

■ Simon Adamyk

Simon Adamyk appeared for Hampshire County Council (the Defendant) in this important commons registration case, successfully resisting a judicial review claim brought in the Planning Court before Kimblin J. The claim was dismissed in its entirety.

BACKGROUND

The case concerned 80 acres of Broxhead Common in north-east Hampshire. The Claimant applied to the Council as commons registration authority to register the 80 acres as common land. Her application was made under sections 1–3 of the Commons Registration Act 1965. The Council declined to determine the application as it contended that it had no jurisdiction to do so. Its position was that, since the relevant provisions of the Commons Act 2006 had come into force, it was no longer possible to register land as common land under the 1965 Act. The Claimant challenged that decision by way of judicial review.

The jurisdictional dispute arose from the complex and unevenly-implemented statutory scheme for the registration of common land in England and Wales. Parliament enacted the Commons Act 2006 in order (among other things) to remedy a number of significant shortcomings in the 1965 Act. In particular, one of the new provisions in the 2006 Act (paragraph 4 of Schedule 2) created a mechanism for the registration of land as common land where that land had not been registered under the 1965 Act because of the misunderstanding which was widespread at the time as to the meaning of waste land of a manor (see *Box Parish Council v Lacy* [1980] 1 Ch 109). This misunderstanding was subsequently corrected by the House of Lords in *Hampshire County Council v Milburn* [1991] 1 AC 325, and the relevant provision of the 2006 Act allowed that mistake to be rectified in certain circumstances. The problem was, though, that this rectifying provision has been brought into force in England only in seven so-called ‘pioneer authorities’ and two so-called ‘2014 authorities’. Hampshire is not among them. Therefore the rectifying provision does not apply in Hampshire.

The Claimant argued that this created an impermissible legislative gap, and submitted that the Court could and should read additional words into section 1(2) of the 1965 Act so as to open a window for fresh applications. The Claimant contended that the so-called ‘golden rule’ of statutory construction justified such an intervention.

ISSUES

The claim raised four distinct issues: (a) whether there was jurisdiction in Hampshire to register the land as common land under the 1965 Act; (b) whether the 80 acres constituted waste land of a manor within section 22(1)(b) of the 1965 Act; (c) procedural fairness; and (d) apparent bias.

JUDGMENT

Kimblin J dismissed the claim comprehensively.

On jurisdiction, the Court held that sections 1–3 of the 1965 Act do not provide for the registration of new common land – they are concerned with the maintenance of existing registers. The registration mechanism in section 4 of the 1965 Act had been repealed by the 2006 Act and, in any event, the time limit for applications under the 1965 Act had expired long ago (on 2 January 1970). Applying the principles of statutory construction confirmed by the Supreme Court in *R (N3) v Secretary of State for the Home Department* [2025] UKSC 6, and the majority reasoning in *R (Littlejohns) v Devon County Council* [2016] EWCA Civ 446, the Court held that the intention of the 1965 Act was to produce a definitive once-and-for-all register. It would be impermissible for the Court to read words into the legislation so as to create a new registration power – that would be legislation, not interpretation, and would usurp the functions of Parliament and the executive.

On manorial waste, the court held that at the time of the Chief Commons Commissioner’s inquiry and decision in the 1970s, the 80 acres were found to be subject to rights of common. This therefore placed them within section 22(1)(a), not section 22(1)(b), of the 1965 Act. They therefore could not qualify as waste land of the manor, regardless of the issue identified in the *Box Hill* case and *Milburn*. Furthermore, following settlement and the voluntary release of those rights of common, nobody had contended before the Chief Commons Commissioner in the end that the land was manorial waste. It was now too late to advance that case.

On procedural fairness, the Court found that the Council had committed a misstep in not inviting the Claimant to respond to representations made by the Interested Party. However, the Court held that no relief could follow from this because the outcome of the application would inevitably have been the same given the lack of jurisdiction (applying *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [2017] PTSR 1041 and section 31(2A) of the Senior Courts Act 1981).

On the allegation of apparent bias, the Court found none. Even though the Council (and counsel instructed by the Council) had opposed the Claimant’s previous applications in relation to the same land or nearby land, this was no indicator of apparent bias.

RESULT

The claim was accordingly dismissed in its entirety. Kimblin J observed that the Council's position on the determinative issues was "*clear cut*" and that there was "*no doubt as to the legal status of the application and of the land*".

Simon Adamyk was instructed by Hampshire County Council.



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