

Attorney-General v Southampton Corporation

Chancery Division

14 November 1969

(1970) 21 P. & C.R. 281 Foster J.

October 15, 16, 17, 20, 21 and November 14, 1969

Common rights—Access—Car park—Whether car park prevented part to be used for exercise or for air—Whether ministerial consent essential to prevent user for exercise or air—Law of Property Act 1925 (15 Geo. 5, c. 20), s.194.

Common rights—Road—Car park—Whether road—Driving motor vehicles on footways or roads prohibited—Whether local authority could authorise breach of prohibition—Southampton Corporation Act 1931 (21 & 22 Geo. 5, c. 99), s. 134.

Common rights—Public walks and pleasure grounds—Enjoyment by public—Power of local authority consistent with or ancillary to those purposes—Whether provision of car park reasonably necessary—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 164 —Open Spaces Act 1906 (6 Edw. 7, c. 25), s. 10.

A common owned by the local authority was bounded on the east by a road A and was crossed on the south by a road C, on the south of which there was a small part of the common. On January 1, 1926, when the Law of Property Act 1926 came into force, rights of common were being exercised over it. Those rights were no longer exercised at present. There were two enclaves within the common. One, near the south-western side, was a zoo and the other, near the south-eastern side, was an old country inn where beer and tea had been served for nearly 200 years. The inn had an access road to road A. The zoo and the inn, though owned by the local authority, were not part of the common. As a result of discussions at various meetings of the committee responsible for the common and recommendations by the town clerk and other officials of the local authority between 1965 and 1968 two car parks for the common were proposed. By the time of hearing of the present case under the amended plan which had not yet been adopted it was proposed to make two car parks, one for 117 cars behind the inn and with access to road A, and the other for 156 cars south of and adjoining the zoo with access to road C. The access road to the zoo car park had parking spaces along each side of it.

On April 3, 1969, a writ was issued by the Attorney-General at the relation of the objectors seeking to restrain the local authority from carrying out its proposals. The relators contended: (a) that in view of the provisions of section 194 of the Law of Property Act 1925 the local authority could not carry out its proposals without the consent of the Minister of Agriculture (which had not been obtained); (b) that the proposals would assist people to break the restrictions imposed by section 134 of the Southampton Corporation Act 1931, and by-laws of the local authority; (c) that the local authority were trustees for persons using the common either under section 164 of the Public Health Act 1875 or section 10 of the Open Spaces Act 1906 and its proposals were not consistent with or ancillary to the trusts imposed on it by those Acts.

On the Attorney-General's motion (the trial of which was treated as the trial of the action) seeking interlocutory injunctions restraining the local authority from carrying out the proposed works:

Held, (1) that although persons could exercise on car parks without any cars parked on them but when cars were parked the car parks could not be used for exercise or for air. Accordingly, the proposed works would be unlawful unless the Minister's consent was obtained.

(2) That the inn car park being the only access to the inn there was a road through the car park within the meaning of section 134 of the Act of 1931 and that the access road from the zoo car park was also a road within the section, and that by-law 2 could not be read as authorising the local authority to allow large sections of the public who would be in breach of by-law 6 (iii), to ignore that by-law.

(3) That the local authority did not hold the common for the benefit of the inhabitants of its area generally but held it under the Act of 1875 for the purpose of being used as public walks or pleasure grounds and under the Act of 1906 to allow the enjoyment of it by the public as an open space and that the local authority could only exercise the powers granted to it by those Acts if such exercise were consistent with or ancillary to those purposes.

(4) That assuming that the provision of car parks for those visiting the common was within the powers of the local authority under the Acts of 1875 and 1906, and was beneficial to them, bearing in mind the inhabitants at large within the local authority's area and not those only who enjoyed the common as an open space or pleasure ground the proposals were not reasonably necessary to enable the public to enjoy the common as an open space or for the common to be used as public walks or pleasure grounds; and that if the local authority were to proceed with the proposals it would be in breach of the duties imposed on it by both the Acts.

Attorney-General v. Poole Corporation [1936] 3 All E.R. 852; [1938] Ch. 23; [1937] 3 All E.R. 608, C.A. applied.

MOTION.

The following statement of facts has been taken from the judgement of Foster J.

