Neutral Citation Number: [2024] EWHC 1193 (Admin)

Case No: AC-2023-LON-002703

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 17th May 2024

Before :

THE HONOURABLE MR JUSTICE MOULD

- -

Between :

THE KING **On the application of** **SEAN DAVID WILKINSON**	**Claimant**
- and - **LONDON BOROUGH OF ENFIELD**	**Defendant**
-and – **TOTTENHAM HOTSPUR LIMITED**	**Interested Party**

- -
- -

ALEX GOODMAN KC (instructed by **Public Interest Law Centre**) for the **Claimant**
MATT HUTCHINGS KC (instructed by **LB Enfield Legal Services**) for the **Defendant**
JAMES MAURICI KC and JOEL SEMAKULA (instructed by **Richard Max and Co**) for the **Interested Party**
Hearing dates: 6th, 7th and 8th February 2024

- -

Approved Judgment

This judgment was handed down remotely at 2pm on Friday 17th May 2024 by circulation to the parties' representatives by e-mail and by release to the National Archives.

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MR JUSTICE MOULD

Mr Justice Mould :-

Introduction – the parties and the claim

1. This is an application for judicial review of the decision of the Defendant, the London Borough of Enfield, to enter into an agreement with the Interested Party, Tottenham Hotspur Limited **['THL']**, to grant a lease for a term of 25 years of part of Whitewebbs Park **['the Park']** for use as a women's and girls' football academy and a turf academy. The Defendant's decision to enter into the lease with THL was taken by the Leader of the Defendant on 7 July 2023 and confirmed by the Defendant's Overview and Scrutiny Committee on 27 July 2023. On 22 September 2023 the Defendant entered into an agreement for lease **['the Agreement']** with a wholly owned subsidiary of THL, Tottenham Hotspur Football Co Limited **['THFCL']**.

2. The Claimant is a retired teacher. He has lived in Enfield since 1981. He lives locally to the Park which he has used regularly since 2008. He visits the Park every day to walk his dog, to socialise at the café, and to enjoy the surroundings, the wildlife and the peace and quiet which the Park offers. He observes other members of the public enjoying the Park for informal recreation and as a valued local amenity. He has been active in the campaign to oppose the proposed disposal of part of the Park to THL since 2019. Since early 2020 he has chaired the Friends of Whitewebbs Park with the objective of keeping the local community informed about the Defendant's plans and of protecting and enhancing the Park as an open space for the Enfield community.

3. THL is the holding company of various subsidiaries through which Tottenham Hotspur Football Club **['the Club']** is operated. Those subsidiaries include THFCL. The Club is a long established and successful professional football club whose men's and women's teams play in their respective premier leagues. The club already has a presence in Enfield as its training centre is located at Whitewebbs Lane, to the east of the Park.

4. The Defendant is the local authority for the Borough of Enfield, within whose administrative area the Park is situated. The Defendant is the freehold owner of the Park, which is registered land under title number AGL378679.

5. The Claimant's first ground of challenge is the Defendant acted beyond its powers in deciding to enter into the agreement for lease (and in subsequently entering into the Agreement). In particular, the Defendant was not empowered to exercise its powers under section 123 of the Local Government Act 1972 **['the 1972 Act']** to dispose of land within the Park. The Park is open space for the purposes of the Greater London Parks and Open Spaces Order (as confirmed by the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967) **['the 1967 Act Order']**. The Claimant's case under ground 1 of his claim is that by virtue of the saving provisions of section 131 of the 1972 Act, the Defendant's powers of disposal of land within the Park are limited to those conferred by the 1967 Act Order, which do not empower the Defendant to dispose of open space forming part of the Park for uses as proposed by the Interested Party. In particular, the Claimant contends that the Defendant is not empowered to grant a lease which will result in some

18 per cent of the Park being inaccessible as open space for the public's enjoyment for a period of up to 25 years.

6. On his second ground of claim, the Claimant contends that the Defendant's decision to enter into an agreement to grant the proposed lease of land at the Park to THFCL (and subsequently to enter into the Agreement) was unlawful as the Defendant had failed to appropriate the land from its current use as open space for the purposes of its disposal to THFCL. In particular, the Defendant had failed in its duty under subsection 122(1) of the 1972 Act to consider whether that land continued to be required for the purposes of providing open space for the enjoyment of the public.

7. The Claimant's third ground of challenge is that the Defendant failed to take properly into account, or to act consistently with, the statutory purposes for which the Defendant holds the Park. The Claimant contends that the land at the Park which is to be disposed of by way of the proposed lease to THFCL is held by the Defendant under section 164 of the Public Health Act 1875 **['the 1875 Act']** for the purposes of being used as public walks and pleasure grounds. The land is accordingly held by the Defendant on trust for enjoyment by the public. The Claimant says that the Defendant either failed to take account of that factor or acted contrary to that statutory purpose in deciding to dispose of "public trust land" to THL for use as a private football training and turf academy.

8. The Claimant's fourth and final ground of challenge is that in deciding to proceed with the proposed disposal by way of lease to THFCL, the Defendant was wrongly advised that it was able to treat the premium payable upon completion of the proposed lease as a capital receipt and use that money to reduce its borrowing and financing costs. The Claimant argues that was a material error, since as a matter of law the correct position is that the money received from the disposal of this land held on public trust must be re-invested in the remaining public trust land at the Park.

9. On 8 September 2023 the Claimant issued his claim for judicial review of the Leader of the Defendant's decision to proceed with the agreement for lease to THL, later confirmed by the Overview and Scrutiny Committee. On 22 September 2023 the Defendant entered into the Agreement. On 1 November 2023 Lang J granted permission. On 21 November 2023 the Claimant applied for permission to amend his claim so as to extend his challenge to the Defendant's decision to enter into the Agreement. The Claimant proposed no amendment to his substantive grounds of claim. On 17 January 2024, Lang J approved a draft consent order between the parties giving the Claimant permission to amend his claim.

Factual background

10. The Park is an extensive area of public open space which used to form the park land of the former White Webbs Estate. On 1 September 1931 the White Webbs Estate was sold to Middlesex County Council **['MCC']**. MCC purchased the Estate with the intention of retaining White Webbs House and some surrounding land for institutional use. The remaining parkland was to be leased to Enfield Urban District Council **['the UDC']** for the purposes of a public open space, public parks, walks, pleasure grounds and sports grounds. An area of 50 acres was to be used for the purpose of a sports ground under section 69 of the Public Health Act 1925 **['the 1925 Act']**.

11. On 7 April 1931, MCC granted the UDC a 999 year lease **['the long lease']** of two parcels of land at the White Webbs Estate. The first parcel comprised some 196 acres of land, which the UDC covenanted to lay out and to maintain for the purposes of public walks and pleasure grounds and/or for games and recreations. The second parcel comprised some 30 acres of land, which the UDC covenanted to lay out and maintain as playing fields for the purposes of section 69 of the 1925 Act or for general public use as part of the open space.

12. The requisite ministerial consent under section 177 of the 1875 Act for the grant of the long lease by MCC to the UDC was given on 24 November 1932.

13. Following the grant of the long lease, the UDC laid out a public golf course on land to the eastern side of the Park which remained in use, as a "pay and play" golf course, until it was closed permanently on 31 March 2021. The Park has been enjoyed by the public as open space since it was let to the UDC under the long lease in 1931. Members of the public were able to pass through and around the golf course as they wished, albeit that they did so on the basis that they did not interfere with play. Since its closure the golf course has remained accessible at will to members of the public using the Park.

14. Under the provisions of the London Government Act 1963 **['the 1963 Act']**, MCC was dissolved. By virtue of section 58(2) of the 1963 Act, on 1 April 1965 ownership of the Park was transferred to the Greater London Council **['the GLC']**. Subsequently, by virtue of article 4 of the London Authorities (Parks and Open Spaces) Order 1971 **['the 1971 Transfer Order']**, on 1 April 1971 ownership of the Park was transferred to the Defendant, Enfield London Borough Council (which had itself come into existence as one of the 32 London Boroughs established under the re-organisation of local government in London enacted by the 1963 Act).

15. On 30 September 2021 the Leader of the Defendant received a report of the Defendant's Director of Property and Economy on the results of a marketing and evaluation process for the leasing of an area within the Park described as "Whitewebbs Park and Golf Course (WPGC)" which had identified THL as the preferred bidder. In summary, THL's bid proposed the grant of a 25 year lease for the use of part of the golf course for football pitches for women's football, with the re-wilding and return of part of the former golf course land to parkland and development of a community hub, including a café and welfare provision. The Leader gave her approval in principle to the Defendant entering into an agreement for lease with THL and, subject to the grant of planning permission, for the grant of a lease.

16. In his report, the Director advised that as the WPGC site includes open space, in order lawfully to enter into a leasehold disposal of that land, it was necessary for the Defendant to fulfil the requirements of subsection 123(2A) of the 1972 Act. On 14 and 21 December 2022, the Defendant published notices in the Enfield Independent newspaper of its intention to enter into an agreement to grant a lease of the WPGC site for a term of 25 years to THL "which is or may include open space".

17. The Defendant received 788 responses to those newspaper notices. Amongst the concerns raised by respondents was the potential loss of public open space for use by walkers, dog walkers and running clubs. Respondents raised the issue of the legal status of the Park, which was said to be public trust land, having been acquired by MCC under the 1875 Act. It was contended that the Defendant had no right to sell or to lease land

within the Park to a private company for an exclusive training academy which would not be accessible to the general public. It was also contended that the Park was open space for the purposes of the 1967 Order whose provisions prevented the proposed leasehold disposal of land within the Park to THL for purposes which excluded the general public from that land.

18. On 26 June 2023, the Defendant published a further report to the Leader **['the June report']** recommending that the Defendant should proceed with the proposed agreement for lease with THL.

19. Paragraphs 6 to 10 of the June report stated that under the proposed lease, approximately 18% of the Park would be enclosed for THL's use as a women's and girls' football academy and a turf academy. Heads of terms had been negotiated for the proposed agreement for lease. The agreement for lease was in draft. It would oblige THL to obtain planning permission for its proposals and to complete a series of improvement works before the lease would be granted. The key terms for the proposed lease were for a 25 year term from the date of completion of the lease at a total consideration of £2M. The lease was to be excluded from the security of tenure and compensation provisions of Part 2 of the Landlord and Tenant Act 1954. The lease would secure improvements to the Park. THL's proposals were summarised as including the creation of a football academy for women and girls, the refurbishment and extension of the Northern Clubhouse to create an education centre for women and girls' football, a turf academy for training ground staff and greenkeepers in conjunction with other leading sports venues, reinstatement of parkland on the southern side of the golf course, tree surveys, a habitat survey, a hydrological survey and woodland management survey, improvements to the Southern Clubhouse and car park to incorporate a café, WCs and public car parking and improvements to the Park's infrastructure including to bridleways and footpaths. A brochure prepared by THL summarising its proposals was appended to the June report.

20. Paragraphs 11 to 28 of the June report provided the Leader with officers' analysis of and responses to the various points of concern raised in objections received following the publication of the newspaper notices in December 2022. That analysis was supported by Appendix C to the June report headed "Proposed Leasing of Whitewebbs Park and Golf Course (WPGC) – Summary of Section 123 Process". Following consideration of those objections, in paragraphs 29 and 30 of the June report, officers advised that, in their view, none raised a sufficient reason not to proceed with and secure the benefits which they saw in THL's proposals.

21. Paragraph 43 of the June report advised that should the Defendant reach agreement with THL for an advance payment of £1.5M, that payment would be treated as a capital receipt. That capital receipt would reduce the Defendant's borrowing and annual financing costs by approximately £100,000 per annum, resulting overall in an annual saving to the Defendant's revenue budget of some £140,000.

22. In paragraph 31 of the June report, officers advised that were the Defendant not to proceed with THL's proposals, funds would need to be sourced from elsewhere to redevelop the dilapidated former clubhouses and maintain the parkland, woodland and park infrastructure. Officers accordingly recommended that the Defendant should proceed to enter into the proposed agreement for lease with THL.

23. On 29 June 2023, the Defendant wrote to local residents drawing attention to publication of the report to the Leader of 26 June 2023 and the recommendation that the Defendant should proceed with the letting to THL. That letter provided a summary of THL's plans and of the claimed benefits which those plans would bring to the community.

24. The Defendant's letter of 29 June 2023 to residents noted that the recommendation to proceed with the agreement for lease was subject to a formal decision and to call-in. On 7 July 2023, the Leader decided to proceed with the proposed agreement for lease to THL. That decision was then "called-in" by 8 members of the Defendant and referred to the Defendant's Overview and Scrutiny Committee which met on 27 July 2023.

25. On 27 July 2023, the Overview and Scrutiny Committee received a report which invited that Committee to decide whether to refer the Leader's decision back to her for reconsideration, to refer the matter to full Council or to confirm the Leader's original decision. In order to assist the Committee, officers provided a report which responded in turn to each of the reasons put forward in support of the calling-in of the Leader's decision. That report included the following passage –

> *"**2. Reason for call-in***
>
> *The park is enjoyed by people from across the Borough. The Council holds the Park in trust and as part of this trust is expected to maintain open access to the parkland.*
>
> ***Officer response***
>
> *The park will continue to be enjoyed by people from across the Borough and TH's proposal offers significant enhancements of the park, for the benefit of the public…Further, TH's proposal will provide a sustainable economic basis for the park, into the future.*
>
> *Section 123(2B) of the Local Government Act 1972 provides a procedure whereby that part of the park to be leased to TH is released from the statutory open space trust and the Council has followed that procedure".*

26. On 27 July 2023, the Defendant's Overview and Scrutiny Committee decided to confirm the Leader's decision to proceed with the proposed agreement for lease with THL.

27. On 22 September 2023, the Defendant as Landlord entered into the Agreement with THFCL as Tenant. A draft of the proposed lease was annexed to the Agreement. Clause 4 of the Agreement commits the Landlord to grant and the Tenant to take a 25 year lease at a peppercorn rent of the premises defined in clause 1 of the draft lease. Those premises are shown edged in red on Plan 1 contained in the draft lease. They extend to approximately 54% of the overall area of the Park. Clause 13.5 of the Agreement requires the Tenant to pay a premium of £1.5M to the Landlord upon completion of the lease.

28. Under the terms of the Agreement, completion of the lease is (amongst other conditions) subject to the grant of planning permission for the use of the demised

premises for the permitted use as defined in the draft lease. The "Permitted Use" is defined in clause 1 of the draft lease as follows –

> *"use as:*
>
> *(a) to that part of the Premises shown edged blue on Plan 2 and Accessway 1 as:*
>
> *(i) a women and girls football academy and training ground (including mixed training for girls and boys at academy level and for community use), changing facilities, classroom and multi-use educational space, installation and use of natural and artificial grass pitches and all ancillary facilities; and/or*
>
> *(ii) the Tottenham Hotspur Football Club's Turf Academy to train ground staff and greenkeepers in conjunction with other leading sports venues;*
>
> *(b) to the Southern Area and Accessway 4 as a new visitor centre and café and provision of public welfare facilities and parking….;*
>
> *(c) Accessway 2 and/or Accessway 3 for purposes of access to the Limes and/or Toby Carvery;*
>
> *(d) any other uses permitted by the Development Planning Permission; and*
>
> *(e) all other areas not used for the foregoing uses to be accessible to the public as open space for recreational purposes".*

29. Clause 4.12.1 of the draft lease prohibits the Tenant from using the demised premises other than for the permitted use.

Procedural matters

Recusal

30. I heard this claim over three days beginning on Tuesday 6 February 2024. Prior to the hearing, on Thursday 1 February 2024 I raised with the parties the fact that prior to my then recent appointment as a High Court Judge, during November 2023 I had appeared as leading counsel for another London borough council as acquiring authority at a public inquiry into confirmation of a compulsory purchase order at which THL had also appeared as an objector. At the date of the hearing of this claim, the decision of the inspector whether to confirm the compulsory purchase order had yet to be issued. I informed the parties to this claim that I did not consider that my earlier involvement as counsel in those compulsory purchase proceedings affected the propriety of my hearing this claim. Nevertheless, I offered the parties the opportunity to raise any concerns that they may have to my doing so. In response, on 2 February 2024 THL did raise a number of concerns and invited me to consider recusing myself. At the beginning of the hearing on 6 February 2024 I stated that I had decided that I should not recuse myself from hearing this claim. I gave my reasons orally and said that I would produce those reasons in writing together with my judgment. I have now done so in the appendix to this judgment.

The witness statement of Richard Serra

31. On 1 November 2023, Lang J gave directions for the management of this claim. Paragraph 7 of those directions required the Defendant and any other person served with the Claim Form who wished to contest the claim, to file and serve detailed grounds of resistance and any written evidence upon which they wished to rely within 35 days of the date of service of Lang J's order granting permission. The Defendant filed detailed grounds for contesting the claim dated 7 December 2023 and the witness statement of Nick Denny, the Defendant's Director of Property and Management, dated 6 December 2023. THL filed detailed grounds of resistance dated 6 December 2023 but did not file evidence in response to the claim within the period directed by Lang J.

32. On 22 December 2023, the Claimant applied to adjourn the hearing of this claim, which by that date had been listed to begin on 6 February 2024. In brief, the Claimant made that application in the context of a dispute between the parties as to whether the Claimant should enjoy costs protection whether on the basis that this was an Aarhus Convention Claim or otherwise under sections 88-90 of the Criminal Justice and Courts Act 2015. That dispute had been listed for hearing on 30 January 2024. In the event, the parties were able to reach agreement on the issue of costs protection which resulted in a consent order approved by Thornton J on 29 January 2024. Paragraph 3 of Thornton J's order gave the Claimant permission to withdraw his application to adjourn the hearing of the claim listed for 6 February 2024.

33. Meanwhile, on 16 January 2024, THL applied for permission to adduce a witness statement made on 15 January 2024 by Richard Serra, Property Director of Tottenham Hotspur Football and Athletic Club Limited (also a subsidiary company of THL). In its application notice, THL stated that it sought to adduce Mr Serra's witness statement "in response to an application made by the Claimant for an adjournment of the substantive hearing which is currently fixed for early February" and that "the evidence is focused on the impacts of any delay in the determination of these proceedings having regard to a number of matters". Those reasons for seeking to adduce Mr Serra's evidence are largely reflected in what Mr Serra says in paragraph 6 of his witness statement –

> *"6. This Witness Statement is made in response to an application made by the Claimant for an adjournment of the substantive hearing which is currently fixed for early February. The application for an adjournment is to be determined on 30 January 2024. This evidence is focused on the impacts of any delay in the determination of these proceedings having regard to a number of matters. Some of these matters also have a bearing on the substantive issues that arise in these proceedings".*

34. As I have said, in the event the Claimant did not pursue his application to adjourn the hearing of this claim from 6 February 2024. Nevertheless, THL did not withdraw its application for permission to adduce the witness statement of Mr Serra. In a supplementary skeleton argument dated 30 January 2024, Mr James Maurici KC and Mr Joel Semakula for THL submitted that, although Mr Serra's witness statement had been filed in response to the Claimant's application to adjourn the substantive hearing which had now been withdrawn, Mr Serra had made clear that his evidence dealt with issues which THL contended were relevant to the legal issues raised by the claim itself. It is fair to say that counsel did not seek to explain why, in that case, Mr Serra's evidence had not been filed and served in accordance with Lang J's directions in her order of 1 November 2023.

