graze sheep is restricted to Ellershaw Wham only by a High Court Judgement 1889 L 1791 dated 1st June 1892 and registered at Wakefield Deeds Registry 27 October 1892 Vol. 35 P793 No. 441*". At the hearing, Lord Masham produced a copy of the judgement and plan in the case referred to which shows that the then tenant of Ellershaw Farm had been the subject of an injunction restraining him from depasturing his sheep on Grewelthorpe Moor on the grounds that a right to do so had not been acquired. The judgement also recognised that such a right had been acquired over Ellershaw Wham. Whilst Mr Harrison submitted that the 1892 case was of little relevance as the rights set out in entry no. 2 of CL 73 had been made final, Mr Cox's view was that the plan was relevant as it showed that in 1892 the land north of Haylands Cross had been considered to be part of Grewelthorpe Moor.
 17. In September 1974 the Swinton estate purchased Ellershaw Farm from a Mr Hardy (the successor in title to Mr Richmond). Ellershaw Farm was subsequently divided and offered for sale as three separate lots. A letter dated

- 7 February 1975² shows that the intention of the estate was to re-sell the farm minus the grazing rights over Grewelthorpe Moor to prevent over-grazing and alleviate the detrimental impact over-grazing had upon grouse shooting. The document shows that the Estate was prepared to sell the land at a loss in order to secure the grazing rights for itself.
18. Part of the Ellershaw Farm land was sold to Mr Harrison in October 1975. The conveyance to Mr Harrison states that the land was sold to him "*SAVING AND RESERVING unto the Vendors all sporting rights and all rights of grazing or other rights whether common or otherwise as have hitherto been used and enjoyed by the owner or occupier for the time being of Ellershaw Farm aforesaid over Grewelthorpe Moor or that part thereof known as Ellershaw Wham*".
 19. Mr Harrison argues that as the conveyance made no mention of the Estate reserving grazing rights over Kirkby Malzeard Moor, it was implicit in the conveyance that the right to graze over Kirkby Malzeard Moor had been conveyed with the property. It is Mr Harrison's contention that he bought the right to graze 200 sheep on Kirkby Malzeard Moor when he bought part of the land of Ellershaw Farm.
 20. I consider Mr Harrison's argument and claims to be misguided for a number of reasons. First, the original claimants made no claim to rights over Kirkby Malzeard Moor. The land over which rights were claimed was Grewelthorpe Moor and Ellershaw Wham and the understanding of the original claimants as to the geographic extent of those parcels of land is shown edged blue and edged red on the application plan; the land edged blue includes the triangle of land north of Haylands Cross. Mr Richmond and Mr Banks did not claim grazing rights over Kirkby Malzeard Moor.
 21. Secondly, it is likely that cross-referencing of their application to the common land units shown on the register map was not undertaken by Mr Richmond and Mr Banks who merely sought to register their rights over the land over which those rights were exercisable. It is likely that what was shown on the commons register map as CL 168 and part of CL 73 was treated as a single common by Mr Richmond and Mr Banks and that the rights claimed were split between the two common land units and not separate and cumulative between them.
 22. Thirdly, the historic extent of Grewelthorpe Moor is clearly shown on the plan attached to the 1892 court judgement. On this plan Grewelthorpe Moor is shown to include the triangle of land north of Haylands Cross and this land was within the boundary of the much larger Masham Moor "*as perambulated in 1848*"³. The 1892 plan shows that the historic boundary between Kirkby Malzeard Moor and Grewelthorpe Moor to be contiguous with the parish boundaries and the boundaries of the Swinton and the Dallowgill Estates.
 23. Finally, at the time of the conveyance of part of Ellershaw Farm to Mr Harrison, the Swinton Estate did not own Kirkby Malzeard Moor and therefore it would not have been possible for the Estate to convey rights over land which it did not own.