This motion was brought in an action by the Attorney-General at the relation of three persons against the Southampton Corporation (hereinafter called "the corporation"). The three persons were Edward Arthur Chalk, chairman of the Southampton Commons and Parks Protection Society; Kenneth Richard Carey, chairman of the Friends of Old Southampton; and Herbert Collins, vice-chairman of the Southampton Civic Trust (hereinafter collectively called "the relators"). The motion sought injunctions to restrain the corporation (a) from constructing two car parks on the Southampton Common (hereinafter called "the common") and (b) from entering into certain agreements for the extension and improvement of the Cowherds Inn. It had been agreed between the parties that trial of the motion should be treated as the trial of the action.

The common comprised 360 acres within the boundaries of the City of Southampton, situate about one mile north of the civic centre of the city and about half a mile north of the football ground called "the Dell" where Southampton Football Club, a First Division team, played its home games. On the east it was crossed by a road called "the Avenue" which was a main road being the A33 road London to Southampton. On the north side it was bounded by Burgess Road, on the west by Hill Lane and on the south Cemetery Road ran through the common with a small part of the common south of it. In the south-west corner there was the cemetery. There were two enclaves on the common known as the zoo and the Cowherds Inn. The zoo was situate to the south of the common, a little north of Cemetery Road and east of the cemetery. The Cowherds Inn was situate on the west side of the Avenue, having an access road to and from the Avenue. It was set back a short distance from the Avenue. From 1789 beer had been sold in the inn and from 1820 tea was also sold there. It was a very modest country inn. Its tenant who left in September 1968 paid a rent of £250 per annum. It had remained vacant since September 1968 and pending the hearing of the present motion. Both the zoo and inn were owned by the corporation in fee simple but were not part of the common. On the southern part of the common there was a lake, a paddling pool, a children's playground, playing fields, dressing rooms and a model yacht lake. To the north-west of the common there was an ornamental lake and in the north a reservoir. Apart from those the common was a wooded area of natural beauty.

From a Charter of Henry III dated 1227 and Charter of Inspeximus, 1340, it appeared that in 1199 the town of Southampton was granted to the burgesses of Southampton to farm for ever, with the port of Portsmouth with all their appurtenances, liberties, and free customs, and all others which pertained to the farm of the town of Southampton. In 1228 in the Black Book of Southampton there was a fine under which one Nicholas of Shirley was granted the right to common on the pasture belonging to the burgesses. Section 87 of the Southampton Corporation Act 1910, provided that certain lands within the borough shall be deemed to be parks or pleasure grounds within the meaning of the Public Health Acts and the provisions of those Acts shall apply thereto accordingly ... (a) the lands known as "the common."

On February 28, 1967, the corporation registered the common under section 4 of the Commons Registration Act 1965, and no objections to the registration had as yet been made under section 5 of that Act. From the evidence of a Mrs. Holt and Alderman Haskell it appeared that in the beginning of the present century the common was used for grazing of cows.

On January 1, 1926, when the Law of Property Act 1925 came into force rights of common were being enjoyed on it but no such rights were being enjoyed at the present time. There was, however, no evidence of abandonment.

At present there was a car park in front of the Cowherds Inn. Cars were parked along Cemetery Road on the verges and also down the Avenue. On bank holidays and at times when there was a fair on the common, cars were parked on the common turning off the Avenue some two hundred yards north of the access road to the Cowherds Inn from the Avenue when that access road was itself completely full.

In 1937 the corporation began considering the provision of a car park in the vicinity of the Cowherds Inn. Nothing was done presumably because of the War. In November 1965, the Public Lands Committee of the corporation, which was responsible for the common, took the matter up again.

In March 1967 the Town Planning and Estates Committee of the corporation, which was responsible for the inn, began considering the inn's future because the then lease was to expire in September 1968.

The matters were referred to the town clerk and city engineer and their reports were considered. Public reaction was gone into. By September 1968, it was proposed to have two new car parks, one for 120 cars behind the Cowherds Inn and the other for 130 cars south of and adjoining the zoo. A road was to be constructed from the Avenue to the Cowherds Inn car park which would be one-way, and only cars travelling north along the Avenue would be permitted to enter it. The road then continued south to Cemetery Road with a spur off to the west to the zoo car park. That road and spur would be two-way. These proposals were embodied in a plan ("plan A") which was approved and adopted on October 9, 1968, at a meeting of the Public Lands Committee.