35. In paragraph 25 of their main skeleton argument dated 23 January 2024, Mr Maurici KC and Mr Semakula summarised the contents of Mr Serra's witness statement as follows –

> *"25. The witness statement of Richard Serra contains a detailed account of the wider community, environmental and sustainability and socio-economic benefits of the Club's proposals. Importantly, the Agreement is conditional on the grant of planning permission by the Defendant Council. Accordingly, all of these benefits will be secured through planning conditions and planning obligations as well as through the consideration (rent) for the Golf Course Land. Of particular note is the fact community access will be secured through a community access plan, which will obligate the Club to provide access to local organisations, schools and clubs for use of the [Women and Girls' Football Academy (WGFA)]".*

36. For the Claimant, Mr Alex Goodman KC objected to the admission of Mr Serra's witness statement. He did so primarily on the grounds that Mr Serra's evidence was irrelevant to the substantive issues to be determined under the claim and had clearly been adduced for the purpose of supporting THL's opposition to the application to adjourn, which had since been withdrawn. Mr Goodman KC drew attention to the material that had actually been before the Defendant when the decisions under challenge were made, which included an account of THL's proposals in the June report which was informed and supported by THL's brochure (bearing Mr Serra's name) which was appended to the June report. Counsel also criticised Mr Serra's witness statement as containing inadmissible evidence of opinion and being argumentative.

37. In the light of Mr Maurici KC and Mr Semakula's primary submission that Mr Serra's witness statement should be admitted in the light of its relevance to the legal issues raised by claim, I propose to decide whether to admit it after I have addressed the four main grounds of challenge advanced by the Claimant.

Redaction of the Agreement

38. On 27 September 2023 THL wrote to the Claimant disclosing the existence of the Agreement (following its execution on 22 September 2023). On 18 October 2023, the Claimant wrote to the Defendant and asked to be provided with a copy of the Agreement. On 8 November 2023, a copy of the Agreement was sent to the Claimant, but with redactions.

39. During January 2024, there was correspondence between the parties as to why the redactions had been made and whether they were justified, particularly following the Order of Lang J on 17 January 2024 permitting the Claimant to amend his claim and directly to challenge the Defendant's decision to enter into the Agreement. That correspondence culminated in a letter from the Claimant's solicitors to THL's solicitors on 30 January 2024, in which the Claimant accepted an offer made on behalf of the Defendant and THL *"of providing a full copy [of the Agreement] to the Judge to ensure any redactions are rightfully made".*

40. I have been provided with unredacted and redacted copies of the Agreement. In their supplementary skeleton argument, Mr Maurici KC and Mr Semakula submitted that each of the redactions is justified as being either both confidential and irrelevant to the substantive issues raised by the claim, or subject to legal professional privilege. For the

Claimant, in his written response dated 1 February 2024, Mr Goodman KC invited me to view the redacted parts and to determine whether THL's application to rely on the Agreement subject to the redactions should be permitted.

41. As with the issue of the admissibility of Mr Serra's witness statement, I propose to decide whether the redactions made to the Agreement provided to the Claimant were justified after I have addressed the four main grounds of challenge.

Legislative provisions

Public Health Acts 1875 and 1925

42. Section 164 of the 1875 Act provides –

> *"Any local authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever.*
>
> *Any local authority may make byelaws for the regulation of any such public walk or pleasure ground…".*

43. Section 69(1) of the 1925 Act (since repealed) empowered local authorities to provide sports grounds –

> *"A county council, local authority or parish council may acquire by purchase, gift or lease, and may lay out, equip and maintain lands, not being lands forming part of any common, for the purpose of cricket, football or other games and recreations, and may either manage those lands themselves and charge persons for the use thereof or for admission thereto, or may let such lands, or any portion thereof, to any club or person for use for any of the purposes aforesaid".*

Local Government Act 1972

44. Sections 120 to 131 in Part VII of the 1972 Act confer powers on local authorities in relation to land transactions.

45. Section 122 of the 1972 Act confers on principal councils (which include London boroughs – section 270(1) of the 1972 Act) a general power of appropriation of land. Sections 122(1)-(2B) provide –

> *"(1) Subject to the following provisions of this section, a principal council may appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation; but the appropriation of land by a council by virtue of this subsection shall be subject to the rights of other persons in, over or in respect of the land concerned.*
>
> *(2) A principal council may not appropriate under subsection (1) above any land which they may be authorised to appropriate under section 229 of the Town and Country Planning Act 1990 (land forming part of a common, etc.) unless—*

(a) the total of the land appropriated in any particular common, . . . or fuel or field garden allotment (giving those expressions the same meanings as in the said section 229) does not in the aggregate exceed 250 square yards, and

(b) before appropriating the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed appropriation which may be made to them,

. . . .

(2A) A principal council may not appropriate under subsection (1) above any land consisting or forming part of an open space unless before appropriating the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed appropriation which may be made to them.

(2B) Where land appropriated by virtue of subsection (2A) above is held-

(a) for the purposes of section 164 of the Public Health Act 1875 (pleasure grounds); or

(b) in accordance with section 10 of the Open Spaces Act 1906 (duty of local authority to maintain open spaces and burial grounds),

the land shall by virtue of the appropriation be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164 or, as the case may be, the said section 10".

46. Section 123 of the 1972 Act grants to principal councils a general power to dispose of land. In its application to such councils in England, sections 123(1)-(2B) state –

"(1) Subject to the following provisions of this section, …. a principal council may dispose of land held by them in any manner they wish.

(2) Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.

(2A) A principal council may not dispose under subsection (1) above of any land consisting or forming part of an open space unless before disposing of the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed disposal which may be made to them.

….

(2B) Where by virtue of subsection (2A) above…. a council dispose of land which is held—

(a) for the purpose of section 164 of the Public Health Act 1875 (pleasure grounds); or

(b) in accordance with section 10 of the Open Spaces Act 1906 (duty of local authority to maintain open spaces and burial grounds),

the land shall by virtue of the disposal be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164 or, as the case may be, the said section 10.

....".

47. "Open space" is defined in section 270(1) of the 1972 Act by reference to the meaning assigned to that phrase by section 336(1) of the Town and Country Planning Act 1990 **['the 1990 Act']**, which is as follows –

" 'open space' means any land laid out as a public garden or used for the purposes of public recreation, or land which is a disused burial ground".

48. Section 131 of the 1972 Act enacts saving provisions of which the following are relevant to the issues raised in the present case –

"(1) Nothing in the foregoing provisions of this Part of this Act or in Part VIII below—

(a) shall authorise the disposal of any land by a local authority in breach of any trust, covenant or agreement which is binding upon them, excluding any trust arising solely by reason of the land being held as public walks or pleasure grounds or in accordance with section 10 of the Open Spaces Act 1906; or

(b) shall affect, or empower a local authority to act otherwise than in accordance with, any provision contained in, or in any instrument made under, any of the enactments specified in subsection (2) below and relating to any dealing in land by a local authority or the application of capital money arising from any such dealing.

(2) The enactments referred to in subsection (1)(b) above are—

....

(d) the Allotments Acts 1908 to 1950;

(e) the Smallholdings and Allotments Acts 1908 to 1931;

....

(k) any local Act (including an Act confirming a provisional order);

....".

49. It is not in dispute between the parties that the 1967 Act Order is a *"local Act (including an Act confirming a provisional order)"* and so falls within the scope of Section 131(2)(k) of the 1972 Act.

Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967

50. The 1967 Act Order was made as a provisional order by the Minister of Housing and Local Government pursuant to subsection 87(3) of the 1963 Act.

51. Section 87(3) of the 1963 Act empowered the Minister to amend, repeal or revoke any Greater London statutory provision (or extend such a provision to apply to a wider area)

for the purpose of securing uniformity in the law applicable with respect to any matter in different parts of *"the relevant area"*, that is Greater London. The 1967 Act Order was headed *"Provisional Order for Securing Uniformity in the Law Applicable with Respect to Parks and Open Spaces".*

52. Part 2 of the 1967 Act Order is headed *"Parks and Open Spaces"*. By virtue of article 2, Part 2 applies to the London borough councils. Article 6 of the 1967 Act Order defines *"open space"* in Part II as including –

> *"any public park, heath, common, recreation ground, pleasure ground, garden, walk, ornamental enclosure or disused burial ground under the control and management of a local authority".*

53. Article 7 of the 1967 Act Order authorises a local authority to provide and maintain facilities for public recreation in any open space –

> *"7(1) A local authority may in any open space –*
>
> *(a) provide and maintain –*
>
> *....*
>
> *(ii) golf courses and grounds, tracks, lawns, courts, greens and such other open air facilities as the local authority think fit for any form of recreation whatsoever (being facilities which the local authority are not otherwise specifically authorised to provide under this or any other enactment);*
>
> *(iii) gymnasia;*
>
> *....*
>
> *(v) indoor facilities for any form of recreation whatsoever;*
>
> *(vi) centres and other facilities (whether indoor or open air) for the use of clubs, societies or organisations whose objects or activities are wholly or mainly of a recreational, social or educational character;*
>
> *....*
>
> *(f) erect and maintain for or in connection with any purpose relating to the open space such buildings or structures as they consider necessary or desirable including (without prejudice to the generality of this paragraph) buildings for the accommodation of keepers and other persons employed in connection with the open space;*
>
> *(g) set apart or enclose in connection with any of the matters referred to in this article any part of the open space and preclude any person from entering that part so set apart or enclosed other than a person to whom access is permitted by the local authority or (where the right of so setting apart or enclosing is granted to any person by the local authority under the powers of this Part of this order) by such person;*

Provided that –

(i) where any part of an open space is set apart or enclosed under the foregoing provisions of this article for the playing of games and that part is not specially laid out and maintained for that purpose, the power under this article to preclude any person from entering that part shall not apply while the part is not in actual use for games;

….".

54. Article 8(1) of the 1967 Act Order empowers a local authority to grant licences or let premises for the purposes of exercising the powers conferred by article 7 –

"8(1) A local authority may, subject to such terms and conditions as to payment or otherwise as they may consider desirable, grant to any person the right of exercising any of the powers conferred upon the local authority by article 7 and let to any person, for any of the purposes mentioned in that article, any building or structure erected or maintained, and any part of an open space set apart or enclosed, pursuant thereto".

55. Article 11 of the 1967 Act Order makes further provisions concerning the exercise of the powers conferred by articles 7 and 8. Of relevance to the present claim are articles 11(1) - at least in part - and 11(2) which state –

"11(1) Subject to the provisions of this article and of article 12, the powers conferred on the local authority by articles 7 to 10 may be exercised notwithstanding the provisions of any enactment or any scheme made under, or confirmed by, any enactment but shall not be exercised in such a manner as to-

(a) contravene any right which any person may have otherwise than as a member of the public; or

(b) prejudice or affect any provision contained in any enactment or scheme for the protection of any specified person;

without the consent of that person…

11(2) Subject to the provisions of so much of article 9 as relates to the enclosure of any part of an open space in the interests of public safety, the powers of articles 7, 8 and 10 shall not be exercised in respect of any open space in such a manner that members of the public are by reason only of the exercise of such powers unable to obtain access without charge to some part of such open space".

56. Article 15 of the 1967 Act Order confers a power on a local authority whose purpose is to enlarge or improve any open space to enter into an agreement with the owner of adjacent land to exchange that land for open space land. On such an exchange being concluded, the open space land ceases for all purposes to form part of the open space and all public rights in, over or affecting that land are extinguished. The adjacent land then forms part of the open space and becomes subject to *"the like rights, trusts and incidents as attached to the open space"*.

57. Article 17 of the 1967 Act Order is a detailed code for the use of portions of open space land for street improvements. Ministerial consent is required. Where part of an open space is used, alienated or exchanged for other land for the purposes of street improvements in accordance with article 17, that land ceases to form part of the open space and all public rights over that part are extinguished. Any land acquired by the local authority under article 17 in exchange or for the purposes of provision of an open space becomes subject to *"the like rights, trusts and incidents as attached to"* the open space.

58. It is common ground between the parties that it is only in the limited circumstances stated in articles 15(2) and 17(5) that the 1967 Act Order provides for the extinguishment of any statutory trust for the public's enjoyment of open space.

59. Article 20 of the 1967 Act Order states as follows –

> *"20. The powers conferred upon a local authority by or in pursuance of this Part of this order shall be in addition to and not in derogation of any other powers possessed by any such authority independently of this order".*

Case law

(i) Public trust land

60. Sections 122(2B) and 123(2B) of the 1972 Act refer to trusts arising by virtue of land being held on trust for the enjoyment of the public in accordance with section 164 of the 1875 Act or section 10 of the Open Spaces Act 1906 **['the 1906 Act']**. In section 122(6) of the 1972 Act as originally enacted, such land was defined as *"public trust land"*. I shall use that phrase to refer to such land in this judgment. As I explain in paragraph 117 below, it was common ground between the parties before me that at least part of the land to be let to THFCL was acquired by MCC and consequently is held by the Defendant for the purposes of section 164 of the 1875 Act. It is public trust land. I note that the Defendant has exercised the power under section 164 of the 1875 Act to make byelaws for the regulation of pleasure grounds, public walks and open spaces in Enfield Borough, the current byelaws being those made on 27 April 2011 and confirmed by the Secretary of State on 25 August 2011. Both Whitewebbs Park and Whitewebbs Golf Course are shown in schedule 1 to the byelaws as grounds to which, by virtue of byelaw 1, the byelaws generally apply.

61. In *R(Friends of Finsbury Park) v Haringey Borough Council* [2017] EWCA Civ 1831; [2018] PTSR 644 **['*Finsbury Park*']**, at [15]-[17] Hickinbottom LJ referred to the following provisions of section 10 of the Open Spaces Act 1906–

> *"A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—*
>
> *(a) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose…".*

and then said –

> *"16. For the sake of completeness, I should say that, even where a park has been established under statutory provisions that contain no express comparable trust (e.g. section 164 of the Public Health Act 1875), these have been construed by the courts as having a similar effect (see, e.g., Attorney General v Sunderland Corporation (1876) 2 Ch D 634, 641 per James LJ, a case concerning the predecessor provision, namely section 74 of the Public Health Act 1848), i.e. it is held on trust for the purpose of public enjoyment. That construction was recognised by Parliament in section 122 of the 1972 Act, which concerns appropriation of land by local authorities and expressly refers to "land held in trust for enjoyment by the public in accordance with [section 164 of the 1875 Act]".*

62. In *R(Day) v Shropshire Council* [2023] UKSC 8; [2023] AC 955 **[*'Day'*]**, at [41], Lady Rose JSC said –

> "*There have been many cases describing how the statutory trusts created over recreation grounds and open spaces both restrict the ability of the local authority to use the land for any purpose other than recreation and also confer rights on the public to use the land for that purpose".*

63. At [42] in *Day*, Lady Rose also cited *Attorney General v Sunderland Corporation* (1876) 2 Ch D 634, as an early example of such a case. In that case, the corporation proposed to use part of a public open space to build municipal buildings, including a museum and a public library. Bacon VC said (page 639)–

> *"It is plain that these lands were vested in this corporation for a public purpose. It has been argued over and over again that a discretion was given to the corporation. But more than ten years ago this land was granted to be used 'only as and for public walks or pleasure-grounds for the use of the inhabitants of the borough;' and that trust has been executed by the corporation ever since.*
>
> *Acts of Parliament have been referred to, which give very extensive powers to corporations. They give, amongst other things, powers to build offices; but they do not give powers to build offices upon other people's land, or to take other people's land for that purpose.*
>
> *Now, these lands have been made into a park, which is intended only for the recreation and healthful exercise of the people of Sunderland. It has been argued that these statutes may, by a circuity, be brought round to give to the corporation power of constructing buildings for other purposes, provided such purposes are not inconsistent with public use and benefit. But I am of opinion that buildings which are intended for purposes not connected with public walks or pleasure-grounds are plainly unlawful."*

64. In *Blake v Hendon Corporation* [1962] 1 QB 283 **[*'Blake'*]**, the question was whether a park acquired by the corporation under section 164 of the 1875 Act and laid out for public use in the early 1930s was rateable property in the hands of the corporation. The Court of Appeal held that the park was not rateable, since beneficial occupation was with the public and not the legal owner, the corporation. At pages 300 and 301, Devlin LJ said –

> *"The purpose of section 164 of [the 1875 Act] is to provide the public with public walks and pleasure grounds. The public is not a legal entity and cannot be vested*

> *with the legal ownership of the walks and pleasure grounds which it is to enjoy. But if it can be given the beneficial ownership, that is what it should have.*
> ….
> *It is sufficient that it should appear from the case, as it does from this case, that land acquired by a local authority under section 164 of [the 1875 Act] is being used by the public for the purposes set out in that section, and that they have free and unrestricted use of it (qualified, it may be, by a limited exclusion for ancillary purposes) for those purposes".*

(ii) The 1967 Act Order

65. The 1967 Act Order has been considered in two recent cases.

66. In *Finsbury Park,* the question was whether the local authority was entitled to use the general power given to local authorities by section 145 of the 1972 Act to provide entertainments as the basis for hiring out a substantial area within Finsbury Park for a large scale music festival. The event would require closure of that area of the park to non-paying members of the public for 16 days. The Court of Appeal held that the local authority was entitled to rely on section 145 of the 1972 Act.

67. One of the issues raised in that case was whether the area limit of one acre (or one-tenth of the open space) imposed by the second proviso in article 7(1) of the 1967 Act Order on the use of part of an open space set apart for an entertainment should apply, to the exclusion of the general power in section 145 of the 1972 Act (which imposed no such area restriction). The argument for the interveners, the Open Spaces Society, was that read in the context of the relevant legislative history, the 1967 Act Order effectively provides *"a comprehensive regime for the holding of entertainments in parks and pleasure grounds in London"* (see [51] in *Finsbury Park*).

