Neutral Citation Number: [2020] EWCA Civ 1751

Case No: C1/2020/0136

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
PLANNING COURT
THE HON MRS JUSTICE LANG
[2019] EWHC 3539 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/12/20

Before :

LORD JUSTICE DAVID RICHARDS

LORD JUSTICE HICKINBOTTOM
and
LADY JUSTICE ANDREWS

- -

Between :

THE QUEEN ON THE APPLICATION OF PETER DAY

Appellant

- and -

SHROPSHIRE COUNCIL

Respondent

- and -

(1) SHREWSBURY TOWN COUNCIL
(2) CSE DEVELOPMENT (SHROPSHIRE) LIMITED

Interested Parties

- -
- -

Alex Goodman (instructed by **Leigh Day Solicitors**) for the **Appellant**
Killian Garvey (instructed by **Shropshire Council Legal and Democratic Services**) for the **Respondent**
The Interested Parties did not appear and were not represented

Hearing date: 4 November 2020

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Approved Judgment

Lord Justice David Richards, Lord Justice Hickinbottom and Lady Justice Andrews:

Introduction

1. When a local authority disposes of land which is subject to a statutory trust for public recreational purposes without complying with the relevant statutory requirements, does that trust continue or end; and, in either case, what are the legal implications for the authority and the disponee?

2. These issues arise in the context of a challenge by the Appellant, a local resident, to the decision of the Respondent local planning authority ("the LPA") of 8 November 2018 to grant conditional planning permission for land described as "off Greenfields Recreation Ground, Falstaff Street, Shrewsbury, Shropshire" ("the Site") for development comprising the building of 15 dwellings on the application of the Second Interested Party ("the Developer").

3. The relevant land was subject to a statutory trust for public recreational purposes, and had been sold by the local council which owned it (not the LPA) without compliance with the mandatory statutory requirements for advertising such a disposal. In her judgment ([2019] EWHC 3539 (Admin)), Lang J held that, if the disposal of the land did not bring the trust to an end, the trust obligations were nonetheless unenforceable as against the Developer as purchaser. She held that, in determining the planning application, the LPA acted unlawfully in failing to take reasonable steps to acquaint itself with the Site's history and legal status and to consider the legal implications of the sale, but went on to hold that, had the LPA acted lawfully, it would have recognised the unenforceability of the trust obligations against the Developer and it would still have granted the planning permission that it did. Thus, applying section 31(2A) of the Senior Courts Act 1981, she concluded that no relief should be granted; and she refused the judicial review. In this appeal, the Appellant contends that Lang J was wrong to refuse his application.

4. Before us, as below, Alex Goodman of Counsel appeared for the Appellant, and Killian Garvey of Counsel for the LPA. At the outset, we would like to express our appreciation for their helpful submissions.

The Factual Background

5. In dealing with the grounds of appeal, it will be necessary to look at some aspects of the history of the Site in a little more detail; but, generally, following uncontested findings below, the facts are now uncontroversial and for present purposes can be set out shortly.

6. The Site is at the western end of land that was, until 2017, owned by the First Interested Party ("the Town Council", in law the parish council for the relevant area). The Site formed part of a much larger area which had been transferred to the Mayor, Aldermen and Burgesses of the Borough of Shrewsbury ("the Borough Council") in two tranches in 1925-6, and was held by it subject to a statutory trust for public recreation. The land subject to the trust was transferred to the Town Council as part of wider local government reorganisation in 2010, by when the Site, having been used

for allotments during the Second World War and then as a council tree nursery, was wasteland.

7. In 2012, the Town Council sought planning permission for a site slightly smaller than the Site, but essentially covering similar land, for the building of eight "eco-homes". At that time, it was unaware that the trust applied to this land, and so did not disclose that fact in its application. On 10 February 2012, the LPA's Central Planning Committee approved the application; and, on 23 March 2016, the LPA granted outline planning permission subject to an agreement under section 106 of the Town and Country Planning Act 1990 ("the 1990 Act"). In respect of that grant, reserved matter approvals have not been granted and the planning permission has not been implemented. The Appellant considers that that grant may have expired by effluxion of time; but the evidence appears to suggest that it may still be extant.

8. In the meantime, in 2017, save for a small portion of land in its south-east corner which was retained by the Town Council ("the Retained Part"), the freehold of the Site was sold to the Developer, in circumstances in which the Town Council again did not disclose the existence of the trust, because it was then still unaware that any trust applied. We shall refer to the Site less the Retained Part as "the Development Site".