On October 8, 1968, the corporation issued a statement to the public making the following points:

(1) The common was visited by thousands of people every year. Many of the visitors went in motor cars, a practice which was likely to grow. There was no car park either on or near the common and the present situation was highly unsatisfactory.

(2) While it was necessary for the corporation to come to grips with the car parking problem and to deal with the wide-spread unauthorised parking, this was only one facet of the larger questions, namely what part should the common now play in the life of Southampton and what should the corporation do to ensure that the common met the requirements of those who went there?

(3) The corporation had decided that some extension of the catering and refreshment facilities was essential. In May, 1968, tenders were invited and an indication given that some public car parking had been agreed in principle but that no right would be granted in such car park to the lessee of the Cowherds Inn. In June 1968, the tenders were received and extensive redevelopments of the Cowherds Inn was discussed with Chef & Brewer Ltd.

On October 28, 1969, the relators' solicitors received from the corporation copies of the draft agreement being negotiated between the corporation and Chef & Brewer Ltd. and the draft lease. The main provisions in those two documents were.

(a) Chef & Brewer Ltd. were to submit plans to the corporation for the alterations and extensions of the Cowherds Inn and when approved by the corporation were to carry out the works within six months.

(b) On completion of the works Chef & Brewer Ltd., were to be granted a lease for forty-two years at a rent of £7,500 per annum subject to rental review every seven years.

(c) The corporation undertook to construct a car park for 120 cars to the rear of Cowherds Inn and an access road from Cemetery Road.

(d) Chef & Brewer Ltd. would pay to the corporation half the cost of the car park and part of the new access road not exceeding the sum of £6,000.

(e) Chef & Brewer Ltd. would covenant in the lease not to permit vehicular access to Cowherds Inn otherwise than by the roads and in the directions shown on plan A, and should by all practicable means prevent visitors leaving cars on the common or on the new roads or on the Avenue.

At a meeting of the Public Lands Committee on March 27, 1969, the town clerk reported that counsel had advised that, whilst the corporation could lawfully construct car parks on the common, difficulty might arise as a result of section 134 of the Southampton Corporation Act 1931, which prohibited the driving of vehicles on roads on the common other than on certain excepted roads. To meet that objection new plans ("plan B1") were made. The access road to the Cowherds Inn car park from Cemetery Road was dropped, and access to it now was from the Avenue as before but continued through the southern part of the Cowherds Inn necessitating destruction of some minor buildings on the southern side. The zoo car park was to be entered by an access road direct from Cemetery Road by a new road. That plan was further amended ("plan B2") by

providing for 117 spaces in the Cowherds Inn car park and for parking spaces along each side of the entrance road to the zoo car park where the spaces were increased to 156.

On April 3, 1969, the writ was issued seeking injunctions to restrain the corporation from making roads as planned and from entering into the agreement and lease.

On July 22, 1969, the corporation granted to Chef & Brewer Ltd. outline planning permission for their proposed works and extensions to Cowherds Inn. Condition 4 of that document was in these terms:

All loading and unloading taking place within the curtilage of the site within seven years of the date of this permission and the access to the cellar from the front of the building being permanently closed.

The plan submitted by Chef & Brewer Ltd. showed that while the front of the inn was to be preserved a large extension was proposed on the north-east side. It would have five bars, four restaurants, two grill bars, a kiosk and a terrace. The costs of the works was estimated at £80,000.

Representation R. J. Roddis and P. R. R. Sinclair for the Attorney-General.
I. A. Kennedy and Miss L. E. Appleby for the corporation.
Cur. adv. vult.

Foster J.

November 14, 1969. read the following judgement in which he stated the facts summarised above and continued:

The relators put their case in three ways. First, the corporation cannot carry out their proposals without the consent of the Minister of Agriculture because of the provisions of section 194 of the Law of Property Act 1925. Secondly, by section 134 of the Southampton Corporation Act 1931, persons cannot drive on the common except on certain roads, and the corporation's proposals would assist persons to flout that section. The relators also rely on the by-laws of the City of Southampton and in particular by-laws 1(i) and 6. Thirdly, the corporation are trustees for persons using the common either under section 164 of the Public Health Act 1875, or under section 10 of the Open Spaces Act 1906, and its present proposals are not consistent with or ancillary to the trusts imposed upon it by those Acts.