68. In [52], Hickinbottom LJ characterised the interveners' argument as being –

> *"…based on the premise that Parliament intended article 7 of the 1967 Act to be specifically directed towards the holding of entertainments in parks and pleasure grounds in London to the extent that it can be assumed that Parliament intended that section 145 of the 1972 Act, that would otherwise apply, should not apply to London".*

69. Hickinbottom LJ then said (at [52]) that he was unable to accept that premise. His reasons for being unable to do so were largely concerned with the specific legislative history which set the context for that case, and is therefore of limited assistance to the present case, which does not concern section 145 of the 1972 Act or its relationship with the 1967 Act Order. However, the following reasoning in [52] in *Finsbury Park* is, in my view, of relevance to the present claim –

> *"(i) The 1967 Act, and the provisional order that preceded it, were adopted after the local government reorganisation in London, expressly to secure 'uniformity in the law applicable with respect to parks and open space'. There is nothing to suggest that it was intended to effect any radical change.*
> ….
> *(iii)The 1972 Act is, of course, the later statute. Section 145 of it applies to all local authorities, which include all 32 London borough councils: section 270….*

> ….
> *(v) Indeed, far from suggesting that the 1967 Act excluded powers which, on the face of it, were given to London boroughs in respect of entertainment in parks, the various statutes expressly provide that the powers they give are supplementary to any powers derived from other Acts: see, especially, article 20 in the Schedule to the 1967 Act. In my view, that is a clear flag of the intention of Parliament".*

70. The second recent case in which the 1967 Act Order was considered is *R(Muir) v Wandsworth London Borough Council* [2017] EWHC 1947 (Admin); [2017] PTSR 1689 **[*'Muir'*]**.

71. The question in *Muir* was whether a proposal to grant a 15 year lease to a limited company of land and buildings at Wandsworth Common for use as a private children's nursery was within the scope of article 7(1)(a) of the 1967 Act Order. Lang J summarised the parties' submissions before her in [65]-[68] of her judgment. The local authority argued that it had power to grant the proposed lease of the premises under article 7(1)(a) of the 1967 Act Order, either as an indoor facility for recreation under article 7(1)(a)(v) or as a centre or other facility for an organisation whose objects or activities were of a recreational or educational character, under article 7(1)(a)(vi) of the 1967 Act Order. The claimant argued that the local authority did not have power to grant the lease because the provision of childcare at a private nursery run by a private company, which had exclusive use of the premises and could restrict entry to members of the public, fell outside the scope of the 1967 Act Order, as it was not a facility for public recreation and use.

72. Lang J held that the local authority's grant of the lease was not a lawful exercise of its powers under articles 7(1)(a)(v) or (vi) of the 1967 Act Order.

73. The local authority's appeal was dismissed: see *R(Muir) v Wandsworth London Borough Council* [2018] EWCA Civ 1035; [2018] PTSR 2121. Floyd LJ gave the only reasoned judgment with which the other members of the court agreed. He said that the issue in the appeal was whether the appellant local authority had the necessary powers to grant a lease of premises situated on Wandsworth Common to a limited company for the purposes of allowing it to operate a pre-school nursery there, which turned on the correct construction and application of the 1967 Act Order.

74. At [22] Floyd LJ said that to come within article 7(1)(a)(v) of the 1967 Act Order, the proposed facilities must be wholly or mainly for recreation. At [24] he concluded that the proposed pre-school nursery fell outside the scope of sub-paragraph (v) for essentially two reasons: firstly, the proposed nursery was more in the nature of a school than a recreational facility; and secondly, because it would offer services which were not a necessary or inherent part of recreation and went far beyond it, by providing all-day childcare for pre-school children. At [30], Floyd LJ said that it was common ground that the proposed lessee was not a club or society. He interpreted the term "organisation" in article 7(1)(a)(vi) of the 1967 Act Order as intended to *"sweep up"* organisations which were not properly described as clubs or societies but shared their principal characteristic of being *"run for the benefit of members sharing a common interest"*. The proposed lessee was not such an organisation, being instead a limited company providing services for clients or customers. For that reason, the proposed pre-school nursery fell outside the scope of sub-paragraph (vi).

75. At first instance in *Muir*, Lang J concluded at [82] that the overall purpose and scope of articles 7 and 8 of the 1967 Act Order is to enable a local authority to provide and maintain recreational facilities for the public, i.e. public recreation. She said that such an interpretation was consistent with the statutory trust, in that case arising under section 10 of the 1906 Act, under which a local authority is trustee and custodian of the open space and holds it for the enjoyment and use of the public as beneficiaries of the trust.

76. On appeal, at [33] Floyd LJ said –

> *"I would accept that it is implicit in article 7 that all the facilities specified must be open to the public (although, as article 10 makes clear, the local authority may make reasonable charges for the use the facilities provided). So much is clear from the context provided by section 10 of the Open Spaces Act 1906, which requires the local authority to hold the land for public enjoyment, the definition of 'open space' in the 1967 Order, and the headings to articles 7 and 8".*

77. The question whether a given facility was available for public recreation and so within the scope of article 7(1)(a) was, however, a question of fact and degree. At [34], Floyd LJ said –

> *"There clearly comes a point where the restrictions on public access become too onerous for it to be possible to say that the facility is still available for public recreation. I would be reluctant to lay down a hard and fast rule as to where that point occurs…".*

Legislative history: local authorities' powers of appropriation and disposal of land

78. In *Day* at [66], Lady Rose said that the powers of local authorities to appropriate land acquired for one purpose so as to use it for another, and to sell land they have acquired for their statutory purpose have a long history. She added that a constant theme that emerges from that legislation is that in many instances, apparently broad powers to deal with land have been hedged about with conditions and requirements, in particular for Ministerial consent or, more recently, public consultation.

79. All parties in this claim placed significant reliance on the legislative history of the relevant provisions of the 1972 Act. In the light of the arguments advanced by the parties, it is necessary to consider that history in some detail. I note at the outset that it was authoritatively surveyed by Lady Rose (with whose judgment all members of the Supreme Court agreed) at [65]-[82] in *Day*.

Local Government Act 1933

80. Prior to the enactment of the 1972 Act, local authorities' general powers of appropriation and disposal of land were consolidated in the Local Government Act 1933 **['the 1933 Act']**.

81. Part VII of the 1933 Act was headed *"Acquisition of, and Dealings in, Land"*. Section 156 stated that the provisions of sections 157 to 166 were to apply to all local authorities other than parish councils.

82. Section 163(1) of the 1933 Act provided a general power of appropriation –

> *"(1) Any land belonging to a local authority and not required for the purposes for which it was acquired or has since been appropriated may be appropriated for any other purpose approved by the Minister for which the local authority are authorised to acquire land".*

83. Section 164 of the 1933 Act conferred a power of letting –

> *"A local authority may let any land which they may possess –*
>
> *(a) with the consent of the Minister, for any term;*
>
> *(b) without the consent of the Minister, for a term not exceeding seven years".*

84. Section 165 of the 1933 Act conferred a power to sell or exchange land –

> *"A local authority may, with the consent of the Minister, -*
>
> *(a) sell any land which they may possess and which is not required for the purposes for which it was acquired or is being used; or*
>
> *(b) exchange any land which they may possess for other land, either with or without paying or receiving any money for equality of exchange".*

85. Section 179 of the 1933 Act enacted saving provisions, including –

> *"Nothing in this part of this Act shall –*
>
> *....*
>
> *(d) authorise the disposal of land by a local authority, whether by sale, lease, or exchange, in breach of any trust, covenant or agreement binding upon the authority;*
>
> *....*
>
> *(g) affect any provisions relating to the acquisition, appropriation or disposal of land by a local authority contained in any of the enactments set out in the Seventh Schedule to this Act or in any statutory order made thereunder, or the application of any capital money arising from such disposal, or, in so far as any of those enactments or orders contains provisions relating to the acquisition, appropriation, or disposal or land, or the application of capital money arising from land, empower a local authority to effect any transaction which might be effected under those provisions otherwise than under those provisions and in accordance therewith;..".*

86. The seventh schedule to the 1933 Act included the Allotment Acts 1908 to 1931, the Smallholdings and Allotments Acts 1908 to 1931 and *"any local Act"*.

87. In *Day*, at [67], Lady Rose summarised the powers conferred on local authorities by sections 163 to 165 of the 1933 Act. In most instances, the consent of the Minister to the transaction or the approval of the Minister of the new purpose was required. Section 164 of the LGA 1933 empowered a local authority (other than a parish council) to let any land which they may possess with the consent of the Minister for any term or without the consent of the Minister for a term not exceeding seven years. Section 165(a) of the LGA 1933 provided that a local authority could with the consent of the Minister sell any land which they may possess but only if that land was not required for the purpose for which it had been acquired or was being used.

The Town and Country Planning Act 1959

88. The requirement for a local authority to obtain Ministerial approval or consent for the appropriation, letting or sale of land in its possession under sections 163 to 165 of the 1933 Act was subsequently modified by sections 23 and 26 of the Town and Country Planning Act 1959 **['the 1959 Act']**. In summary, the effect of those provisions was to free local authorities from the requirement to obtain Ministerial approval or consent to the appropriation, letting or disposal of land in their possession, but subject to the retention of that requirement in respect of the appropriation, letting or disposal of land consisting of or forming part of open space.

89. Section 23 of the 1959 Act which related to powers of appropriation, included the following provisions –

> *"23(1) Subject to the following provisions of this section, where by any enactment—*
>
> > *(a) power is conferred on any authority to whom this Part of this Act applies, or on any class of such authorities, to appropriate land for any purpose…., but*
> >
> > *(b) that power is so conferred subject to a provision … that the power is not to be exercised except with the consent of a Minister specified in that provision, or for a purpose approved by a Minister so specified, …*
>
> *the enactment shall have effect, in relation to any exercise of the power after the commencement of this Act by an authority to whom this Part of this Act applies, as if it conferred that power free from any such provision as is mentioned in paragraph (b) of this subsection.*
>
> *(2) The exercise after the commencement of this Act, by any authority to whom this Part of this Act applies, of any power of appropriation in relation to which the preceding subsection has effect shall be subject to the following provisions, that is to say,—*
>
> > *(a) land which consists or forms part of an open space (not being land which consists or forms part of a common or of a fuel or field garden allotment) shall not be appropriated except with the consent of the Minister of Housing and Local Government;*
> >
> > *….*
>
> *(3) Subsection (1) of this section shall not apply—*
>
> *….*
>
> > *(b) to any appropriation of land which, immediately before the appropriation, is land which consists or forms part of a common, or formerly consisted or formed part of a common, and is held or managed by a local authority in accordance with a local Act;*
>
> *and shall not operate so as to dispense with any requirement for the consent of the Minister of Agriculture, Fisheries and Food—*
>
> > *(i) under subsection (7) of section two of the Small Holdings and Allotments Act, 1926, as applied by section twelve of the Agricultural Land (Utilisation)*

Act, 1931 (whereby the consent of that Minister is required in certain cases in respect of transactions relating to cottage holdings), or

(ii) in respect of any appropriation of land which, immediately before the appropriation, is land held for use as allotments;

but, in relation to any appropriation of land by an authority to whom this Part of this Act applies, where the consent of that Minister is required under section eight of the Allotments Act, 1925, so much of that section as requires consultation with the Minister of Housing and Local Government shall not apply".

90. Section 26 of the 1959 Act which related to powers of disposal of land, included the following provisions –

"26(1) Subject to the following provisions of this section, where by any enactment—

(a) power is conferred on any authority to whom this Part of this Act applies, or on any class of such authorities, to dispose of land, but

(b) that power is so conferred subject to a provision … that the power is not to be exercised except with the consent of a Minister specified in that provision,…

the enactment shall have effect, in relation to any exercise of the power after the commencement of this Act by an authority to whom this Part of this Act applies, as if it conferred that power free from any such provision as is mentioned in paragraph (b) of this subsection.

(2) A disposal by an authority to whom this Part of this Act applies—

(a) of land which consists or forms part of an open space (not being land which - consists or forms part of a common or of a fuel or field garden allotment) or

….

if … it is a disposal which, apart from this section, could not be effected except with the consent of a Minister, shall not be effected except with such consent as is mentioned in the next following subsection.

(3) The said consent—

(a) in a case falling within paragraph (a) of the last preceding subsection, is the consent of the Minister of Housing and Local Government, …

(4) Except with the consent of the Minister of Housing and Local Government, an authority to whom this Part of this Act applies shall not sell, exchange or let any land, in the exercise of a power in relation to which subsection (1) of this section has effect, for a price, consideration or rent less than the best price, best consideration or best rent (as the case may be) that can reasonably be obtained, having regard to any restrictions or conditions (including conditions as to payment or the giving of security for payment) subject to which the land is sold, exchanged or let.

(5) Subsection (1) of this section shall not apply —

…

> *(d) to any disposal of land which, immediately before the disposal, is land which consists or forms part of a common, or formerly consisted or formed part of a common, and is held or managed by a local authority in accordance with a local Act;*
>
> *…*
>
> *and subsection (1) of this section shall not operate so as to dispense with any requirement for the consent of the Minister of Agriculture, Fisheries and Food —*
>
> *(i) under subsection (7) of section two of the Small Holdings and Allotments Act, 1926, as applied by section twelve of the Agricultural Land (Utilisation) Act, 1931, or under subsection (1) of section six of the said Act of 1926, or*
>
> *(ii) in respect of any disposal of land which, immediately before the disposal, is land held for use as allotments;*
>
> *but in relation to any disposal of land by an authority to whom this Part of this Act applies, where the consent of that Minister is required under section eight of the Allotments Act, 1925, so much of that section as requires consultation with the Minister of Housing and Local Government shall not apply".*

The Local Government Act 1933 and the disposal of public trust land

91. The question of how the powers of disposal conferred on local authorities by the 1933 Act (in particular, the power of letting under section 164) applied in relation to public trust land was addressed in *Blake*. At page 302, the Court of Appeal applied the principle laid down in *British Transport Commission v Westmorland County Council* 1958] AC 126, 142 –

> *"You must first ascertain the object for which the land is held. All other powers are subordinate to the main power to carry out the statutory object and can be used only to the extent that their exercise is compatible with that object….Applying this to the present case, the power to let in section 164 of [the 1933 Act] is subordinate or supplementary to the main power in section 164 of [the 1875 Act] and can, therefore, be validly exercised only if it is compatible with the full use by the public of Stonegrove Park as public walks and pleasure grounds.*
>
> *….*
>
> *The object of section 179(d) [of the 1933 Act] is to cut down the power of letting, not to extend it".*

92. In *Laverstoke Property Co Ltd v Peterborough Corporation* [1972] 1 WLR 1400, the issue was whether the corporation was empowered by section 165 of the 1933 Act to sell public trust land (in that case, land held under section 10 of the 1906 Act) which was no longer required for its purpose. At page 1405 G-H, Goff J said –

> *"I will assume in favour of the plaintiffs that if section 165 of the Act of 1933 stood alone this general power would override the express provisions of the special Act of 1906, but in my judgment, even so, the plaintiffs face an unanswerable difficulty, since section 179 of the Act of 1933 provides:*
>
> > *"Nothing in this Part of this Act shall-…(d) authorise the disposal of land by a local authority, whether by sale lease or exchange, in breach of any trust, covenant or agreement binding upon the authority;"*
>
> *and section 10 of the Open Space Act 1906 expressly created a trust".*

93. At page 1408A, Goff J observed that there may be other powers which allowed the Minister to consent to the disposal of the land subject to a statutory trust or which abrogated the trust, but that the trust could not be overridden by the power in section 165 of the LGA 1933 alone.

The Town and Country Planning Act 1971

94. Section 121(1) of the Town and Country Planning Act 1971 **['the 1971 Act']** enacted a special procedure for the appropriation by a local authority of land held by them which was or formed part of a common, open space or fuel or field garden allotment. In summary, the local authority was required to make an order authorising the proposed appropriation which required confirmation by the Secretary of State. Section 121(3) of the 1971 Act disapplied section 163 of the 1933 Act to land which a local authority had power to appropriate under section 121(1) of the 1971 Act. Following the repeal of the 1971 Act, section 229(1) of the 1990 Act re-enacted that special procedure in substantially the same terms.

The Local Government Act 1972

95. The 1972 Act repealed the 1933 Act and, under sections 122 and 123 of the 1972 Act, enacted new powers for local authorities to appropriate and to dispose of land.

96. As originally enacted, sections 122(1)-(2) and (6) of the 1972 Act provided –

> *"(1) Subject to the following provisions of this section, a principal council may appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation; but the appropriation of land by a council by virtue of this subsection shall be subject to the rights of other persons in, over or in respect of the land concerned.*
>
> *(2) A principal council may not appropriate under subsection (1) above any land which they may be authorised to appropriate under section 121 of the Town and Country Planning Act 1971 (land forming part of a common, etc.) unless—*
>
> > *(a) the total of the land appropriated in any particular common, open space or fuel or field garden allotment (giving those expressions the same meanings as in the said section 121) does not in the aggregate exceed 250 square yards, and*
> >
> > *(b) before appropriating the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed appropriation which may be made to them,*
>
> *and where, by virtue of this subsection, any public trust land is appropriated under subsection (1) above, the land shall, by virtue of the appropriation, be freed from any trust arising solely by reason of its being public trust land.*
>
> *….*
>
> *(6) In this section "public trust land" means land held as public walks or pleasure grounds or in accordance with section 10 of the Open Space Act 1906 (public open spaces)".*

97. As originally enacted, sections 123(1)-(3) and (7) of the 1972 Act provided –

> *"(1) Subject to the following provisions of this section, a principal council may dispose of land held by them in any manner they wish.*
>
> *(2) Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.*
>
> *(3) A principal council may not dispose of public trust land unless –*
>
> > *(a) the total of the land disposed of in any particular public walk, pleasure ground or other open space does not in the aggregate exceed 250 square yards, and*
> >
> > *(b) before disposing of the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed disposal which may be made to them,*
>
> *but where any such land is so disposed of the land shall, by virtue of the disposal, be freed from any trust arising solely by reason of its being public trust land.*
>
> *…*
>
> *(7) For the purposes of this section a disposal of land is a disposal by way of a short tenancy if it consists—*
>
> > *(a) of the grant of a term not exceeding seven years, or*
> >
> > *(b) of the assignment of a term which at the date of the assignment has not more than seven years to run,*
>
> *and in this section "public trust land" has the meaning assigned to it by section 122(6) above".*

98. In *Day* at [79], Lady Rose explained the legislative intention behind the words in sections 122(2) and 123(3) of the 1972 Act which stated that the land shall by virtue of the appropriation/disposal, be freed from any trust arising solely by reason of its being public trust land –

> *"That wording had not been included in section 164 LGA 1933 or sections 26 or 29 TCPA 1959. It was not included in the initial draft clause introduced into Parliament which became section 123 of the LGA 1972. As Mr Goodman showed us, this wording first appeared when the clause came to be considered by the House of Lords in Committee when an amendment was proposed to introduce the 'freed from any trust' wording. The intention behind the amendment was said by the Earl of Gowrie when moving the amendment to be 'to put beyond doubt that where public walks or pleasure grounds or public open space is appropriated or disposed of, to the very limited extent allowed under the Bill, the land is freed from any public trust so that it can be used for the purpose for which it is appropriated or disposed of': see Hansard (HL Debates), 18 September 1972, col 798-799".*

99. That legislative intention was reflected in the terms of the saving provision in section 131(1)(a) of the 1972 Act, which replaced section 179(d) of the 1933 Act. The saving provision in section 179(g) of the 1933 Act was repealed and replaced by section

131(1)(b) of the 1972 Act. In paragraph 48 above, I have set out the terms of section 131(1)(a) and (b) and the relevant parts of section 131(2) of the 1972 Act.