9. It is, now, uncontroversial that:

    i) Until the disposal of the Development Site, the whole Site was held by the Town Council under a statutory trust for public recreation.

    ii) The Town Council did not put the Developer on notice (and the Developer in fact did not know) that there was, or even might be, such a trust attaching to the land.

    iii) Although the Site was advertised as being for sale, the Town Council sold the freehold of the Development Site to the Developer without following the required statutory procedure for the disposal of land subject to such a trust, namely advertisement for two consecutive weeks in a local newspaper and the subsequent consideration of any objections; and, in disposing of the Site as it did, the Town Council acted unlawfully.

    iv) However, as a result of the statutory scheme, the disposal of the freehold to the Developer is still valid.

10. As to the statutory trust, Lang J did not determine whether it had ceased upon the sale of the Development Site to the Developer but held:

    i) Even if the disposal of the Site did not discharge the trust over that land, the subsisting public rights over the land could not be enforced against the Developer.

    ii) The LPA failed to take reasonable steps to acquaint itself with the Site's history and legal status, and the legal implications of the sale; and as a result, when granting planning permission, it had failed to take into account material considerations. The grounds of claim had thus been made good to that extent.

iii) However, as we have indicated, applying section 31(2A) of the Senior Courts Act 1981 and given that the rights under the statutory trust, insofar as they subsisted, could not be enforced against the Developer, had the LPA not erred in this way, the judge concluded that it is highly likely that it would in any event have granted planning permission as it did. Relief was therefore refused.

iv) With regard to the Retained Part, the LPA similarly erred in failing to make due enquiry and to take a material matter into consideration, namely that it was still subject to the trust in respect of which the Town Council had both statutory obligations and the power to enforce; but, had the LPA taken that matter into consideration as it should have done, it is highly likely that planning permission would have been granted because there was no proposal to develop that land and the interference with the use of the recreational ground would be *de minimis*.

11. Therefore, whilst the grounds of challenge had succeeded, all relief was refused; and the claim was consequently dismissed. Lang J made no order as to costs.

The Statutory Scheme

12. Given that the relevant trust in this case is entirely a creature of statute, the circumstances in which the rights and obligations attached to the trust arise and come to an end are essentially a matter of statutory construction. Therefore, before considering the issues that arise in this appeal, it would be helpful to outline the relevant statutory provisions applying to such trusts.

13. A number of statutory provisions give a local authority the power to hold land for the purposes of public recreation. In this case, two are potentially relevant.

14. First, section 164(1) of the Public Health Act 1875 ("the 1875 Act") (as amended by paragraph 27 of Schedule 14 Part II to the Local Government Act 1972 ("the 1972 Act")), provides that:

> "Any local authority may purchase or take a lease lay out 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.

15. Second, sections 9 and 10 of the Open Spaces Act 1906 ("the 1906 Act") provide, so far as relevant:

> "9. A local authority may, subject to the provisions of this Act—
>
> (a) acquire by agreement and for valuable or nominal consideration by way of payment in gross, or of rent, or otherwise, or without any consideration, the freehold of, or any term of years or other limited estate or interest in, or any right or easement in or over, any open space or

> burial ground, whether situate within the district of the local authority or not; and
>
> (b) undertake the entire or partial care, management, and control of any such open space or burial ground, whether any interest in the soil is transferred to the local authority or not; and
>
> (c) for the purposes aforesaid, make any agreement with any person authorised by this Act or otherwise to convey or to agree with reference to any open space or burial ground, or with any other persons interested therein.
>
> 10. 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
>
> (b) maintain and keep the open space or burial ground in a good and decent state…".

For the purposes of the 1906 Act, section 20 defines "open space", as follows:

> "The expression 'open space' means any land, whether inclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole of the remainder of which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied."

16. Five specific points, relevant to this appeal, arise out of those provisions.

17. First, by section 8 of the Parish Council Act 1957, "local authority" expressly includes a parish council for the purposes of the 1906 Act; and it was common ground between the parties that the Town Council was a local authority for all purposes relevant to this appeal.

18. Second, the power under which the Town Council's predecessor acquired the land of which the Site formed part was not expressly considered at the time of acquisition; but Lang J thought that it was probably under the 1875 Act (see, e.g., [65] of her judgment). However, for the purposes of this appeal which power was used is immaterial; because, as Lang J herself recognised (see [78]), although the 1875 Act contains no express trust comparable with section 10 of the 1906 Act, it is well-established (and common ground in this case) that land acquired under either provision is held on a similar trust for public enjoyment (see, e.g., Attorney General v

Sunderland Corporation (1876) 2 Ch D 634 at page 641 per James LJ, and R (Friends of Finsbury Park) v Haringey London Borough Council [2017] EWCA Civ 1831; [2018] PTSR 644 at [16] per Hickinbottom LJ). Indeed, section 122(6) of the 1972 Act defined the term "public trust land" as used in that section as originally enacted to mean "land held as public walks or pleasure grounds [i.e. held under section 164 of the 1875 Act] or in accordance with section 10 of [the 1906 Act]"; and, now, section 122(2B) of the 1972 Act (which concerns the appropriation of land by local authorities) expressly refers to "land held *in trust* for enjoyment by the public in accordance with [section 164 of the 1875 Act]" (emphasis added). For convenience, in this judgment, we shall use the term "section 10 trust" to cover both a trust arising under section 10(a) of the 1906 Act and the similar implied trust on land owned by a local authority under the 1875 Act.