² Objectors bundle appendix 5

³ This boundary is shown by a broken line with encompasses Ilton Moor, Grewelthorpe Moor and Ellershaw Wham

24. The only document which offers any support for Mr Harrison's contention that his claimed rights extended over Kirkby Malzeard Moor is the commons register map which shows the triangle of land at issue as being part of CL 73. However, any right to graze Kirkby Malzeard Moor (as identified on the register map) was limited to that small part of CL 73 north of Haylands Cross; this would not give rise to a right to graze over the remainder of Kirkby Malzeard Moor.
25. The documentary evidence adduced demonstrates that the triangle of land shown by the commons register map as part of CL 73 has historically been part of Grewelthorpe Moor. The grazing rights claimed by Mr Richmond and Mr Banks in 1968 did not include any part of Kirkby Malzeard Moor and the 1892 High Court case was solely concerned with a claim of grazing rights over Grewelthorpe Moor. In my view, the reference to Grewelthorpe Moor found in Mr Harrison's conveyance includes the triangle of land north of Haylands Cross which the commons register has recorded as part of CL 73. As this land is in fact part of Grewelthorpe Moor, it follows that grazing rights over that land were retained by Swinton Estate and not conveyed to Mr Harrison.
26. The objection made by the Swinton Estate to the registration of rights under application 424 was considered by Commissioner Morris Smith by means of two hearings, the first of which was held on 11 March 1981. At that hearing, the grounds of objection were expanded beyond that noted in paragraph 16 above to include an objection that the claimed rights had been extinguished by merger arising from the Estate's purchase of Ellershaw Farm in 1974.
27. Following the resumption of the hearing on 25 October 1984, the Commissioner determined that the rights shown in entry no 1 of CL 168 had been extinguished as a result of the Swinton Estate's acquisition of Ellershaw Farm. As noted in paragraph 9 above, the CRA is of the view that the rights recorded in entry 1 of CL 168 are the same rights which were recorded as entry no. 2 of CL 73. I concur with the CRA and the objector that the two entries refer to the same single set of grazing rights; the two entries accurately reflect the grazing rights claimed by Mr Richmond and Mr Banks in application 424.
28. As the grazing rights recorded in entry no. 1 of CL 168 were extinguished by merger in 1974 on the acquisition of Ellershaw Farm by the Swinton Estate, it follows that the rights recorded in entry no. 2 of CL 73 were also extinguished at the same date. The conclusiveness of the register as to what is recorded would suggest that the rights recorded in entry no. 2 of CL 73 are still extant but this cannot be the case as the rights recorded in that entry are the same rights which were recorded in entry no. 1 of CL 168. As the extinguishment of rights by merger took place after entry no. 2 of CL 73 had been made final, it follows that the register was incorrect when the CRA took steps to amend it.
29. Although the CRA of the day had initially cross-referenced Mr Richmond and Mr Banks' application to the common land units shown on the register map, it would appear that subsequent cross-referencing between entry no. 1 of CL 168 and entry no. 2 of CL 73 was not undertaken following the Commons Commissioner's decision in 1985. This error allowed entry no. 2 of CL 73 to mistakenly remain on the register until 2013.

Summary

30. The grazing rights over Grewelthorpe Moor and Ellershaw Wham which were attached to Ellershaw Farm were extinguished by reason of merger upon the purchase of the farm by the Swinton Estate in 1974. Part of the farm land was subsequently conveyed to Mr Harrison in 1975 but without any right to graze on Grewelthorpe Moor or Ellershaw Wham; no grazing rights were conveyed to Mr Harrison.
31. The extinguishment of the grazing rights recorded in entry no. 1 of CL 168 was recognised by Commissioner Morris Smith and the entry became void following his determination. As the rights in entry no. 2 of CL 73 are the same rights as were recorded in entry no. 1 of CL 168, it follows that entry no. 2 also became void as a result of the Commissioner's decision.
32. The Commissioner's decision with regard to entry no. 1 of CL 168 does not appear to have been cross-referenced with entry no. 2 of CL 73 by the CRA of the time. When the CRA were made aware of this anomaly, it took steps to amend the register by making entry no. 16 of CL 73.
33. In the circumstances, the action taken by the CRA has resulted in a correction of the register to accurately reflect the fact that the rights described in entry no. 2 had been extinguished by merger which post-dated the recording of the entry as being final.

Conclusions

34. I conclude that the Commons Registration Authority did not make a mistake when making entry no. 16 of CL 73 in the Register to record that entry no. 2 of CL 73 had become void by reason of merger. As the criteria set out in section 19 (2) (b) of the 2006 Act are not met, it follows that I conclude that the Commons Register does not require amendment.

Formal Decision

35. The application is not granted.

Alan Beckett

INSPECTOR

Hearing document

1. Copy of judgement dated 1 June 1892 between Samuel Cunliffe Lister Baron Masham and John Wood regarding grazing rights over Grewelthorpe Moor and Ellershaw Wham.