The Local Government, Planning and Land Act 1980

100. Section 118 of the Local Government, Planning and Land Act 1980 **['the 1980 Act']**, gave effect to schedule 23 of that Act, which contained miscellaneous amendments about land, including amendments *"to relax controls"*. Paragraph 12 of schedule 23 inserted subsections (2A) and (2B) in section 122 of the 1972, as set out in paragraph 45 above. A further amendment inserted in section 270(1) of the 1972 Act a definition of *"open space"* by reference to the meaning assigned to that phrase by section 290(1) of the 1971 Act (now section 336(1) of the 1990 Act – see paragraph 47 above).

101. By virtue of part 13 of schedule 34 to the 1980 Act, the words *"open space"* were omitted from section 122(2)(a) of the 1972 Act. As a result of that amendment, principal councils were no longer required to follow the special procedure contained in section 121 of the 1971 Act in order to appropriate open space land exceeding 250 square yards in area. They were now able to appropriate such land in accordance with the procedure now contained in sections 122(2A) of the 1972 Act. Whereas appropriation of an area of land in excess of 250 square yards which forms part of a common, fuel or field garden allotment continues to be governed by the special procedure now contained in section 229 of the 1990 Act (which is the statutory successor to section 121 of the 1971 Act).

102. Paragraph 14 of schedule 23 to the 1980 Act inserted subsections (2A) and (2B) in section 123 of the 1972 Act, as set out in paragraph 46 above. Part 13 of schedule 34 to the 1980 Act repealed section 123(3) of the 1972 Act. Following the repeal of section 123(3)(a), principal councils were no longer limited in the exercise of their general power of disposal in respect of open space forming part of public trust land to an area not in excess of 250 square yards.

103. Paragraph 3 of schedule 23 to the 1980 Act also substituted new sections 23(2B) and 26(2A) in the 1959 Act. These removed the requirement for Ministerial consent to the appropriation or disposal of land consisting of or forming part of an open space and (mirroring sections 122(2A) and 123(2A) of the 1972 Act) replaced it with advertisement and consultation requirements in advance of a decision whether to appropriate or to dispose (as the case may be).

Day v Shropshire

104. In *Day*, the local authority was the freehold owner of open space which was public trust land, being held either under section 164 of the 1875 Act or section 10 of the 1906 Act. The local authority had sold the land to a third party for the purposes of carrying out housing development. The local authority had done so without having followed the procedure laid down by section 123(2A) of the 1972 Act; in other words, the local authority had not advertised the proposed sale of the land and considered any objections received in response, prior to deciding to dispose of it. The question for the Supreme Court was whether the sale to the third party had nevertheless extinguished the statutory trusts under sections 164 of the 1875 Act and section 10 of the 1906 Act, by virtue of the operation of sections 123(2B) and 128(2) of the 1972 Act. The Supreme Court held that the statutory trusts had not been extinguished.

105. The relevance of *Day* to the issues arising in the present case lies not only in Lady Rose's analysis of the legislative history to which I have already referred, but also, and indeed in particular, in her conclusions about what was needed in order to extinguish

public rights in public trust land (whether the statutory trusts have arisen by virtue of section 164 of the 1875 Act or section 10 of the 1906 Act).

106. At [92] in *Day*, Lady Rose said that statutory trust land has generally been treated as being different from other land, so that wide powers applicable to appropriation or disposals of all land held by local authorities are not regarded as overriding the public's rights to enjoy recreation land. What, therefore, was required in order to override those rights? The Supreme Court answered that question in [101]-[102] of Lady Rose's judgment –

> *"101. What I gather from all the cases to which we have been referred is that Parliament, when enacting Part VII of the LGA 1972 and when amending those provisions in 1980, can have been in absolutely no doubt that very clear words indeed were needed in order for a power to dispose of land to be effective in extinguishing the public's rights under the statutory trusts created in public walks and pleasure grounds under section 164 PHA 1875 or open spaces under section 10 OSA 1906.*
>
> *102. Very clear words indeed were used in section 123(3) as originally enacted and in the amended provisions. Those expressly stated that where the statutory requirements were complied with, the land disposed of would be 'freed from any trust arising solely by reason of its being public trust land'."*

107. At [109]-[110], Lady Rose said that the changes made by Parliament in under the 1980 Act, introducing the new subsections (2A) and (2B) into section 123 of the 1972 Act, removed the land area restriction for public land and the requirement for Ministerial consent for open space other than public trust land. But Parliament still specified expressly what was needed in order for the land to be freed from the public trust, if it was open space which was held for the purposes of the 1875 Act or the 1906 Act. That *"careful and considered amendment"* of the original provisions of the 1972 Act was designed to delimit the circumstances in which the statutory trusts referred to in section 123(2B) of the 1972 Act will be overridden by a sale of the land. The *"elaborate provisions"* of section 123 were *"clearly designed to secure that members of the public should have ample opportunity to learn what was proposed and the right to contend that the statutory trust land should not be sold".* At [111] she said –

> *"The requirements of section 123(2A) are not of themselves onerous; where the local authority knows the status of the land in its control there should be no difficulty in it complying with the requirements. The difficulty of then proceeding with the sale and freeing the land from the statutory trust will depend on the number and persistence of the objectors".*

108. Mr Matt Hutchings KC, who appeared for the Defendant, drew my attention to *R v Westminster City Council ex parte Leicester Square Coventry Street Association Ltd* (1990) 59 P&CR 51 as an example of a case in which public trust land had been freed from the statutory trusts through operation of the special provisions of section 123(2A) and (2B) of the 1972 Act. At page 53, Simon Brown J said –

> *"Subsections (2A) and (2B) contain special provisions relating to land held (as this is) subject to section 10 of the Open Spaces Act 1906; nothing, however turns upon these…Westminster followed the correct procedures and thus the land was freed from its section 10 trust".*

Statutory interpretation

109. In *R(O) v Home Secretary* [2023] UKSC 3; [2023] AC 255 at [29] Lord Hodge JSC gave the following guidance on the process of statutory interpretation –

> *"29. The courts in conducting statutory interpretation are seeking the meaning of the words which Parliament used…Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context….Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained…".*

The correct approach to scrutiny of officers' reports

110. In *R (Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314; [2019] PTSR 1452 at [42] Lindblom LJ summarised the principles upon which the court acts when criticisms are made of a planning officer's report on a planning application to a local authority's planning committee. Although the present case is not concerned with a legal challenge to a planning decision, I consider that the following guidance is relevant to the issue raised in ground 3 of the present claim –

> *"Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge … The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice".*

The Grounds of Challenge

The status of the Park as open space

111. Before turning to the four grounds of challenge, it is necessary to explain the agreed position reached by the parties in relation to the status of the Park as open space.

112. It was not in dispute between that parties that the Park, including the land to be disposed of by way of lease to THFCL under the Agreement, falls within the definition of "open space" given in article 6 of the 1967 Act Order. Nor was it in dispute that the proposed lease of land at the Park to THL under the Agreement will constitute a disposal of land forming part of an open space which engages the statutory requirements enacted under subsection 123(2A) of the 1972 Act. To that extent, it is common ground that the Defendant acted in accordance with the requirements of section 123(2A) of the 1972 Act in advertising its intention to dispose of that land by way of lease to THFCL in December 2022; and in considering the responses received from members of the public as part of the June report.

113. Following the issue of this claim, however, there was at least initially a dispute between the parties as to whether the land which was to be leased to THL under the Agreement had been acquired by MCC and was now held by the Defendant under section 164 of the 1875 Act.

114. In paragraph 28 of its detailed grounds for contesting the claim issued on 7 December 2023, the Defendant's case was that, on the available evidence, MCC had acquired the freehold estate in the Park for mixed purposes. The Defendant contended that MCC could not have acquired the freehold estate for the purposes of section 164 of the 1875 Act, as the imposition of the statutory trust for public recreation over the whole of the Park would have been inconsistent with the intended use of 50 acres of the land acquired as playing fields under section 69 of the 1925 Act. However, paragraph 30 of the Defendant's detailed grounds stated –

> *"30. Nevertheless, in making relevant decisions in relation to the golf course and Park, [the Defendant] has treated the Park as if it were subject to a statutory trust for public recreation".*

115. Meanwhile, the Claimant had carried out searches at the London Metropolitan Archives and discovered further historic documents relating to MCC's purchase of the Estate and subsequent letting of the Park to the UDC in the early 1930s. On 25 January 2024 the Claimant's solicitor supplied those documents to the Defendant for review.

116. On 29 January 2024, the Defendant's solicitor wrote to the Claimant's solicitor contending that the further documents supplied by the Claimant confirmed that MCC had acquired the Park for mixed purposes. The Defendant then said –

> *Crucially, it also shows that, prior to the conveyance of the freehold dated 1 September 1931, Middlesex fixed specific areas of the Park to be acquired for each of these purposes.*
>
> *This is particularly clear from the letter from the District Valuer dated 25 June 1931, which apportioned the agreed purchase price of £23,000 'to certain defined areas', as follows: 30 acres to be utilised for the purposes of s.68 of the Public Health Act 1925; 21.33 acres including the mansion and outbuildings to be devoted to the purpose of hospital accommodation; and 202.67 acres acquired as open space. The above area of 30 acres, plus 196 acres out of the area of 202.67 acres, were subsequently let to the UDC.*
>
> *We therefore accept on behalf of the Council that Middlesex acquired 202.67 acres of the total 254 acres for the purposes of s.164 of the Public Health Act 1875 and that, consequently, this area of the Park is held by the Council for these purposes.*
>
> *Since the area of the Park agreed to be let to THL exceeds 51.33 acres, it logically follows that (regardless of the precise locations of the areas acquired as playing fields and for welfare purposes) at least part of the land to be let to THL was acquired by Middlesex and consequently is held by the Council for the purposes of s.164 of the Public Health Act 1875".*

117. That analysis forms the basis of paragraph 1 of the agreed list of issues signed by counsel for all parties. I note also paragraph 3 of that agreed list, which records the Claimant's agreement that at least 202.67 acres of the 254 acres of the Park were acquired and have at all times and are currently held pursuant to section 164 of the 1875 Act; and that at least part of the land to be let to THFCL was acquired by MCC and consequently is held by the Defendant for the purposes of section 164 of the 1875 Act.

Ground 1

Issue

118. The main issue arising under ground 1 is whether section 123 of the 1972 Act empowers the Defendant to dispose of that part of the Park which is to be let to THFCL under the proposed 25 year lease. The specific question is whether the effect of sections 131(1)(b) and 131(2)(k) of the 1972 Act is to restrict the Defendant's powers of disposal of that open space to those authorised by the 1967 Act Order.

119. The argument before me focused upon the proposed use of that part of the Park which is shown edged in blue on Plan 1 in the draft Lease annexed to the Agreement **['the blue land']**. The blue land comprises about 18 per cent of the overall area of the Park. Paragraph 19 of the June Report summarised THL's proposals for the use of the blue land in the following way –

> *"The area of the park which THL would have exclusive use of was previously used as a golf course and it would be limited to approximately 18% of the overall park. This area would be dedicated to growing women's and girls' football with a new state of the art Football Academy as well as a new Turf Academy, and access would be managed by the Club. The proposed Football Academy aligns with the Council's ambition of increasing opportunity for women and girls to play sport in Enfield".*

120. Mr Goodman KC also drew attention to the Equality Impact Assessment completed by the Defendant on 31 May 2023, which stated –

> *"Proceeding with the proposal would mean that the Council and THL would enter into a conditional Agreement for Lease for the former Whitewebbs Golf Course to be leased by THL if the conditions in the AfL are fulfilled. It is anticipated that approximately 18% of Whitewebbs Park as a whole would be dedicated to a women's and girls' football training academy and a turf academy with limited public access".*

121. Those passages in the June Report and the Equality Impact Assessment are essentially reflected in the permitted uses of the blue land under the terms of the proposed lease. I have set out the "Permitted Use" as defined in clause 1 of the draft lease in paragraph 28 of this judgment. Paragraphs (a)(i) and (ii) of that definition state the uses which are to be permitted in the blue land. As is clear from the terms of paragraph (e) of the definition of the permitted use (*"(e) all other areas not used for the foregoing uses to be accessible to the public as open space for recreational purposes"*), both the Defendant and THL expect that the public will not have regular access to the blue land, which comprises about 18 per cent of the Park, for use as open space for recreational purposes. At the very least, following the grant of the proposed lease, the public's ability to gain access to the blue land for use as open space for recreational purposes will become very limited and subject to the day to day demands of THL's football academy, training ground and turf academy operations.

Submissions

122. For the Claimant, Mr Goodman KC submitted that the Defendant does not have the power under section 123 of the 1972 Act to dispose of part of the Park by way of lease on terms which will deprive the public for 25 years of the ability to gain access to the blue land for use as public open space for recreational purposes. Although in former years the public have given way informally to those playing golf on the golf course, the

existence of the golf course did not hinder the public's ability to gain access to the Park. The public were not excluded from the golf course. Members of the public were able to pass freely over the golf course, just as they were over the Park as a whole. In contrast, by virtue of the proposed 25 year lease to THFCL, members of the public will be limited in their enjoyment to no more than 82% of the open space provided within the Park.

123. Mr Goodman KC submitted that the power to dispose of land conferred on the Defendant by section 123(1) must be read with section 131(1) of the 1972 Act. It was a power to dispose of land in any manner which the Defendant may wish, but the power was not to be exercised otherwise than in accordance with the provisions of the 1967 Act Order (it being common ground that the 1967 Act Order falls within section 131(2)(k) of the 1972 Act).

124. Mr Goodman KC referred to article 8 of the 1967 Act Order, which authorises the Defendant to let any part of an open space to which that order applies for the purposes of exercising any of the powers conferred by article 7. Although articles 7 and 8 of the 1967 Act Order authorise London borough councils to provide a wide range of recreational facilities within London parks and to licence or let land or buildings within London parks for such purposes, those powers do not extend to letting open space within the Park for purposes inconsistent with continued public recreation. In particular, it was submitted, to dispose of land within the Park on a 25 year lease to a private company for private development and uses excluding the public from enjoying the demised premises as open space for public recreation, was not within the powers of articles 7 and 8 of the 1967 Act Order.

125. The Defendant was not able lawfully to escape the limitations on its powers of disposal under articles 7 and 8 of the 1967 Act Order by invoking the general power of disposal granted by section 123(1) of the 1972 Act. That was the inescapable effect of section 131(1)(b) of the 1972 Act. In purporting to rely on its powers under section 123(1) of the 1972 Act as the source of its authority to enter into the Agreement and to grant the proposed lease to THFCL, the Defendant had acted (and threatens to act) otherwise than in accordance with articles 7 and 8 of the 1967 Act Order. By virtue of sections 131(1)(b) and 131(2)(k) of the 1972 Act, the Defendant is not empowered so to act. The Claimant's submission was that the Defendant does not have the power under section 123(1) read with section 131(1)(b) of the 1972 Act, to dispose by way of lease of a substantial area of the Park to a private company for purposes and activities which are primarily private and commercial in nature and necessarily exclude the public from access for the majority of the time.

Discussion

126. A principal council's power under section 123(1) to dispose of land which it holds by way of long lease is widely expressed. It may dispose of such land in any manner it wishes. In the case of land which consists of or forms part of an open space, a principal council must fulfil the requirements of subsection 123(2A) of the 1972 Act before it is in a position lawfully to dispose of such land under section 123(1). Conversely, having fulfilled those requirements, a principal council is able to dispose of such land freed from any trust arising solely by virtue of the land being held in trust for the enjoyment of the public under section 164 of the 1875 Act (or section 10 of the 1906 Act). That is

the effect of the very clear words of subsection 123(2B) of the 1972 Act: see *Day* at [102].

127. However, Mr Goodman KC is correct in his submission that, in the present case, the wide powers of disposal granted to the Defendant by section 123(1) of the 1972 Act must not be exercised otherwise than in accordance with the provisions of the 1967 Act Order. That is the effect of section 131(1)(b) of the 1972 Act and the consequence of the 1967 Act Order being an Act confirming a provisional order within the terms of section 131(2)(k) of the 1972 Act. It is beyond argument that the 1967 Act Order contains provisions which relate to dealing in land by a local authority: Part 2 of the 1967 Act Order provides for the use, disposal, acquisition and exchange of open space land within the ownership and control of London borough councils.

128. Mr Goodman KC is also correct in his submission that the Defendant enjoys powers under the provisions of the 1967 Act Order which enable it both to provide a wide range of recreational facilities at the Park and to let land at the Park to any person for the purposes of providing such recreational facilities. That is the effect of articles 7 and 8 of the 1967 Act Order.

129. It was the Claimant's case that both the Agreement and the proposed lease to THFCL fall outside the purposes and scope of articles 7 and 8 of the 1967 Act Order. Although that is disputed by THL and by the Defendant, at this stage in my analysis I must assume that the Claimant is right and that, at the very least, the proposed disposal of the blue land for the purposes which are described in the June report and the proposed lease may not be authorised by virtue of articles 7 and 8 of the 1967 Act Order.

130. It is also fair to say that when the Defendant reached its decision to enter into the Agreement for the proposed lease, it did not do so relying on its powers conferred by articles 7 and 8 of the 1967 Act Order. It did so relying on its powers of disposal under section 123(1) of the 1972 Act, and on the basis that it had properly fulfilled the requirements of section 123(2A) of the 1972 Act. Mr Hutchings KC's primary argument in response to ground 1 was that the Defendant's decision to enter into the Agreement for the grant of the proposed lease fell squarely within the powers conferred on the Defendant by section 123(1) of the 1972 Act, read together with both sections 131(1)(b) of that Act and the 1967 Act Order, read as a whole.

131. The Claimant's case under ground 1 necessarily founds on the argument that the effect of section 131(1)(b) of the 1972 Act when read with the powers conferred by articles 7 and 8 of the 1967 Act Order is to limit the Defendant's powers of letting open space within the Park to those conferred by articles 7 and 8 of the 1967 Act Order. In order for that argument to succeed, it is necessary to read the 1967 Act Order as excluding the exercise by London borough councils of the powers of disposal conferred by section 123 of the 1972 Act, at least insofar as they might otherwise be applied to land falling within the definition of open space in article 6 of the 1967 Act Order.

132. Read in strict isolation, that construction of articles 7 and 8 of the 1967 Act might be arguable, if only on the basis that it can be argued that a power which is granted for certain stated purposes gives rise to the implication that other purposes are excluded. However, in my view, it is necessary to read articles 7 and 8 of the 1967 Act Order not merely in isolation but rather in the context of the whole Order. In particular, it is necessary to give proper effect to article 20 of the 1967 Act Order.

133. I have set out the terms of article 20 in paragraph 59 above, but they merit repetition –

> *"20. The powers conferred upon a local authority by or in pursuance of this Part of this order shall be in addition to and not in derogation of any other powers possessed by any such authority independently of this order".*

134. The effect of article 20 is, in my view, that the purpose and intention of Part 2 of the 1967 Act Order is to give London borough councils additional powers for the management and use of open space land within their ownership and control. Put another way, the powers conferred under Part 2 are to stand alongside other powers which a London borough council may possess in relation to open space within its ownership or control – as article 20 states *"independently of this order"*.