19. Third, section 10(a) of the 1906 Act imposes obligations on a local authority: it does not impose obligations on a third party. Neither party before us suggests otherwise.

20. Fourth, section 10(a) of the 1906 Act, section 122(2B) of the 1972 Act and the authorities talk of a "trust" in respect of the relevant land, with the local authority holding the land *on trust* for use by the public for its recreation. Thus, it has been said that the relevant authority holds the land or interest as "merely custodians or trustees to hold it and manage it for use by the public" (The Churchwardens and Overseers of Lambeth Parish v London County Council [1897] 2 AC 625 at page 632 per Lord Herschell): and that, although the public is not a legal entity and cannot therefore be vested with legal ownership, it effectively enjoys the beneficial ownership of such land (see, e.g., Blake v Hendon Corporation [1962] 1 QB 283, a rating case, at pages 293 and 300, per Devlin LJ giving the judgment of the court; and, more recently, R (Muir) v Wandsworth Borough Council [2017] EWHC 1947 (Admin) at [82] per Lang J).

21. However, a section 10 trust is not a trust in the usual private law sense because, although the local authority is clearly obliged to hold the relevant legal title for the benefit of the public, the trust does not have any beneficiary recognised as such in equity; nor is it a charitable trust or one of the small band of non-charitable purpose trusts (such as for the upkeep of a grave) which equity recognises. It is a statutory construct, in respect of which Parliament alone has determined the obligations and rights involved. Having said that, at first blush, it appears to have some similarities with a purpose trust; but there is a significant difference relevant in the context of this appeal. In a charitable or other purpose trust recognised by equity, the trustees generally hold the trust property on trust to apply the capital and/or income of the property in furtherance of the charitable or other purpose. However, in the case of section 10 trust, the land is held and administered by the local authority to allow *its* 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.

22. Thus, a section 10 trust imposes an obligation on a local authority in respect of the relevant land that requires the authority to hold, maintain, control and regulate the land to allow the enjoyment of it by the public as open space and for no other purpose. It includes a primary obligation on the authority to allow public access – "they must allow the public the free and unrestricted use of it" (Lambeth Parish, cited at paragraph 20 above, at page 631 per Lord Halsbury LC), an obligation described by

Sir Raymond Evershed MR (giving the judgment of this court in Burnell v Downham Market Urban District Council [1952] 2 QB 55 at page 69) as "an absolute duty".

23. Section 10 attaches the obligations of the statutory trust, and the duty to maintain etc, only where a local authority has acquired an "estate or interest in or control over…" the relevant open space: on the face of the statute, the trust obligations on the authority therefore go hand-in-hand with ownership or control. Indeed, for the primary obligation to allow the public free access to be satisfied, some control over the relevant land must generally be essential. The power in a local authority to lease land that is subject to a trust does not diminish this proposition because, in circumstances in which an authority has acquired land exclusively for the purposes of public recreational purposes, the statutory scheme envisages temporary, relatively short-term lets for some other purpose, e.g. where the land is not yet required for the purpose for which it has been acquired (Attorney General v Hanwell Urban District Council [1900] 2 Ch 377, a case concerning a local authority's purchase of land for sewerage works under section 175 of the 1875 Act, at page 383 per Lord Alverstone MR). Section 164 of the 1875 Act also allows for both purchase or lease of land by an authority, and support by that authority of public walks or pleasure grounds provided by someone else; but it seems to us that trust obligations would equally apply only in the former case.

24. Fifth and finally, section 9(b) of the 1906 Act gives a local authority the power to undertake the care and management of open space in circumstances in which it neither owns nor has any interest or control over the relevant land; and sections 2(1), 5 and 9(c) of that Act provide for agreements between a local authority and those who own or control open space for that power to be exercised. However, the Act does not appear to envisage any circumstances in which any obligations of or powers in a local authority arise other than in the context of (i) ownership or control of the relevant land, or (ii) agreement with someone else who owns or controls the relevant land. In our view, nothing in Naylor v Essex County Council [2014] EWHC 2560 (Admin), upon which Mr Goodman relied, is to the contrary.

25. As a section 10 trust is a creature of statute, it is to statutory provisions to which we must also turn to identify the circumstances in which an authority may dispose of land subject to such a trust.