I will deal first with section 194 of the Law of Property Act 1925. The preceding section, section 193 reads:

Members of the public shall, subject as hereinafter provided, have rights of access for air and exercise to any land which is a metropolitan common within the meaning of the Metropolitan Commons Acts 1866 to 1898, or manorial waste, or a common which is wholly or partly situated within a borough or urban district, and to any land which at the commencement of this Act is subject to rights of common and to which this section may from time to time be applied in manner hereinafter provided:

And section 194 reads: [His Lordship read section 194 (1) and (3) and continued:]

Two questions have to be considered under this section. First, was the land subject to common rights on January 1, 1926? Secondly, do the corporation's proposals amount to construction of works whereby access to the land will be prevented or impeded? It is common ground that the consent of the Minister under that section has not been obtained.

For the relators it was submitted that on January 1, 1926, the common was subject to common rights. They rely on the minute of September 16, 1901, and Mrs. Holt's evidence, and say that the concrete will prevent animals grazing on the car parks. For the corporation it is said that it was not subject to common rights on January 1, 1926, that section 193 only refers to persons having "air and exercise" and car parks will not interfere with those rights; that section 194 only deals with enclosing the periphery of the common, that the evidence of Mrs. Holt was evidence of an excessive user which is no user at all and that in any event it is not intended to surround the car parks with a fence but only a concrete kerb, though there is no evidence from the corporation to this effect.

I do not think that there is much doubt that the corporation as Lord of the Manor granted common rights over the common at least until the early part of this century or that at the present time no rights are being exercised. There is some evidence of cows on the common in 1926. For the right to be extinguished it must be shown that it has been abandoned and a mere non-user over a long period is only evidence of abandonment and not conclusive evidence. The evidence is necessarily very scanty on the position on

January 1, 1926, but as there is no positive evidence of abandonment, I must conclude that the common was subject to common rights on January 1, 1926. I do not follow the argument that excessive user is no user at all. Where the word "access" is used in section 194 (1) I think that it refers to the expression "access for air and exercise" in section 193. Will the construction of the two car parks prevent or impede access to the land for air and exercise? It is not clear how the car parks are going to be marked off. If there was a fence surrounding them it would clearly be a work within section 194 but the corporation have suggested that there may only be a concrete kerb over which persons can easily step. I assume that this suggestion will be put into effect. Similarly on plan B2 there are shown two ticket machines with the words "if required" added in brackets, and those machines might also be a work within the section, but I will assume that they will not be erected.

It is true that if you consider the car parks without any cars parked upon them a person can exercise upon them but when the car parks have cars upon them, it seems to me inevitable that the space so occupied cannot be used for exercise or for air. In my judgement therefore the proposed works will be unlawful unless the Minister's consent is obtained.

I turn to section 134 of the Southampton Corporation Act 1931, and the by-laws. [His Lordship read the section and continued:]

The by-laws were sealed on April 12, 1967, and came into effect on September 1, 1967. In by-law 1 there are definitions in these terms:

Throughout these by-laws the expression "the council" and the expression "the pleasure ground" means except where inconsistent with the context, each of the undermentioned pleasure grounds situate in the City of Southampton:

And one of those is the Southampton Common, otherwise known as the common.

By-law 2 reads as follows:

An act by an employee of the council necessary to the proper execution of his duty or by any person in pursuance of an authority granted by the council, shall not be deemed an offence against these by-laws.

By-law 6 (iii) reads as follows:

No person shall, except in the exercise of any lawful right or privilege, on any part of the common except on the roads and paths specified in the schedule to these by-laws:

- (a) bring or cause to be brought any truck or barrow
- (b) drive or cause to be driven any vehicle other than a wheel chair or perambulator drawn or propelled by hand and used solely for the conveyance of a child or children or an invalid
- (c) ride any bicycle tricycle or other similar machine.