135. Moreover, the powers conferred by Part 2 of the 1967 Act Order are not to be read as derogating from any other powers possessed by a London borough council independently of that Order. In *Finsbury Park* at [52(v)], Hickinbottom LJ read article 20 as expressly providing that the powers of the 1967 Act Order are *"supplementary to any powers derived from other Acts"* rather than excluding other powers which were on their face given to London boroughs. He read article 20 as a *"clear flag"* of the intention of Parliament, i.e. that the powers conferred by Part 2 of the 1967 Act Order are to be read as supplementing other powers enjoyed by London boroughs, rather than as excluding or restricting the operation and exercise of those other powers.

136. I can see no good reason to take a different approach to article 20 of the 1967 Act Order in the present case. Mr Goodman KC submitted that *Finsbury Park* was to be distinguished because it was concerned with the application of section 145 of the 1972 Act, which was not one of the *"foregoing provisions of this Part of this Act"* whose operation was subject to the saving provisions in section 131(1)(b) of the 1972 Act. That particular point may be correct, but it does not diminish the relevance or force of Hickinbottom LJ's analysis of article 20 in [52(v)] of *Finsbury Park*. It is article 20 itself which, in clear terms, states the legislative intention that the powers given by Part 2 of the 1967 Act Order are to be taken as being available to London borough councils in addition to other powers which they possess, not as impliedly excluding or limiting the exercise of those other powers.

137. Mr Goodman KC submitted that article 20 of the 1967 Act Order did not operate to relieve the Defendant from exercising its powers under section 123(1) in accordance with the saving provision in section 131(1)(b) of the 1972 Act. It was section 131(1)(b) of the 1972 Act which limited the exercise of the power of disposal in respect of a letting of open space land to the purposes stated in articles 7 and 8 of the 1967 Act Order. He relied upon article 11(2) of the 1967 Act Order, which prohibited the use of the powers conferred by articles 7 and 8 in respect of any open space in such a manner that members of the public are by reason only of the exercise of those powers, unable to obtain access without charge to some part of that open space.

138. The difficulty with Mr Goodman KC's argument, in my view, is that it requires article 20 of the 1967 Act Order to be ignored when applying section 131(1)(b) of the 1972 Act. Mr Goodman KC submitted that it would be an internally inconsistent reading of the 1967 Act Order to interpret article 20 as overriding the limitations or restrictions imposed by article 11 on the exercise by a London borough council of its powers under articles 7 and 8 of the 1967 Act Order. I can see the force of that submission, but it is not the material point. The material point is that, for the purposes of applying section 131(1)(b) of the 1972 Act, article 20 is no less relevant a provision of the 1967 Act Order than articles 7, 8, 10 and 11 of that Order.

139. Article 20, therefore, must be given its proper effect which, for the reasons I have given, is that the provisions of the 1967 Act Order supplement rather than exclude a London borough council's power as a principal council to dispose of open space land by way of lease under section 123 of the 1972 Act (as I have summarised those powers in paragraph 126 above).

140. The Claimant submitted that the legislative history supported the view that by virtue of section 131(1)b) of the 1972 Act, the Defendant's power to dispose of open space land are limited to those conferred by the 1967 Act Order. It is necessary, therefore, to turn back to the legislative context in which the 1967 Act Order was enacted; and to the changes to the powers of disposal of land granted to principal councils under general local government legislation in the period since the 1967 Act Order was enacted. I have surveyed that legislative history in paragraphs 78ff. above.

141. The 1967 Act Order was enacted on 27 July 1967. As at that date, sections 164 and 165 of the 1933 Act and section 26 of the 1959 Act governed local authorities' general powers of disposal of land in their possession (whether by sale, lease or short lease). Under those statutory provisions, local authorities were –

(1) empowered, with the consent of the Minister of Housing and Local Government, to sell, or to lease for a term longer than 7 years, all or any part of open space belonging to them which was not public trust land and which (in the case of sale) was not required for the purpose for which it was held (sections 164 and 165 of the 1933 Act and section 26(1) (2) and (3) of the 1959 Act).

(2) not authorised to sell or lease land in breach of any trust (section 179(d) of the 1933 Act).

(3) where any local Act contained provisions relating to the disposal of land, not empowered to effect any transaction which might be effected under those local provisions otherwise that in accordance with them (section 179(g) of the 1933 Act).

142. In *Blake* in 1962, the Court of Appeal had held that, in its application to public trust land, the power of letting conferred by section 164 of the 1933 Act could be validly exercised only if compatible with full use by public of the land in question as open space, public walks or pleasure grounds. Subsequently, in 1972, Goff J in *Laverstoke* applied the same principle to the exercise of the power of sale conferred by section 165 of the 1933 Act.

143. Viewed against that general legislative context, it seems to me that Mr Goodman KC is correct to say that the powers given to London borough councils under articles 7, 8 and 11 of the 1967 Act Order may reasonably be said to have conferred greater flexibility for disposal of open space land, at least by way of letting, than local authorities otherwise enjoyed under the 1933 Act. It follows that following the coming into force of the harmonised, London-wide powers created by Part 2 of the 1967 Act Order, section 179(g) of the 1933 Act did not in practice operate to restrict London borough councils who would otherwise have proposed to let open space land in the exercise of their general power under section 164 of the 1933 Act. London borough councils were now able to let their open space land for the recreational purposes set out in article 7 of the 1967 Act Order without the need to secure Ministerial consent (although of course subject to articles 11 and 12 of that Order).

144. Five years later, the 1972 Act repealed the 1933 Act. The powers of disposal of land given to principal councils by section 123 of the 1972 Act were a little more

generous in their application to open space land than had been the case under the 1933 and 1959 Acts. A principal council was authorised by section 123(1) to dispose of public trust land to the limited extent stated by section 123(3)(a) and subject to the publicity and consultation requirements created by section 123(3)(b) of the 1972 Act. Compliance with those requirements freed the open space land sold or let from the public trust. The requirement to obtain ministerial consent under section 26 of the 1959 Act was disapplied by section 128(3) of the 1972 Act. However, ministerial consent continued to be required for a disposal of open space which was not public trust land, other than by way of short tenancy: see section 123(4) and (5) of the 1972 Act (as originally enacted).

145. The saving provisions under sections 179(d) and (g) of the 1933 Act had also been repealed and replaced by sections 131(1)(a) and (b) of the 1972 Act. Mr Goodman KC submitted that those newly enacted saving provisions did not in practice operate to restrict London borough councils in the letting of their open space land. The powers they already enjoyed under articles 7, 8 and 11 of the 1967 Act remained at least arguably greater in extent than their general powers under section 123 of the 1972 Act, particularly having regard to the very limited extent of public trust land that principal councils were authorised to dispose of under sections 123(1) and (3)(a) of that Act. Again, that submission seems to me to be correct.

146. Things changed markedly, however, following the enactment of the 1980 Act. In paragraphs 100 to 103 above, I have set out the amendments made by the 1980 Act both to the 1972 Act and to the 1959 Act. The effect of those amendments was to free principal councils from the obligation to obtain ministerial consent to the disposal of open space within their ownership (unless disposed of for less than the best consideration reasonably obtainable). Moreover, principal councils were no longer limited in the exercise of their general power of disposal in respect of open space forming part of public trust land to an area not in excess of 250 square yards. Instead, principal councils were required to follow the publicity and consultation requirements enacted under section 123(2A) of the 1972 Act. In comparison to the powers conferred on principal councils under section 123 of the 1972 Act in its original form, these changes were correctly characterised by the draftsman as an overall relaxation of controls.

147. Mr Goodman KC points out that, although relaxing those controls on the exercise by principal councils of their general powers of disposal of open space under section 123 of the 1972 Act, Parliament amended neither the saving provisions in section 131 nor the 1967 Act Order. This, it was submitted, shows the legislative intention to have been that London-wide arrangements for the management, control and disposal of open space enacted under the 1967 Act Order should continue to apply, to the exclusion of the now wider, general powers of disposal otherwise available to principal councils under section 123 of the 1972 Act, following the relaxation of controls enacted by the 1980 Act.

148. It was further submitted that there is nothing remarkable about Parliament legislating in a special way for London. Mr Goodman KC drew attention to numerous examples of such special London-wide legislation in other fields of regulation and control. There was, it was submitted, a rational basis for Parliament to have limited principal councils who are London borough councils to the more restricted powers of disposal of open space land in Greater London given by the 1967 Act Order: metropolitan open space is a particularly valuable public amenity and accordingly

merits the protection which results from more limited powers for its disposal other than for purposes consistent with its continuing enjoyment by the general public.

149. Persuasively though this line of argument was put by Leading Counsel, I am unable to accept it. As I have already explained, consideration of the legislative context in which the 1967 Act Order was enacted shows that articles 7 and 8 of that Order gave London borough councils more extensive powers of letting of open space in Greater London than they then enjoyed under their general disposal powers. It is reasonable to see that state of affairs as continuing following the enactment of section 123 of the 1972 Act in its original terms.

150. That, however, is an analysis of the practical utility from 1967 onwards of the powers of disposal available to London borough councils under the 1933 Act, and later the 1972 Act, as compared with those granted by the 1967 Act Order. It is not a justification for concluding that the effect in law of section 131(1)(b) of the 1972 Act is to confine a London Borough council to the powers of disposal of open space granted under the 1967 Act Order, to the exclusion of its general power of disposal as a principal council under section 123 of the 1972 Act.

151. In my view, in order to see whether that contention as to the effect in law of section 131(1)(b) of the 1972 Act is justified, it is necessary to return to article 20 of the 1967 Act Order. Section 131(1)(b) of the 1972 Act cannot itself provide the answer, since whether (and if so, to what extent) that saving provision excludes or limits a principal council in the exercise of its power of disposal of land under section 123 turns on the provisions of the particular enactment specified in section 131(2) which is in play in the given case. Section 131(1)(b) tells us that a principal council is not empowered by its general power of disposal under section 123 to act otherwise than in accordance with any provision contained in a specified enactment relating to a dealing in land by a local authority. Section 131(1)(b) does not tell us whether that principal council does or does not act in that way. In order to understand whether that is indeed the position, we must look to the provisions of the specified enactment.

152. In that important respect, section 131(1)(b) of the 1972 Act requires a different approach to that which was required by its statutory predecessor, section 179(g) of the 1933 Act. Under that earlier saving provision, where a local authority was able to effect a sale or letting of land which it owned under one of the saved enactments in the seventh schedule to the 1933 Act, the authority was obliged to use that saved power and carry out the disposal in accordance with that power. Whereas under section 131(1)(b) of the 1972 Act, a principal council is able to rely upon its general power of disposal under section 123, provided that in so doing the council acts in accordance with the provisions of the saved enactments under section 131(2) of the 1972 Act.

153. The approach required under section 131(1)(b) of the 1972 Act may be illustrated by reference to section 8 of the Allotments Act 1925, which prohibits the sale, appropriation, use or disposal by a local authority of land held by them as allotments without ministerial consent. It is obvious that a purported sale by a principal council in reliance on section 123(1) of the 1972 Act of a parcel of allotment land, without having first obtained ministerial consent, would be otherwise than in accordance with section 8 of the 1925 Act and, for that reason, contrary to section 131(1)(b) of the 1972 Act.

154. A further illustration, closer in its subject matter to the present case, is provided by *Muir*.

155. In *Muir*, the land and buildings to be leased for use as a private children's nursery was held by the local authority as part of Wandsworth Common under the Wandsworth Common Act 1871. At first instance in *Muir*, at [32]-[33] Lang J referred to sections 33 and 34 of that Act –

> *"33. The conservators…shall by all lawful means prevent resist and abate all encroachments and attempted encroachments on the common and protect the common and preserve it as an open space and resist all proceedings tending to the enclosure or appropriation for any purpose of any part thereof.*
> *34. It shall not be lawful for the conservators except as in this Act or the agreement schedule thereto expressed to sell lease grant or in any manner dispose of any part of the common".*

156. Over time, the freehold estate in the common was subject to statutory transfer, coming into the ownership of Wandsworth LBC by virtue of the 1971 Transfer Order. At [35], Lang J records it as being common ground between the parties that –

> *"upon each of these transfers, the new freeholder was vested with the duties and powers originally conferred upon the conservators by the 1871 Act".*

157. These passages from Lang J's judgment in *Muir* show that the Wandsworth Common Act 1871 was a local Act whose clauses prohibited the letting by the principal council, Wandsworth London Borough Council, of any part of the common. A purported disposal by Wandsworth under section 123 of the 1972 Act of land forming part of the common would not have been in accordance with section 34 of the local Act. The saving provisions of section 131(1)(b) operated, on those facts, to deny Wandsworth the right to grant the lease for the children's nursery under section 123 of the 1972 Act. For that reason, it is unsurprising that the issue before the court was whether the proposed lease in *Muir* was within Wandsworth's powers to grant under articles 7 and 8 of the 1967 Act Order. As Lang J observed at [67] of her judgment, if that were found to be the position, then the effect of article 11 of the 1967 Act Order was to enable *"the prohibition on letting in section 34 of the 1871 Act"* to be overridden.

158. In contrast to both section 8 of the Allotments Act 1925 and section 34 of the Wandsworth Common Act 1871, the provisions of the 1967 Act Order upon which the Claimant principally relies in the present case, that is articles 7 and 8, contain no prohibition on the letting of open space land belonging to a London borough council. On the contrary, both articles 7 and 8 are essentially permissive – their purpose is to confer power rather than to deny power. In particular, article 8 confers an express power to let land owned by a London borough council which forms part of an open space. Although the exercise of those permissive powers is regulated by the provisions of article 11 of the 1967 Act Order, including the restriction on charging imposed by article 11(2), their essential character and purpose is to authorise London borough councils to let open space for stated purposes, rather than to prohibit them from letting open space.

159. It is necessary to return to article 20 of the 1967 Act Order. At the date of its enactment, as we have seen, the powers of letting open space for recreational purposes conferred by article 7 and 8 of that Order were accurately to be described as being *"in addition to"* other powers then possessed by London borough councils independently of the 1967 Act Order. Such other powers that then existed to dispose of open space were limited and generally exercisable only with ministerial consent. Conversely, there

was little in the way of existing powers of disposal of open space from which the 1967 Act Order might *"derogate"*. That remained broadly the position following the enactment of section 123 of the 1972 Act in its original terms.

160. The position was quite different following the amendments to section 123 of the 1972 Act which were introduced by the 1980 Act. Had it been intended that the more extensive powers of disposal of open space land enjoyed by principal councils after 1980 should not be available to London boroughs, then it would have been open to Parliament to make that clear by amendment to article 20 of that Order. Likewise, had it been intended that the 1967 Act Order should now be read and applied in derogation of the extended powers and relaxed controls under section 123 of the 1972 Act in its amended terms, it would have been open to Parliament to have made that clear by amendment to article 20.

161. Instead, article 20 of the 1967 Act Order has been in effect in its original terms since that Order was enacted in 1967, notwithstanding the subsequent legislative history of progressive relaxation of the controls on principal councils' powers of disposal of open space land, through to the current arrangements under section 123 of the 1972 Act.

162. For these reasons, I see no basis in the legislative history to depart from my conclusion that, by virtue of article 20, the provisions of the 1967 Act Order supplement, sit alongside but do not exclude a London borough council's power as a principal council to dispose of open space land by way of lease under section 123 of the 1972 Act.

Conclusions

163. For these reasons, I cannot accept the Claimant's submission that the Defendant is unable to exercise the power under section 123 of the 1972 Act to dispose of part of the Park, by way of lease, on terms which will deprive the public for 25 years of the ability to gain access to the blue land for use as public open space for recreational purposes.

164. In my judgment, the Defendant did not act otherwise than in accordance with the provisions of the 1967 Act Order in entering into the Agreement and deciding to grant the proposed 25 year lease of land at the Park to THFCL for its proposed use as a football training facility and turf academy. By virtue of article 20 of the 1967 Act Order, the Defendant's powers of letting as a London borough council, under articles 7, 8 and 11 of that Order, are correctly to be regarded as being in addition to the Defendant's powers of disposal of land as a principal council, under section 123 of the 1972 Act. Moreover, the Defendant's powers of letting under articles 7, 8 and 11 of the 1967 Act Order are not to be regarded as derogating from its powers of disposal under section 123 of the 1972 Act. The Defendant's powers of disposal under section 123 of the 1972 Act are other powers which it possesses as a principal council, independently of its powers as a London borough council under Part 2 of the 1967 Act Order.

165. Subject to fulfilling the requirements of section 123(2A), the Defendant has the power under section 123 of the 1972 Act to enter into the Agreement to dispose of open space land at the Park under the proposed 25 year lease to THFCL for that proposed use. The Defendant's exercise of that power for that purpose is not affected by the saving provision in section 131(1)(b) of the 1972 Act, because the grant of the proposed lease for that purpose is in accordance with the provisions of Part 2 of the 1967 Act Order read as a whole.

166. Finally, in arriving at these conclusions on ground 1 I have not found it necessary to rely on the observations of Lord Scott of Foscote to which Mr Maurici KC and Mr Semakula drew my attention, in *R(Beresford) v Sunderland City Council* [2004] 1 AC 889 at [28] and at [89] in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674. Mr Goodman KC's argument in support of ground 1 was firmly focused on the effect of section 131(1)(b) of the 1972 Act and the provisions of the 1967 Act Order. As I read them, Lord Scott's observations are not, at least in any direct way, concerned with the operation of the saving provisions enacted under section 131 of the 1972 Act.

Is the proposed lease to THFCL within articles 7 and 8 of the 1967 Act Order?

167. In the light of my conclusions it is, strictly speaking, unnecessary for me to go on to consider whether the Agreement and the proposed 25 year lease to THFCL is for purposes which fall within the scope of article 7 of the 1967 Order. Nevertheless, having heard counsel's submissions on that question and in case I am wrong in my conclusions on the principal issue raised under ground 1, I should briefly set out my conclusions on that alternative line of defence advanced on behalf of THL but also supported by the Defendant.

168. Mr Maurici KC and Mr Semakula submitted that the Agreement and the proposed 25 year lease to THFCL are consistent with the 1967 Act Order.

169. The Agreement and the proposed lease provide for the retention of 82 per cent of the Park as accessible public open space, an area that is in practice greater than was previously the case when the golf course was in operation.

170. As to the remaining 18 per cent, that is the blue land, which is to be developed as a football training centre and turf academy, counsel submitted that the Club is *"unquestionably"* a club. The proposed training facility will have a social and educational element. It will foster a large element of community access and support women's and girls' football locally. It will consist of both indoor and open air facilities catering for the Club's women's team, for academy teams and the wider community (including boys and mixed training). The proposals were not confined to commercial football training, as the Claimant contends.