And Schedule A reads:

Driving and cycling, are permitted on the following:—... (8) the road which leads from the Avenue to "the Cowherds" inn and returns in a semi circle to the Avenue.

It was submitted on behalf of the corporation that the proposals in plan B2 do not involve any roads (except on excepted roads) being built which would have the effect of allowing or encouraging persons to transgress section 134 of the Act of 1931. It was said, that a road cannot include a passage in a car park to a car parking space. I was referred to many definitions of "road" in the Road Traffic Acts and to several cases, including *Elkins v. Cartlidge*; *Thomas v. Dando*; *Griffin v. Squires*; and *R. v. Waterfield*.

I agree that for the purpose of the Road Traffic Acts a person may not be driving on a road when driving in a car park. In this case the Cowherds car park is to afford the means of access to the rear of the inn for delivery of all goods, and access to the front of the premises will in time not be permitted, so that the only access to the inn will be through the car park. I agree with the corporation's contention that on plan B2 no part of the approach road to the inn will be on any part of the common which is not part of an excepted road. But as the car park itself will provide the only access to the inn, I am driven to the conclusion that there is a road through the car park which is on the common.

If one compares the zoo car park on plan B1 with the present proposals on plan B2, the approach has had car spaces added on each side to enable the corporation to say that it is not an approach road but the entrance to the car park. No other reason was suggested why it was necessary to increase the capacity of the zoo car park from 130 car spaces to, 156 car spaces. In my judgement the land coloured brown on plan B2 is a road within the meaning of section 134 of the Act of 1931 and nonetheless because there are parking, spaces provided on each side.

It was contended by the corporation that a person who drove a car into the car parks would not be in breach of by-law 6 (iii) because the corporation could grant an authority to all users of the car park under by-law 2 and they would then become persons exercising a lawful right or privilege. I cannot read by-law 2 as authorising the corporation in effect to allow large sections of the public to ignore a particular by-law. In my judgement persons who drive into or out of these car parks will be in breach of by-law 6 (iii).

I now turn to section 164 of the Public Health Act 1875; section 87 of the Southampton Corporation Act 1910, and sections 10 and 12 of the Open Spaces Act 1906. [His Lordship read section 164 of the Act of 1875, and sections 10 and 12 of the Act of 1906 and continued:]

A great deal of the argument has turned on the effect of these sections. It is, however, common ground that the Acts are not mutually exclusive and the same piece of land may be subject to both Acts. The corporation propose to exercise the powers given to it by section 10 of the Act of 1906, and the area of the proposed car parks would be considerably less than the one-twentieth permitted by that Act. If, however, that power was not available to it the corporation would use the power granted by section 164 of the Act of 1875. On behalf of the corporation it has been argued that the provisions of section 87 of the Southampton Corporation Act 1910 give the corporation the powers granted by the Act of 1875, but do not impose on it the duties, and rely for this on the words "shall be deemed to be" in section 87 (1) of the Act of 1910, but the subsection continues "and the provisions of those Acts shall apply thereto accordingly." If the provisions of those Acts are to be applied, in my judgement the corporation is burdened with the duties imposed by the Act as well as armed with the powers.

A similar argument was put forward in regard to the Act of 1906, that because the corporation came in under section 12 it thereby acquired only the powers of the Act and was not thereby made subject to the duties. It is true that section 12 only mentions powers but the exercise of those must, in my judgement, be in accordance with the purpose of those Acts, namely to hold and administer the open space in trust to allow the enjoyment of it by the public as an open space. In my judgement the corporation does not hold the common for the benefit of the inhabitants of Southampton generally, but it holds it under the Act of 1875, for the purpose of being used as public walks or pleasure grounds and under the Act of 1906, to allow the enjoyment of it by the public as an open space, and it can only exercise the powers granted to it by those Acts if such exercise is consistent with or ancillary to those purposes.

In *Attorney-General v. Corporation of Sunderland*, which was a case under section 74 of the Public Health Act 1848, James L.J. says:

The corporation is in the position of a trustee, and the question is whether, in building a museum and library, it is improperly executing the trust. The primary object of the trust is to provide a place of enjoyment and recreation; nothing is improper which conduces to that object, and we ought not to quarrel with anything which the corporation in a reasonable exercise of their discretion consider conducive to it.

Mellish L.J. says:

I think that we ought not to put a narrow and strict construction upon the words, but that we ought to see whether the trustees, in what they are proposing to do, are bona fide carrying out the object of the trust.

Attorney-General v. Poole Corporation came before Farwell J. in the court below. He says:

The power which is given by section 164 of the Public Health Act 1875, in connection with pleasure grounds, is to lay out, plant, improve and maintain lands for the purpose of being used as public walks or pleasure grounds. That must mean that the corporation is entitled to do anything which is properly and reasonably necessary for the laying out and the maintaining of the grounds as pleasure grounds....

The case went to the Court of Appeal and it was there argued as if it came under the Act of 1906, though Sir Wilfrid Greene M.R., as he then was, said that if the case had come under the Public Health Act he would have agreed with the judgement of Farwell J. He added:

In an Act of Parliament framed for the purposes for which this Act is framed, and having regard to the language of section 10 read as a whole, it appears to me that the language used must include a power to do anything which is properly and reasonably necessary to enable the public to enjoy the land as an open space, and if the doing of something is reasonably necessary or reasonably desirable for that purpose, it appears to me that the power to hold the land with a view to the enjoyment by the public as an open space would include the power to do that thing.

I was referred to Attorney-General v. Bradford Corporation, in which Eve J. proposed a different test but his remarks were, I think, obiter, and the case was not cited in the Poole case. A number of rating cases were also cited to me but they do not, I think, assist me. I therefore accept that the test laid down in the Poole case is this, "Is the proposed exercise of the power properly and reasonably necessary to enable the public to enjoy the land as an open space?" Figures were produced to me and not disputed by the corporation that if the car parking standards required by the corporation were applied to the Cowherds Inn when it is enlarged, 61.47 per cent. of the parking space of the Cowherds Inn car park would be required for the visitors and customers of the inn. Valiant efforts were made to persuade me that all customers to the inn would in reality be users of the common though this could not in any event apply to persons going to the inn to dine or wine after dark. It was pointed out that the two car parks taken together will only cover one acre out of three hundred and sixty acres, a very small area. No survey has ever been carried out by the corporation as to the car parking requirements of persons who use the common. Certain figures were produced for the purposes of this action of cars parked on or around the common during May and June, 1969, but these figures are remarkable in that only on a bank holiday and four other occasions did the total number of cars so parked exceed the total number of car spaces to be provided in the two new car parks, and at the time the Cowherds Inn was shut. I was not told whether any of the cars in Cemetery Road were cars of persons frequenting the Dell, or visiting friends in the neighbourhood or even going to the city centre itself. I have no doubt that the scheme is beneficial to the inhabitants of Southampton and its surroundings as a whole, since it will provide a large rental from the reconstructed Cowherds Inn and ease the traffic parking difficulties there and at Cemetery Road. That is not, in my judgement, the test. The test is whether the proposals are reasonably necessary to enable the public to enjoy the common as an open space or for maintaining the common as public walks and pleasure grounds.

The position is quite unique since neither the zoo nor the Cowherds Inn are part of the common though they are situate within its boundaries and no doubt contribute to its attractions. But I cannot escape the conclusion on the facts that the Cowherds Inn car park is primarily intended for customers of that inn who may or may not be users of the common and that the zoo car park is primarily intended for visitors to the zoo, the Dell and perhaps the city itself and again those visitors may not be users of the common. While no doubt the provision of a car park for those visiting the common may well be within the corporation's powers under the Acts, and the court should not put a narrow construction on the extent of those powers especially where the corporation, has thought and decided that their proposals are beneficial, yet if the corporation has in its view the inhabitants of the city at large and not those only who enjoy the common as an open space or pleasure ground, as I think that it did, I must conclude that the proposals are not reasonably necessary to enable the public to enjoy the common as an open space or for the common to be used as public walks or pleasure grounds. In my judgement the proposals fail the test, and if the corporation were to proceed with the proposals it would be in breach of the duties imposed on it by both the Acts.

Representation Solicitors—Gregory Rowcliffe & Co., for Stephens, Locke & Abel, Southampton; Sharpe, Pritchard & Co.

[Reported by Akhtar Razi, Barrister-at-Law.]

Declaration accordingly.