171. Mr Maurici KC and Mr Semakula submitted that the blue land is to accommodate indoor facilities for football training and so falls within the wide scope of article 7(1)(a)(v) of the 1967 Act Order – *"indoor facilities for any form of recreation whatsoever"*. The blue land is to accommodate indoor and outdoor facilities for use by the Club and so falls within the wide scope of article 7(1)(a)(vi) of the 1967 Act Order – *"centres and other facilities (whether indoor or open air) for the use of clubs, societies or organisations whose objects or activities are wholly or mainly of a recreational, social or education character"*.

172. I approach these submissions in the light of the guidance given by the Court of Appeal in *Muir* to which I have referred in paragraphs 74 to 77 above.

173. In order to come within article 7(1)(a)(v) of the 1967 Act Order, THL's proposed facilities must be wholly or mainly for recreation. It seems to me correct to say that a football training centre which includes both indoor and outdoor components may justifiably be said to be a facility which is to be used wholly or mainly for recreation. Recreation clearly embraces sports and pastimes. Football training for women, girls and boys, even if largely focused on developing the skills of professional or would-be professional footballers, is a form of recreational activity.

174. However, at [33] in *Muir*, Floyd LJ said that it is implicit in article 7 of the 1967 Act Order that the recreational facility under consideration must be open to the public and that accessibility to the public (with or without charge) is a relevant factor in reaching an overall judgment as to whether a proposed facility is (or will be) available for public recreation. As Floyd LJ said, that question is one of fact and degree, but he observed that there will come a point where the restrictions on public access become too onerous for it to be possible to say that the facility is still available for public recreation (and so falls within the scope of article 7(1)(a)(v)).

175. In the present case, paragraph 19 of the June report stated that THL would have exclusive use of the area of the Park which effectively comprises the blue land. That area would accommodate a new football academy and turf academy. Access would be managed by the Club. The user clause in the proposed draft lease draws a clear distinction between, on the one hand, use of the blue land for the provision of a women and girls football academy and training ground and the Club's Turf Academy to train ground staff and greenkeepers in conjunction with other leading sports venues; and on the other hand, the requirement that other areas of the Park not used for those purposes must be accessible to the public as open space for recreational purposes.

176. That distinction is also drawn in THL's brochure which was appended to the June report. The brochure speaks of the Club's proposal to create a women and girls football academy *"taking inspiration from the World-class facilities on offer to the Men's First Team and Academy teams at its existing Training Centre"*. It is said that the new Academy will *"work in conjunction with the Tottenham Hotspur Women's First Team, which gained professional status following promotion to the Barclays FA Women's Super League in 2019. It will be supported by the Club's Global Coaching Team and charitable Foundation, to create clear progression pathways from entry to elite level through player development programmes…"*. Of the proposed Turf Academy, the brochure states THL's aims *"to produce a new generation of exceptional sports turf, greenkeeping, horticultural and mechanical staff by giving the sports turf industry a world-class facility to educate students"*.

177. I acknowledge that both the June report, the proposed draft lease and the brochure also emphasise THL's and the Defendant's shared objective that the football academy and training centre at the blue land should focus on the development of female football at grassroots level in the Borough and beyond, seeking to grow women and girls' levels of participation in sport and leisure. The permitted user clause also speaks of the use of the blue land for *"community uses"*. I would also expect that THL would operate a policy of admitting members of the public on a regular basis to the football academy to watch team training sessions and to other community based events.

178. Nevertheless, in my view, it is clear that football academy and training facilities and turf academy training facility proposed at the blue land are not facilities which, to any significant degree, will be accessible to the public for recreation. The football training facility will be primarily focused on the development of emerging and elite professional footballers in a highly managed programme operated by a long established and successful premier league football club. The opportunity for members of the public to access that facility for recreation are likely to be very limited and subsidiary to that principal purpose. The proposed turf academy will be a highly specialised and professional training facility which is very unlikely to offer any significant opportunities for public recreation. In my judgment, neither facility would fall within the scope of article 7(1)(a)(v) of the 1967 Act Order.

179. In order to come within article 7(1)(a)(vi) of the 1967 Act Order, it is necessary to establish that the proposed football academy and training centre and turf academy are to be provided for the use of *"clubs, societies or organisations whose objects or activities are wholly or mainly of a recreational, social or educational character".* In *Muir*, an issue arose as to whether the proposed lessee of the premises on Wandsworth Common, a company operating a private children's nursery, was an *"organisation"* for the purposes of article 7(1)(a)(vi).

180. At first instance in *Muir*, at [108] Lang J applied the *eiusdem generis* principle (i.e. within the same class) and said –

> *"I agree that the identifiable class is not-for profit groups which share a common interest, of a recreational, social or educational character. It excludes a commercial organisation such as [the company]"*.

181. On appeal in *Muir*, Floyd LJ questioned (without deciding the point) whether the class identified in article 7(1)(a)(vi) was strictly limited to not-for-profit organisations. At [30] he said –

> *"The term 'organisation' in sub-paragraph (vi) is, in my judgment, there to sweep up organisations which are not strictly or properly described as clubs or societies, but which nevertheless share their principal characteristic of being run for the benefit of members sharing a common interest. The interested party does not operate on this basis, but is a limited company providing services for clients or customers".*

182. It is, of course, possible to argue that the football academy, training and turf academy facilities which THL is to operate on the blue land will be for the use of a club whose objects or activities are wholly or mainly recreational in character. The Club is a long established football club. However, in my view, it does not follow, as THL contends, that it is unquestionably a *"club"* in the sense described by Floyd LJ in *Muir*. No doubt there was a time, many decades ago, when the Club might have had the principal characteristic of an organisation which was run for the benefit of its members who shared a common interest. In my judgment, however, that cannot sensibly be said to be the Club's principal characteristic in the modern era. It remains a professional football club, but is organised on highly commercial lines within a sophisticated corporate structure with obligations to shareholders and diversified activities. Whilst it is the case that there is no hard-edged restriction to not-for-profit organisations, it seems to me that THL and its subsidiaries, including the Club, operate on a commercial basis which lies beyond the scope of the class of clubs, societies and other organisations contemplated by article 7(1)(a)(vi) of the 1967 Act Order.

183. For these reasons, I would not have concluded that the Defendant was able lawfully to enter into the Agreement and to grant the proposed lease to THFCL in the exercise of its powers under articles 7 and 8 of the 1967 Act Order.

184. Nevertheless, as I have already explained, I must reject ground 1 of the claim.

Ground 2

Issue

185. The issue arising under ground 2 is whether the Defendant was empowered to dispose of land at the Park by way of the proposed lease to THFCL without having consciously considered and decided that the land to be let should be appropriated in the exercise of the Defendant's powers under section 122(1) of the 1972 Act. In particular,

was it necessary for the Defendant to determine whether the land was no longer required for its existing purpose as open space for the enjoyment of the public?

Submissions

186. Mr Goodman KC submitted that at the time of the Defendant's decision to grant a 25 year lease of land at the Park for use as a football academy and training centre, a turf academy and related purposes proposed by THL, the land to be disposed of was held as open space for the enjoyment of the public. In order lawfully to exercise its power under section 123 of the 1972 Act to dispose of land which it held for that purpose to THL for use for other purposes, the Defendant was obliged firstly to make a decision under section 122(1) of the 1972 Act. In other words, the Defendant must first make a decision that the land to be disposed of for uses other than for the purpose of open space for the public's enjoyment was *"no longer required"* for that purpose. Moreover, that decision requires a *"conscious deliberative process"* on the part of the Defendant: see *R(Goodman) v Secretary of State for Environment Food and Rural Affairs* [2015] EWHC 2576 (Admin) at [26].

187. Mr Goodman KC drew the contrast between the factual position in the present case and another case in which, for example, a principal council proposed to grant a lease of land which it held as open space for the public's enjoyment to a third party to establish and operate a café. In that example, the council would not need to make a decision under section 122(1) in order lawfully to exercise its powers of disposal under section 123 of the 1972 Act, since the proposed use of the demised premises would be consistent with the purpose for which the council held the open space, that is a café for the benefit of the public enjoying the use of the park. However, in the present case, that is not the position. Here, the proposed use of the demised premises, in particular the blue land, is for purposes that will inevitably bring the public's enjoyment of that land to an end for at least the 25 year period during which the lease is in effect.

188. It was submitted that as originally enacted, a principal council's power of appropriation under section 122(1) of the 1972 Act did not extend to the appropriation of open space whose area in aggregate exceeded 250 square yards in extent: see section 122(2)(a) of the 1972 Act (as enacted). A principal council who wished to appropriate a larger area of open space belonging to it for another purpose was obliged to follow the procedure set out in section 121 of the 1971 Act. That limitation was removed by section 118 of and schedule 23 to the 1980 Act, whilst retaining the publicity and consultation requirements now set out in section 122(2A) of the 1972 Act. Nevertheless, the power of appropriation granted under section 122(1) of the 1972 Act remained unaffected by the amendments made by the 1980 Act. In particular, in any case in which a principal council proposes to appropriate open space of any size belonging to it for another purpose than its continuing enjoyment by the public, that council is required consciously to consider and to decide whether that land is no longer required for that existing purpose.

189. In the present case, it was submitted the Defendant had failed to make that decision. In the absence of so doing, the Defendant was not in a position lawfully to exercise its powers under section 123 of the 1972 Act to enter into the Agreement or to grant the proposed lease of land at the Park to THFCL.

Discussion

190. The power of appropriation conferred upon principal councils by section 122(1) of the 1972 Act has a long statutory history. Its origins may be traced at least as far back

as section 95 of the Public Health Acts Amendment Act 1907. In *Attorney-General v Manchester Corporation* [1931] 1 Ch 254, 269, Maugham J said –

> *"[Section 95] was no doubt passed, or partly passed, to prevent the evil which it was thought arose from the decision of the Court of Appeal in the case of Attorney-General v Hanwell Urban District Council [1900] 2 Ch 377. The headnote says (inter alia): 'A local authority have no power to apply permanently land which they have acquired for one purpose to another purpose inconsistent with the original purpose…'".*

191. In *R(Maries) v Merton London Borough Council* [2015] PTSR 295 at [53], King J said that *Dowty Boulton Paul Ltd v Wolverhampton Corporation (No 2)* [1976] Ch 13 remained the leading authority on the interpretation and approach to section 122(1) of the 1972 Act (albeit decided under the predecessor power of appropriation given by section 163(1) of the 1933 Act). At [59], King J identified three principles distilled from the judgments in *Dowty's* case –

> *"(1) whether land is still or is no longer required for a particular purpose, meaning no longer needed in the public interest of the locality for that purpose, is a question for the local authority, subject to Wednesbury principles, and not the court.*
>
> *(2) the statute is concerned with relative needs or uses for which public land has been or may be put. It does not require it to fall into disuse before the authority may appropriate it for some other purpose.*
>
> *(3) the authority is entitled when exercising its appropriation power to seek to strike the balance between comparative local (public interest) needs: between the need for one use of the land and another with the wider community interests at heart. It is for it to keep under review the needs of the locality and is entitled to take a broad view of local needs".*

192. The Claimant's submission under ground 2 is, in effect, that the Defendant was required to undertake the same process of comparative assessment in the present case, in order lawfully to decide to dispose of the land to be let under the proposed lease to THFCL.

193. I have no doubt that had the Defendant purported to exercise its power under section 122(1) of the 1972 Act in relation to the land proposed to be leased to THFCL, the Defendant would have been required to undertake that process of comparative assessment. There is, however, nothing to indicate that the Defendant intended to appropriate that land for any other purpose. The Defendant intended to take, and indeed took, a very different course. It intended to dispose of the land by way of lease to THFCL with a view to realising a financial benefit of £2M and (in the words of paragraphs 68 to 70 of the June report) –

> *"increasing the amount of freely publicly accessible open space, which was previously a golf course, the provision of community facilities, an investment in biodiversity and park infrastructure… improved space for all park users, which would help narrow the gap between the best and poorest physical and mental health among Enfield residents…the existing café and former clubhouse…would be improved…proposed improvements to the park's infrastructure including bridleways and footpaths would create an enhanced destination for exercise and active travel".*

194. It was not the Claimant's case before me that the financial consideration which the Defendant is to receive upon the grant of the proposed lease to THFCL is any less than the best that can reasonably be obtained. Nor did the Claimant argue that the benefits which the June report identifies failed to provide a rational justification for the Defendant's decision to dispose of the land at the Park by way of the proposed 25 year lease to THFCL.

195. I cannot accept that the means whereby the Defendant seeks to realise those benefits, that is the grant of the 25 year lease to THFCL pursuant to the Agreement, is founded or needs to be founded upon the exercise of its powers of appropriation under section 122 (1) of the 1972 Act. As Maugham J explained in the *Manchester Corporation* case, the power of appropriation is given to local authorities to enable them to put land which they hold for one of their purposes to use for another of their purposes. The nature of that power is reflected in the three principles identified by King J in *Maries'* case. In the present case, the Defendant does not propose to use the land at the Park to be leased to THFCL for another of the Defendant's purposes. The Defendant proposes to dispose of that land by way of lease.

196. In the light of this analysis, it seems to me that to succeed on ground 2 the Claimant must show that, in order lawfully to achieve that intended outcome, the Defendant was nevertheless under a duty to go through the process of appropriation under section 122(1) of the 1972 Act.

197. Neither section 122(1) nor section 123(1) of the 1972 Act support the Claimant's position. Section 122(1) confers a power to appropriate. It does not impose a duty on a principal council to exercise that power in circumstances in which that council is proposing to exercise its power under section 123(1) of the 1972 Act to dispose of land. Section 122(1) and 123(1) read as freestanding, separate powers amongst a miscellany of powers given to principal councils under Part 7 of the 1972 Act.

198. I can find nothing in the terms of sections 122(1) or 123(1) upon which to infer, in a case in which the purchaser or lessee proposes a use of the land sold or let which differs from that for which the land had hitherto been used by the council, the legislative intention that the decision to dispose must be founded upon a prior decision to appropriate, applying the principles identified in *Maries'* case. The position was of course different when the 1933 Act was in force, insofar as concerned a sale of a local authority's land. Section 165(a) of the 1933 Act authorised a local authority to sell any land which it possessed *"which is not required for the purpose for which it was acquired or is being used"*. Those words were not repeated in section 123(1) of the 1972 Act. The Claimant's argument under ground 2 is tantamount to requiring that those words nevertheless be read back in to section 123(1) of the 1972 Act. In my view, that is not a sustainable reading of that enactment.

199. Mr Goodman KC submitted that the Claimant's position derived support from the reasoning of Lord Scott at [89] in the *Oxfordshire* case. I do not agree. In the preceding paragraph of his speech in that case, Lord Scott had referred to [27]-[28] of his speech in *Beresford's* case, where he said –

> *"The two sections, 122 and 123, prescribe…special procedures that a council must follow if the 'open space' land is to be appropriated to some other purpose or disposed of (as the case may be)….An appropriation to other purposes duly carried out pursuant to section 122 would plainly override any public rights of use of an 'open space' that previously had existed. Otherwise appropriation would be*

ineffective and the statutory power frustrated. The comparable procedures prescribed by section 123 for a disposal must surely bring about the same overriding effect".

200. In those passages, in my view, it is clear that Lord Scott regarded section 122 and 123 as separate powers which might fall to be exercised by a principal council as the circumstances of the case demanded. Thus, in a case where the council's objective was to retain ownership of the land but to put it to another purpose, the council is able to do so by virtue of the power of appropriation given by section 122 of the 1972 Act. Whereas in another case where the council's objective is to dispose of the land, whether by sale or lease, the council is able to do so by virtue of the power of disposal given by section 123 of the 1972 Act.

201. Moreover, Lord Scott observed that in either of those scenarios, the special procedures which must be followed in the case of open space are comparable (see sections 122(2A) and 123(2A) of the 1972 Act). The same is also true of the legal consequence of fulfilling those special procedures, which under both section 122(2B) and section 123(2B) is that the open space appropriated or disposed of (as the case may be) is thereby freed from any public trust arising solely under section 164 of the 1875 Act or section 10 of the 1906 Act. That reinforces the conclusion that sections 122(1) and 123(1) are separate powers which serve different purposes, both generally and in their application to open space land, including public trust land.

202. Mr Goodman KC saw an anomaly in treating the powers conferred by sections 122 and 123 of the 1972 Act as independent of each other. The anomaly was said to arise from the fact that as originally enacted, section 123(1) empowered a principal council to dispose in any manner it wished of all or any land including commons, open space, fuel or field garden allotments, save for a small subset of open space which was *"public trust land"*. Whereas a principal council's powers of appropriation of any such categories of land were, by virtue section 122(2), highly restricted. On the Defendant's case, where a parcel of common land, open space or allotment land was still required for that purpose, a principal council was not able to appropriate that land under section 122(1), but were able to dispose of it under section 123(1) whether or not it was still so required.

203. It seems to me that the answer to Mr Goodman KC's perceived anomaly lies in the saving provisions under section 131(1)(b) and 131(2) of the 1972 Act. As the Claimant emphasised in his case under ground 1, the general power of disposal given to principal councils by section 123(1) of the 1972 Act is not to be exercised otherwise than in accordance with the enactments identified by section 131(2). Those enactments include the Allotments Acts 1908 to 1950 and the Small Holdings and Allotments Acts 1908 to 1931. That body of legislation restricts the disposal by local authorities of land held by them for the purposes of allotments. I have already referred to section 8 of the Allotments Act 1925 as an example of such a restriction.

204. Commons enjoy protection under other primary legislation. Under section 123 of the 1972 Act in its original form, ministerial consent was required to the disposal of open space which was not public trust land: section 123(4) and (5) of the 1972 Act. In summary, the anomaly which the Claimant perceives is more apparent than real. It seems to me that the legislative intention behind section 122(2) of the 1972 Act as originally enacted, was to retain the special procedures under section 121 of the 1971 Act (now section 229 of the 1990 Act) for appropriation of special categories of land (commons, open space, fuel and field garden allotments). Those special procedures

continue to apply, but they were disapplied from open space by virtue of the 1980 Act and replaced with the current procedural arrangements set out in sections 122(2A) and 123(2A) of the 1972 Act. There is no anomaly.

205. Finally, Mr Goodman KC argued that a further anomaly arises by virtue of the fact that the freehold estate in the Park, including the reversionary interest in the land to be disposed of by way of lease to THFCL, is retained by the Defendant. In the absence of appropriation of that freehold estate under section 122(1) and (2A) of the 1972 Act, it continues to be held by the Defendant as open space for the public's enjoyment under section 164 of the 1875 Act. It was submitted that it was necessary for the Defendant to exercise its power under sections 122(1) and (2A) to appropriate its freehold estate and so free its reversionary interest from the public trust by virtue of section 122(2B) of the 1972 Act.

206. In my view, that argument raises essentially the same problem which the Court of Appeal grappled with in *Blake*. It was the fact that the council held the park in that case on trust for the public for the statutory objective of providing public walks and pleasure grounds which prevented it from letting land within the park for other purposes. *Blake* was one of the cases that Lady Rose had in mind when she said at [92] in *Day* that public trust land has generally been treated as being different from other land, so that the wide powers of appropriation and disposal enjoyed by local authorities are not regarded as overriding the public's right to enjoy recreation land. As Lady Rose explained at [101]-[102] in *Day*, when enacting Part 7 of the 1972 Act and amending those provisions in the 1980 Act, Parliament had in very clear terms stated that compliance with the special procedure now set out in sections 122(2A) and 123(2A) of the 1972 Act would result in the land appropriated or disposed of being *"freed from any trust arising solely by reason of its being public trust land"* – sections 122(2B) and 123(2B) of the 1972 Act. In short, Parliament has provided a special procedure which, if properly followed, will overcome the problem identified in *Blake* and enable a principal council either to appropriate public trust land or dispose of that land, whether by sale or lease, free from the trusts arising under section 164 of the 1875 Act or section 10 of the 1906 Act. That legislative intention is reflected in section 131(1)(a) of the 1972 Act.

207. In [101] of *Day*, Lady Rose characterised the legislative purpose of those very clear words as being *"in order for a power to dispose of land to be effective in extinguishing the public's rights under the statutory trusts created in public walks and pleasure grounds under section 164 PHA 1875 or open spaces under section 10 OSA 1906"*. The power of disposal created by section 123(1) of the 1972 Act is widely expressed. It is plainly a power which extends to the grant of a lease to a third party of all or part of freehold land belonging to a principal council.

208. Section 123(2B) does not limit its effect only to particular categories of land disposal, such as freehold sale. On the contrary, sections 123(1), (2A) and (2B) expressly contemplate a principal council exercising its power under section 123(1) to dispose by way of lease of open space land which it holds on public trust under section 164 of the 1875 Act. There is nothing in those statutory provisions to support the argument that such a disposal, if carried out in accordance with section 123(2A), does not result in the extinguishment of the public trust arising under section 164 of the 1875 Act. On the contrary, section 123(2B) is very clear in stating that the land *"by virtue of the disposal"* shall be freed from the public or statutory trust. Where the disposal is by

way of lease, grant of the lease frees the open space land so disposed of from the public trust.

209. In short, in my judgment, the answer to Mr Goodman KC's further anomaly is provided by the very clear terms of section 123(2B) of the 1972 Act, as the Supreme Court recognised in [101]-[102] of *Day*. On the assumption that the Defendant has fulfilled the requirements of section 123(2A) of the 1972 Act, by virtue of section 123(2B) the grant of the proposed lease to THFCL will free the land subject to the lease from the trust arising from the fact that the Defendant holds that land under section 164 of the 1875 Act. It is unnecessary for the Defendant also to appropriate the leasehold reversion in order to give effect to the like provisions enacted under section 122(2A) and 122(2B) of the 1972 Act. There is no support for that further requirement in the terms in which sections 122 and 123 of the 1972 Act are expressed, and no support for the Claimant's argument in the authorities.

210. For these reasons, ground 2 does not succeed.

Ground 3

The issue

211. In paragraph 71 of his statement of facts and grounds, the Claimant pleaded ground 3 as follows –

> *"In taking its decision on 7 and 27 July 2023, the Council erred in failing to take account of, the obviously material fact that granting a lease for the use of the land as a private training academy by [THL] which would be inconsistent with its statutory purpose (**Western Power Distribution Investments Ltd v Cardiff City Council** [2011] EWHC 300; **British Transport Commission v Westmorland County Council** [1958]). The Defendant took no account of that factor and/or acted impermissibly inconsistently with the statutory purpose".*

212. Ground 3 was pleaded in the same terms in paragraph 71 of the Amended Statement of Facts and Grounds. Paragraph 82 of the Claimant's skeleton argument added the contention that in taking its decision on 7 and 27 July 2023, the Defendant had erred in failing to understand as well as failing to take account of the obviously material fact referred to in the statement of facts and grounds. Otherwise, the argument for ground 3 was summarised in the same terms as the pleaded ground.

213. Paragraph 99 of the Defendant's skeleton argument summarised its response to ground 3 as follows –

> *"99. [The Defendant's] Leader and Overview and Scrutiny Committee clearly knew that the proposed use of (part of) the land under the proposed lease was inconsistent with any public trust which applied to it. They directed themselves, correctly, that compliance with s.123(2A) of the LGA 1972 would free the land from any public trust upon its disposal".*

214. Prior to the hearing of this claim, the parties agreed that the issue raised by ground 3 was whether, in resolving to dispose and to enter into the Agreement, the Defendant made a legal error in failing to understand or to take account of the obviously material fact that granting the lease would be inconsistent with its statutory purpose and/or in failing to act consistently with the statutory purpose for which the land is held by the Defendant, under section 164 of the 1875 Act.

Submissions

215. In oral submissions, Mr Goodman KC developed his argument under ground 3 in considerable detail. Indeed he argued ground 3 ahead of both grounds 1 and 2. It was submitted that nowhere in the June report nor the report submitted to the Defendant's Overview and Scrutiny Committee had the Defendant actually acknowledged the existence or significance of the Park's status as public trust land, held for the public's enjoyment under section 164 of the 1875 Act.

216. Indeed, it was submitted, the Defendant's position until shortly before the hearing of this claim had been that it did not accept that any part of the Park was held under section 164 of the 1875 Act and so subject to the statutory trusts. It was clear that the Defendant had not recognised the public's recreational rights over the Park, including the former golf course land which was to be disposed of to THL under the proposed 25 year lease.

217. Evidence of that lack of recognition was to be found in the June report, which spoke of the public having enjoyed *"the benefit of access"* over the full grounds, including the former golf course as a *"temporary measure".* Paragraph 68 of the June report advised that THL's proposal *"includes increasing the amount of freely publicly accessible open space, which was previously a golf course".* These and other passages in the June report disclosed a clear failure by the Defendant to recognise that the public rights to enjoy the Park for recreation had always extended over the whole of the land comprised in the Park, including the former golf course. It was wrong in principle to characterise the Agreement and THL's proposals as resulting in an increase in the public's opportunities for enjoyment of the Park. On the contrary, given the status of the Park as public trust land, the true effect of the Agreement would be to diminish the public's right of enjoyment of the Park, restricting the public's ability to access a substantial area over which the public had hitherto enjoyed untrammelled beneficial rights under the statutory trusts arising under section 164 of the 1875 Act.

218. Mr Goodman KC referred in detail to the course of correspondence between the Claimant, the Council for the Protection of Rural England and the Defendant in the period from November 2021 and leading up to the June report, in which the status of the Park as public trust land had been asserted repeatedly to the Defendant. The Defendant had failed to recognise and to give proper significance to that status in its decisions under challenge in this claim, only belatedly facing up to that status shortly before the hearing, on 29 January 2024.

219. Mr Goodman KC summarised the Claimant's case under ground 3 in his reply. It was clear that in July 2023 the Defendant was at best agnostic as to the status of the land to be leased to THL as public trust land, as to the fact that the Defendant held the land for the purposes of the statutory trusts, and had accordingly failed to give proper recognition to the public's beneficial rights of enjoyment of that land. Had the Defendant's Leader and Overview and Scrutiny Committee been properly advised on those matters, they might well have thought twice about the merits of THL's proposals, leading as those proposals would to very significant restrictions on the public's enjoyment of the Park as public trust land.

Submissions

220. Both Mr Hutchings KC and Mr Maurici KC objected strongly to the way in which Mr Goodman KC had developed the Claimant's case under ground 3 through his oral submissions. It was submitted that Mr Goodman KC had strayed very substantially beyond the scope of ground 3 as pleaded, to the prejudice of the Defendant and THL.

For his part, Mr Goodman KC replied just as strongly that he had stayed within the scope of ground 3 as pleaded, whereas the Defendant had failed to discharge its duty of candour.

221. My approach is founded upon the undeniable fact that there was no application to amend ground 3 of the claim following the Defendant's letter of 29 January 2024. I must, therefore, determine that ground of challenge on the basis of the pleaded case, to which I have referred in paragraph 211 above. As to whether the Defendant has discharged its duty of candour, it seems to me that the Defendant's position as to the status of the Park as public trust land based on its state of knowledge, and as to how it had addressed that status in its decisions under challenge, was clearly and candidly stated in paragraphs 28 and 30 of its detailed grounds, to which I have referred in paragraph 114 above. It might be debated whether the Defendant ought to have made further inquiries about the history of the Park; but it is fair to say that having been informed of and considered the further archival evidence discovered by the Claimant, on 29 January 2024 the Defendant accepted that at least in part, it holds the land to be let to THFCL under section 164 of the 1875 Act as public trust land.

222. The first element of ground 3 is the contention that in taking its decisions on 7 July 2023 (the Leader) and 27 July 2023 (the Overview and Scrutiny Committee), the Defendant failed either to understand or to take account of the obvious material fact that granting a lease of land at the Park for use by THL as a private football and turf training academy would be inconsistent with the statutory purposes for which the Defendant then held that land, for the benefit of the public's enjoyment on statutory trust under section 164 of the 1875 Act.

223. The Defendant's response to that contention is that in taking those decisions in July 2023, both the Leader and the Overview and Scrutiny Committee proceeded as if the land was subject to the statutory trusts for public recreation. In order to judge whether the Defendant did recognise and take proper account of the fact that granting the proposed lease would be inconsistent with the public's beneficial interest in the enjoyment of the land under the statutory trusts, it is necessary to return to the June report and to the report to the Overview and Scrutiny Committee.

224. Paragraph 56 of the June report stated that the former golf course included open space land. The Leader was informed that the Defendant had acted in accordance with section 123(2A) of the 1972 Act. Paragraph 14 of the June report had referred the Leader to the objections raised to the proposal grant of a lease to THL and to THL's proposals, following the advertisement of that proposed disposal under section 123(2A). The Leader was referred to Appendix C to the June report for an analysis of those objections.

225. Section 6 of Appendix C was headed *"Process and Decision-Making"*. The first *"theme of objection"* at box 6.1 was stated in the following terms –

> *"Whitewebbs Park is public trust land. It was acquired by Middlesex County Council under section 169 of the Public Health Act 1875. The land is subject to a public trust and Enfield Council is a trustee, as opposed to a beneficial owner. Enfield Council thus have no rights at all to sell or lease any part of the park to a private corporation for an exclusive training academy, inaccessible by the general public".*
>
> (The reference to section 169 of the 1875 Act is an obvious typographical error but the substance of the objection is clearly stated).

226. In response, box 6.1 referred the Leader to the Legal Implications section of the main June report and added –

> *"The Council has responded directly to CPRE in these matters".*

227. Paragraph 57 of the June report (under the heading *"Legal Implications"*) advised that correspondence from CPRE had suggested that the Defendant's proposal to grant a lease to THL was unlawful, a matter which was considered in a confidential appendix to the June report.

228. There had indeed been correspondence from CPRE which argued that the proposed lease to THL was unlawful, given the land's status as public trust land held under section 164 of the 1875 Act. The point was succinctly put by CPRE and the Friends of Whitewebbs Park in their letter to the Defendant of 3 November 2022, which stated –

> *"The land is subject to a public trust. The council is in the role of trustee or custodian of the land, and must approach decisions regarding its use accordingly…We consider that the proposed restrictions on public use and access inherent in THFC's proposals to convert the land to a private training academy are contrary to the statutory trust arising under s164 PHA 1875".*

229. As I have noted in paragraph 25 above, on 27 July 2023, the Defendant's Overview and Scrutiny Committee received a report which responded in turn to each of the reasons put forward in support of the calling-in of the Leader's decision. That report included the following passage –

> *"**2. Reason for call-in***
>
> *The park is enjoyed by people from across the Borough. The Council holds the Park in trust and as part of this trust is expected to maintain open access to the parkland.*
>
> ***Officer response***
>
> *The park will continue to be enjoyed by people from across the Borough and TH's proposal offers significant enhancements of the park, for the benefit of the public…Further, TH's proposal will provide a sustainable economic basis for the park, into the future.*
>
> *Section 123(2B) of the Local Government Act 1972 provides a procedure whereby that part of the park to be leased to TH is released from the statutory open space trust and the Council has followed that procedure".*

230. In the light of the information and advice given by officers to the Leader in the June report and its appendix, and subsequently in the further report to the Overview Scrutiny Committee, I am satisfied that in taking the decisions under challenge on 7 July and 27 July 2023, the Defendant did recognise and take proper account of the fact that granting the proposed lease would be inconsistent with the public's beneficial interest in the enjoyment of the land under the statutory trusts. Other passages in those reports upon which the Claimant relies for the contrary conclusion (see paragraph 217 above) are, in my judgment, consistent with the Defendant having done so. Those passages were concerned with the practical opportunities which THL's proposals offered to enhance the public's use and enjoyment of the Park as open space. They were not concerned

with the legal status of the Park which was, as I have shown, addressed elsewhere in the reports.

231. In particular, the officer's response which I have set out in paragraph 229 above is a clear acknowledgement that, insofar as the land to be leased to THL enjoys the status of public trust land, there is both a substantive justification for interfering with that status given the perceived advantages of THL's proposals for continued public enjoyment of the Park; and a statutory procedure under section 123 of the 1972 Act, which the Defendant has followed, which empowers the Defendant to free the land to be leased from the public trusts, by virtue of section 123(2B). The officer's analysis was a succinct and accurate statement of the legal position.

232. The Claimant's other contention under ground 3 is that the Defendant has acted contrary to the statutory purpose for which it holds land at the Park. The Claimant relies on the principle established in *British Transport Commission v Westmorland County Council* [1958] AC 126, 142 to which I have referred in paragraph 91 above. The Claimant points to *Western Power Distribution Investments Ltd v Cardiff County Council* [2010] EWHC 300 (Admin) as an authority which applies that principle in the context of public trust land held under section 164 of the 1875 Act.

233. In my judgment, neither of those authorities supports the Claimant's argument under ground 3. In each case, there was found to be an inescapable conflict between the primary purpose for which the statutory body held the land and the secondary purpose which was argued to be consistent with that purpose. In the present case, because the Defendant has followed the special procedure enacted under section 123(2A) of the 1972 Act in advance of deciding to dispose of the land at the Park by way of a 25 year lease to THFCL, the potential for conflict between the proposed use of that land under the Agreement and the land's status as public trust land held by the Defendant under section 164 of the 1875 Act is resolved by the very clear words of section 123(2B) of the 1972 Act. Upon the grant of the lease to THL, the land will be freed from the statutory trusts arising by virtue of its being land held in trust for enjoyment by the public under section 164 of the 1875 Act.

Conclusion

234. For these reasons, I am satisfied that in resolving to dispose and to enter into the Agreement, the Defendant did not fail either to understand or to take account of the fact that granting the lease would be inconsistent with the statutory purpose for which it held the land, under section 164 of the 1875 Act. Nor did the Defendant act unlawfully in deciding to grant a lease for purposes which are inconsistent with that statutory purpose. Ground 3 is rejected.

Ground 4

The Issue

235. The parties were agreed that the issue arising under ground 4 is whether, in resolving to dispose and in entering into the Agreement, the Defendant was influenced by a legally flawed expectation of its ability to use the capital receipt resulting from the premium payable under the proposed lease as part of its general funds.

Submissions

236. Mr Goodman KC submitted that the Defendant holds the land to be let to THFCL for the purposes of section 164 of the 1875 Act, which creates a trust. The Defendant holds land under section 164 for the purpose of public enjoyment. It was submitted that

the Defendant was under a fiduciary duty to reinvest capital monies received in consideration of the leasehold disposal of such land in the remaining land at the Park which the Defendant holds on the statutory trusts.

237. Mr Goodman KC also relied again upon section 131(1)(b) of the 1972 Act and submitted that for the Defendant to use a capital payment as money in its general funds would be to apply capital money arising from the proposed leasehold disposal otherwise than in accordance with the limitations on the use of receipts from the disposal of open space land imposed by the 1967 Act Order. He relied in particular on articles 15 and 17 of that Order.

238. It was submitted that the Defendant had been wrongly advised that the premium and other monies payable upon the grant of the proposed lease to THFCL would be available for use as part of its general funds. Had the Defendant not fallen into error on that matter, it might well have taken a less favourable view of the perceived advantages of THL's proposals.

Discussion

239. The Claimant relied in support of his argument under ground 4 on a passage from *Lewin on Trusts* (20th Edition) at paragraph 7-102 for the proposition that in the case of statutory trusts, the general rules of trust law and principles of equity, so far as not excluded or modified by statute, are applied by default so as to fill the gap left by the terms of the statute. However, the same passage was considered by the Supreme Court at [50] in *Day*, where Lady Rose said –

> *"50. I agree with the Court of Appeal that although the arrangement created by section 164 of the PHA 1875 and section 10 of the OSA 1906 is called a 'public trust', it is not a trust which has the incidents of a private trust. One must be careful, therefore, not to import into the statute concepts that are familiar from private trusts".*

240. Having set out the passage in *Lewin on Trusts* from which Mr Goodman KC draws his proposition, at [52] in *Day* Lady Rose added –

> *"52….Whether it is ever appropriate to fill a gap in these statutes by importing concepts from private trust law seems to me doubtful but does not arise for decision in this case".*

241. Lady Rose also referred to [21] in the judgment of the Court of Appeal in *Day* (*R(Day) v Shropshire Council* [2021] QB 1127) where the court said that the statutory trust arising under section 10 of the OSA is a statutory construct in respect of which Parliament alone has determined the obligations and rights involved -

> *"21….in the case of a section 10 trust, the land is held and administered by the local authority to allow <u>its</u> enjoyment by the public as an open space, and there are no residuary beneficiaries entitled in the event that the purpose fails. In this sense, the land and the trust are inseparable".*

242. Lady Rose said at [52] in the Supreme Court in *Day* that insofar as there was an inconsistency between the reasoning of the Court of Appeal and paragraph 7-102 in *Lewin on Trusts*, she preferred the approach of the Court of Appeal.

243. Although these observations of the Supreme Court and the Court of Appeal are properly to be seen as *obiter dicta*, I have no doubt that I should follow them. If it is correct to see the land and the statutory trusts arising under section 164 of the 1875 Act

and section 10 of the 1906 Act as inseparable, it follows that section 123(2B) of the 1972 Act provides a complete answer to the Claimant's contention under ground 4. The effect in law of disposal of land at the Park by way of lease to THFCL under sections 172(1) and (2A) is to free that land from the statutory trusts. The Defendant is not subject to any fiduciary duty owed to the public arising by virtue of the statutory trust, because upon the grant of the lease that trust is extinguished. As the Court of Appeal said at [21] in *Day*, there are no residuary beneficiaries entitled in the event that the purpose fails. The Defendant is able to use the capital monies received in consideration of the leasehold disposal for purposes other than reinvestment in the remaining land at the Park which the Defendant holds on the statutory trusts.

244. The Claimant also relied upon some passages from the judgment of Lang J at first instance in *Muir*. At [71], Lang J referred to *The Churchwardens and Overseers of Lambeth Parish v London County Council* [1897] AC 625 (the Brockwell Park case) in which Lord Halsbury held that the council did not occupy Brockwell Park, they were *"merely custodians and trustees for the public"* and *"there is no possibility of beneficial occupation to the county council; they are incapable by law of using it for any profitable purpose; they must allow the public the free and unrestricted use of it"*. The mansion house and refreshment rooms remained part of the park and the same principles applied to them.

245. At [72], Lang J cited Farwell LJ in *Mayor of Liverpool v Assessment Committee of West Derby Union* [1908] 2 KB 647, 669 (a case about Stanley Park in Liverpool) -

> *"I can find nothing to warrant the suggestion that the corporation are to be allowed to use the park on those days for their own profit. The object appears to me to be to enlarge the public benefit intended to flow from its use as a park by allowing the park to be utilised during the seven days for some charitable or public purposes for which a small charge may be made, or possibly to enable the corporation themselves to recoup the expense to which they may be put by holding some show there which may be of general public interest. I very much doubt whether on the true construction of these by-laws the corporation are entitled to use the park for the purpose of making a profit for themselves…."*

246. Having cited also the Court of Appeal's application of that reasoning in *Burnell v Downham Market Urban District Council* [1952] 2 QB 55, at [75] in *Muir*, under the heading *"Making a profit"* Lang J said -

> *"75. In the light of the observations in the Brockwell Park and Liverpool cases to the effect that the local authority, as trustee, could not lawfully make a profit from land held under the OSA 1906, the Council conceded that it could not properly use any rent paid by the IP for its general purposes; it could only be used for the purpose of improving or maintaining the Common".*

247. In my view, these authorities are not in point. They are concerned with the limitations which apply to the use of *"profits"* resulting from the use of public trust land whilst that land is subject to the statutory trusts arising under section 164 of the 1875 Act and section 10 of the 1906 Act. The earlier authorities (*Lambeth Overseers, Mayor of Liverpool* and *Burnell*) are examples of the application of the principle identified by the Court of Appeal at page 302 in *Blake*. For as long as open space is held by a local authority on the statutory trusts, money making activities carried on at the land by or on behalf of that authority must be consistent with the status of the land as public trust land and so compatible with the full use of the land by the public as

public walks, pleasure grounds and open space. The same principle applies to the use of the money actually made by the local authority from those activities. That principle applied to the proposed leasehold disposal in *Muir*, because in that case the council purported to exercise its powers under articles 7 and 8 of the 1967 Act Order for the purpose of granting the proposed lease to the operator of the children's nursery. The council did not purport to grant that lease under section 123 of the 1972 Act.

248. In the present case, however, officers' advice in the June report was given on the premise that the Defendant had granted the proposed lease to THFCL in the exercise of its powers under sections 123(1) and (2A) of the 1972 Act, with the statutory consequence that the land subject to the lease had been freed from the statutory trust arising under section 164 of the 1875 Act. The principle identified in *Blake* no longer applied and so presented no barrier to the Defendant's use of the monies received by way of consideration for the grant of the lease as part of its general funds.

249. Nor do I consider that section 131(1)(b) of the 1972 Act read with articles 15 or 17 of the 1967 Act Order limits the use of those monies as the Claimant contends.

250. Article 15(1) of the 1967 Act Order states –

> *"15(1) For the purpose of enlarging or improving any open space a local authority may enter into an agreement with the owner of adjacent land for exchanging such land for open space land and the local authority may pay or receive any moneys for equality of exchange:*
>
> *Provided that –*
>
> *(a) All such moneys received by a local authority shall be applied in expenditure on capital account in respect of the acquisition or improvement of land used, or to be used as or added to, an open space and not otherwise;…".*

251. Article 15 of the 1967 Act Order is concerned with arrangements for the exchange of open space land held by a London borough council for privately owned, neighbouring land. It is in that fact-specific context that article 15 imposes controls on the use of capital monies received by the local authority for equality of exchange in any given case.

252. Articles 17(1) and (4) of the 1967 Act Order state –

> *"17(1) Notwithstanding anything contained in any enactment, a local authority, on such terms and conditions as they think fit, whether as to payment or otherwise, for the purpose of the construction, widening or alteration of any street (whether carried out by a local authority or by any other person), may –*
>
> *(a) utilise, alienate or exchange for other land any part of any open space; and*
>
> *(b) in a case where land is utilised under this article, debit the account relating to the construction, widening or alteration of the street with an amount representing the whole or a portion of the value of the land so utilised.*
>
> *…*
>
> *(4) Where under paragraph (1) a local authority utilise, alienate or exchange for other land any part of an open space they shall expend on capital account for or in respect of the acquisition of lands to be used as, or to be added to, an open space (including payments of any compensation payable by them under this article or under article 15(2)) sums not less than any monies which –*

(a) in the case of such utilisation they may have debited to the account relating to the construction, widening or alteration of the street under paragraph (1); or

(b) in the case of such alienation, they may receive as consideration of the land alienated by them; or

(c) in the case of such exchange, they may receive for equality of exchange".

253. Article 17 of the 1967 Act Order is concerned with arrangements for the street improvements which involve the use of open space land. Again, it is in that fact-specific context that article 17 imposes controls on the use of capital monies received by the local authority as a result of such arrangements.

254. Neither article 15 nor article 17 seeks to impose wider controls on the use of monies received by a London borough council upon the sale or disposal of open space land. In the words of section 131(1)(b) of the 1972 Act, the 1967 Act Order does not contain any provisions relating to the application of capital money arising from the leasehold disposal by a London borough council of open space land in the exercise of its powers as a principal council under sections 123(1) and (2A) of the 1972 Act. Moreover, it is relevant to note that where Parliament has found it necessary to impose controls on the use of monies received by a principal council from a disposal of land under section 123(1) of the 1972 Act, it has done so expressly. Section 123(6) of the 1972 Act (now repealed) required that capital money received in respect of a disposal under section 123 of land held for charitable purposes must be applied in accordance with any directions given under the Charities Act 1960.

Conclusion

255. For these reasons, I reject ground 4 of this claim. The advice given in the June report that the premium and other monies payable to the Defendant upon the grant of the proposed lease to THFCL would be available for use as part of its general funds was not erroneous in law.

Mr Serra's evidence

256. Having now addressed the ground of claim, I return to the question whether I should admit the witness statement of Richard Serra dated 15 January 2024 on behalf of THL.

257. As I have pointed out in paragraph 31 above, under the directions made by Lang J on 1 November 2023, THL as Interested Party were given the opportunity to file evidence in response to the claim within the period of 35 days following the grant of permission. THL did not do so. No reason has been advanced on behalf of THL as to why those parts of Mr Serra's witness statement which are said to be in response to the substantive claim were not filed within that period. Nor is it said that Mr Serra's evidence responds specifically to new matters raised for the first time by the Claimant in his amended statement of facts and grounds. In fact, the substantive grounds of claim remained essentially unaltered by that amended document. Finally, it was the Claimant's application to adjourn the hearing listed for early February which caused THL to file Mr Serra's witness statement, as I have explained in paragraph 33 above.

258. In the light of these matters, in my view, I should admit Mr Serra's witness statement only if persuaded that his evidence attests to facts which are otherwise absent from the evidence before the court but of such direct relevance to the determination of

the issues raised by the grounds of claim, that it would be unjust or unfair for me not to admit that evidence for consideration.

259. I am entirely satisfied that this is not the position. Mr Maurici KC and Mr Semakula focus their submissions in support of admitting Mr Serra's evidence upon paragraphs 8 to 42 of his witness statement. True it is that those paragraphs offer a little more detail than is contained in the June report and its annexes about THL's proposals for the land subject to the Agreement, and the asserted need for and benefits of those proposals. Nevertheless, the substance of those matters is covered in the June report, supplemented by THL's annexed brochure. I have not found it necessary to refer to or to rely on Mr Serra's evidence in order to understand the relevant facts which set the context for my consideration of the grounds of claim and the Defendant's and THL's response to those grounds.

260. For these reasons, I decline to grant THL permission to admit and to rely upon the witness statement of Richard Serra dated 15 January 2024.

Redaction of the Agreement

261. The established practice in relation to the partial redaction of documents which otherwise should be disclosed in judicial review proceedings under the duty of candour is set out in paragraphs 15.5.1 to 15.5.3 of the Administrative Court Judicial Review Guide 2023. I have followed that practice in considering whether the redactions made by THL when disclosing the Agreement to the Claimant are justified.

262. The burden is squarely upon the party seeking permission to redact a document to justify the need for each redaction. In a case where the asserted justification is that the text being redacted is confidential and irrelevant, it is not enough to show that the content is confidential. The court must be persuaded that the content is also genuinely irrelevant to the proper consideration and determination of the issues raised in the claim.

263. In this case, Mr Maurici KC and Mr Semakula have summarised the redactions made to the Agreement and to the draft lease in paragraph 33(f) of their supplementary skeleton argument. They break the redactions down into four categories. Having myself considered the redacted passages, I am satisfied that they are correct to do so. I shall follow the same approach and briefly consider each category in turn.

264. The first category of redactions comprises a series of longstop dates by which a number of the conditions to which the Agreement is subject require to be fulfilled. I am satisfied that those longstop date provisions are confidential to the parties to the Agreement. Having reviewed those provisions and how they operate in relation to the contracting parties' performance of the Agreement, I do not consider that they have any relevance to the issues raised in this claim.

265. The second category of redactions comprises schedule 2 to the Agreement. That schedule explains the Third Party Applications Condition, to which reference is made in the *"Definitions"* clause at the foot of page 2 of the Agreement. THL's asserted justification for the redaction of schedule 2 is that its contents are subject to legal professional privilege and/or common interest privilege. Having reviewed the contents of schedule 2, I am not persuaded that is correct. Schedule 2 contemplates that certain applications may be made by third parties, defines the Third Party Applications Condition and imposes certain obligations on the Landlord with a view to satisfying that condition. None of those provisions seem to me in themselves to attract either legal professional privilege or common interest privilege. I acknowledge THL's concern that disclosure of schedule 2 may risk future attempts by opponents of THL's proposals to

make applications with a view to frustrating or delaying delivery of those proposals in accordance with the Agreement. That risk, however, is not in itself a justifiable basis for redaction of a document which is otherwise disclosable under the duty of candour in judicial review proceedings.

266. The third category of redactions concerns references to third parties which are said to involve commercial confidences and to be irrelevant to the issues raised by this claim. I am satisfied that THL has justified redaction of these redactions both for the commercial sensitivities that they raise and because they have no relevance to the issues raised by this claim.

267. The fourth and final category of redactions relates to the identity of the individual who has signed the Agreement on behalf of THFCL. I can see no reason to conclude that the identity of the director of THFCL who signed the Agreement should be regarded as confidential. Moreover, it seems to me that knowledge of that person's identity is of some relevance to the claim, since it may shed light on the significance which both the Defendant and THL attach to the Agreement and to the delivery of THL's proposals for the land at the Park to be leased to THFCL.

268. In summary, I am satisfied that THL's application for permission to redact the Agreement for the purposes of its disclosure to the Claimant in these proceedings should be granted in part. I accept that the redactions relating to long stop dates and references to third parties are justified. I consider that the redactions of schedule 2 to the Agreement and of the definition of "Conditions" in clause 1 on page 1 of the Agreement are not justified. Finally, I consider that THL have not justified the redaction of the name of the director who signed the Agreement on behalf of THFCL.

Disposal

269. For the reasons given in this judgment, this claim is dismissed.

APPENDIX AC-2023-LON-002703

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

MR JUSTICE MOULD

B E T W E E N :

THE KING
(on the application of)
WILKINSON — Claimant

- and -

LONDON BOROUGH OF ENFIELD — Defendant

- and -

TOTTENHAM HOTSPUR FOOTBALL CLUB — Interested Party

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RULING ON RECUSAL - 6 FEBRURY 2024

1. On Thursday, 1 February 2024, having been informed on that day that this case was to be listed before me for hearing today, I informed counsel for the parties by email as follows:

> *"Prior to his recent appointment, [the Judge] acted for Haringey London Borough Council as acquiring authority at a compulsory purchase inquiry during November 2023 in relation to a regeneration scheme at High Road West Tottenham. Tottenham Hotspur Football Club appeared as an objector at that inquiry. The decision of the inspector whether to confirm the compulsory purchase order has yet to be announced. The Judge does not consider that his involvement as counsel in those compulsory purchase order proceedings affects the propriety of his hearing this claim for judicial review. However, he thinks it right to draw the parties' attention to the above matters and to offer the opportunity for them to make representations on that point. Given the*

> *impending hearing date, the Judge asks please that any such representations are submitted by no later than 12.00 noon tomorrow 2 February 2024."*

2. In response to that email, counsel for the Interested Party made the following representations:

> *"The Club would make the following points: 1. The compulsory purchase order inquiry was, as the Judge notes, very recent indeed and the decision on it is still outstanding. 2. The inquiry involved the Judge cross-examining Mr Serra who is also the deponent of the Club's witness statement in these proceedings and the admissibility of that witness statement is in dispute between the parties. 3. The cross-examination and closing speech of the Judge at the recent inquiry involved direct criticism being made of Mr Serra. In the light of these particular, and unusual, circumstances the Club would ask that the Judge considers recusing himself from hearing this case."*

3. Following receipt of that message, I asked that any further response be received by four o'clock in the afternoon last Friday. Counsel for the Defendant indicated that he had no further response to make but I received, during the course of the afternoon, an email from counsel for the Claimant, which was in the following terms:

> *"The Interested Party appears to imply there might be an appearance of bias in the judge hearing this case. The Judge would be aware of the leading cases on that issue."*

4. Reference was made to *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, to *Bates v Post Office Ltd* [2019] EWHC 871 (QB), and to *Dobbs v Triodos Bank NV* [2005] EWCA Civ 468 at [7]. Those references drew attention to some well-known judicial observations as to the nature of the test for apparent bias. I shall return in a moment to something that is said by Fraser J (as he then was) in *Bates v Post Office Ltd*.

5. Counsel for the Claimant concluded:

> *"If the judge wishes to take a cautious approach, one option would be for the Interested Party's application regarding the admission of the evidence of Mr Serra to be dealt with as a table application by a different judge, (the Claimant is content to make no further oral submissions, having filed a detailed written response today). There can be no objection then to the judge dealing with the substantive case (since it is the application relating to Mr Serra's evidence which is the primary concern for the Interested Party)."*

6. Having reflected on those representations over the weekend, I then wrote to counsel for all parties yesterday, 5 February, in the following terms:

> *"The Judge is grateful to Counsel for their written representations. Having considered the concerns raised on behalf of the Interested Party, the Judge has decided that he should not recuse himself from hearing this claim. Nor does he consider it to be necessary or appropriate to recuse himself from deciding the Interested Party's application to admit the witness statement of Mr Serra. The Judge will very briefly state his reasons at the start of the hearing. He will also include his reasons in his judgment following the hearing of the claim. The hearing will accordingly proceed tomorrow morning."*

7. That is today.

8. In *Bates v Post Office Ltd* [2019] EWHC 871 (QB) at [27], Fraser J referred to the classic statement in respect of the legal test for apparent bias; that is, whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. That has been taken from the well-known passage in the speech of Lord Hope at [103] in *Porter v Magill* [2002] 2 AC 357. At [29] of his judgment in *Bates*, Fraser J also referred to the case of *Otkritie International Investment Management Ltd & Ors v Urumov* [2014] EWCA Civ 1315. At [30], Fraser J referred to the following passage from the judgment of Longmore LJ in *Otkritie*:

> *"13. There is already a certain amount of authority on the question whether a judge hearing an application (or a trial) which relies on his own previous findings should recuse himself. The general rule is that he should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or a real possibility of bias must conclude the matter in favour of the applicant; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All the cases, moreover, emphasise, that the issue of recusal is extremely fact-sensitive."*

9. Although the present case is not one in which the issue is any findings that I have made as a judge in previous proceedings in this case, it does seem to me that those words of Longmore LJ are of some general assistance in guiding me as to the approach I should now take.

10. I have asked myself what the fair minded and informed observer's reaction would be to the knowledge of my recent involvement as leading counsel in the compulsory purchase order inquiry in Haringey. That person would know that Tottenham Hotspur Football Club appeared as objectors and promoted an alternative solution to the regeneration scheme that I was advocating as counsel in that case on behalf of the acquiring authority.

11. Leading counsel for the Interested Party relies in particular on my having cross-examined Mr Richard Serra, and having made criticisms of his evidence and, to some degree, of his conduct as a witness in that case. It seems to me that the fair minded and informed observer would recognise that I made those criticisms, and carried out that cross-examination, in my professional capacity as advocate for the local authority promoting the compulsory purchase order. In doing so I sought to advance that authority's case for confirmation of the order and to challenge the credibility of the alternative scheme being put forward by Tottenham Hotspur Football Club. Without more, my cross-examination and closing submissions portrayed no personal animus against either the Club itself or, indeed, Mr Serra. They were simply the performance of my proper function as a professional advocate on behalf of the promoter of the compulsory purchase order in that case. There is, in my judgment, nothing more to it than that.

12. The fair minded and informed observer would also observe, although perhaps not as a necessary element of his judgment, that the subject matter of the earlier proceedings was quite different. There the merits of a compulsory purchase order were in issue as also was the credibility of both the acquiring authority's scheme and the Club's posited alternative. There were live issues as to the credibility of the evidence given by each of those parties in support of their respective cases.

13. Here, on the other hand, as I understand it, I am concerned to determine legal issues regarding the decision of a different London borough council to dispose of public open space land within its area. The issue, in particular, is the legality of that disposal, both having regard to general local government legislation and to local legislation which regulates the management and use of public open space in Greater London. Within that context, I have detected no suggestion that the credibility of Mr Serra as a witness, or indeed of the evidence that he has set out in his witness statement, is in issue. I observe that there is an issue as to the admissibility of his evidence, but that appears to me to turn essentially on the relevance of that evidence to the issues that are before the court; and, to some degree, whether that evidence does no more than to duplicate documentary and witness statement evidence that is already before me in the papers.

14. It is for that reason that I have reached the view that not only should I decline to recuse myself from hearing the case, but also that I should not act on the suggestion of the Claimant that I may, in effect, delegate the question of the admissibility of Mr Serra's evidence to another judge to resolve.

15. Finally, I should say that it seems to me that the fact that the compulsory purchase order inquiry was conducted recently and that the decision on confirmation of the compulsory purchase order is still awaited, adds nothing of substance to the question as to whether I should recuse myself.

16. Overall, returning to the guidance given by Longmore LJ, quoted by Fraser J in the *Bates* case, it seems to me here that I should not recuse myself. On the basis of the representations made and, indeed, my own judgment as to the circumstances to which I referred in my email to counsel last Thursday, I am satisfied that there is no reason for me to conclude that I cannot give all parties in this case a fair hearing. Moreover, I am satisfied the fair minded and informed observer would

reach the same conclusion. For those reasons, I have decided that I should proceed to hear this claim.