26. At the time of the acquisition by the Borough Council of the recreation land of which the Site formed part (i.e. 1925-6), there appears to have been no power by which, once a local authority had acquired land to which a section 10 trust applied, it could dispose of that land. Section 165 of the Local Government Act 1933 gave an authority power to sell any land which was not required for the purpose for which it was acquired or being used, with the consent of the relevant Minister; but the disposal of land "in breach of any trust" was expressly excluded from that power (section 179(d)), thus excluding any possible sale of land to which a section 10 trust attached (Laverstoke Property Company Limited v Peterborough Corporation [1972] 1 WLR 1400).

27. The first time a power to dispose of such land arose appears to have been as a result of section 42 of the Town and Country Planning Act 1947 ("the 1947 Act"). That section enabled a local authority, by order of the relevant Minister, to appropriate "open space" (not as defined in the 1906 Act, but rather under the narrower definition

found in section 8 of the Acquisition of Land (Authorisation Procedure) Act 1946, i.e. "any land laid out as a public garden, or used for the purposes of public recreation, or land being a disused burial ground") for any purpose specified in a development plan being a purpose for which that authority could be authorised to acquire land.

28. The potential problem of disposals of land which required Ministerial approval being made without such approval – and the need to give disponees some protection in the event of non-compliance – appears to have been specifically addressed first in the Town and Country Planning Act 1959 ("the 1959 Act") Section 26 of that Act provided that the disposal of open land by a local authority could not be effected without the consent of the relevant Minister; and section 28 gave a parish council power to appropriate land to a different use with the consent of the Minister. However, under the heading, "Protection of persons deriving title under transactions requiring consent", section 29(1) provided:

> "Where after the commencement of this Act an authority to whom this Part of this Act applies [which included local authorities] purport to acquire, appropriate or dispose of land under an enactment whereby power to acquire, appropriate or dispose of land is conferred on that authority, or on a class of authorities to whom this Part of this Act applies, then—
>
> > (a) in favour of any person claiming under the authority, the acquisition, appropriation or disposal so purporting to be made shall not be invalid by reason that any consent of a Minister which (whether by virtue of this Part of this Act or otherwise) is required thereto has not been given, and
> >
> > (b) a person dealing with the authority, or with a person claiming under the authority, shall not be concerned to see or inquire whether any such consent has been given."

There was no requirement to advertise any such appropriation or disposal, or otherwise engage with the public.

29. Although those provisions from the 1959 Act appear to remain on the statute book, so far as disposals by a parish council are concerned their function has been superseded by the 1972 Act, sections 124-127 of which concern "Land transactions – parish and community councils". These do require engagement with the public. In the following parts of this judgment, references to sections 124-127 (and section 123, which is drawn into those sections by incorporation) are to those sections of the 1972 Act.

30. Section 127 (as amended by section 118 of and paragraph 19 of Part V of Schedule 23 to the Local Government, Planning and Land Act 1980), so far as relevant to this appeal, provides:

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

> (2) Except with the consent of the Secretary of State, land shall not be disposed of under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained.
>
> (3) Subsections (2A) and (2B) of section 123 above shall apply in relation to the disposal of land under this section as they apply in relation to the disposal of land under that section, with the substitution of a reference to a parish… council… for the reference to a principal council in the said subsection (2A).
>
> (4) …
>
> (5) 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."

"Land", for these purposes, is defined in section 270 to include "any interest in land and any easement or right in, to or over land".

31. Section 123(2A) and (2B), read with section 127(3), provide (so far as relevant to this appeal):

> "(2A) A [parish] 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 [1875 Act]; or
>
> (b) in accordance with section 10 of the [1906 Act],
>
> 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."

By section 270(1), "open space" is defined by reference to section 336(1) of the 1990 Act: therefore, here, it again has the same meaning as in the 1947 Act (see paragraph 27 above), narrower than that found in the 1906 Act, namely "any land laid out as a

public garden, or used for the purposes of public recreation, or land which is a disused burial ground".

32. Pausing there, it is to be noted that section 123(2A) is in negative mandatory terms, i.e. unless there has been compliance with the section 123(2A) requirements for advertisement etc, an authority is proscribed from disposing of land subject to a section 10 trust; and before us it is (rightly) common ground that, as a result of the reference to subsection (2A), subsection (2B) expressly frees land from any section 10 trust that attaches to it where – and only where – there has been compliance with the statutory requirements for advertisement etc set out in that subsection. As we have already indicated, it is not in dispute that, when the Town Council sold the Site to the Developer, it did not comply the requirements of section 123(2A).

33. Section 128(2) (a successor provision to section 29(1) of the 1959 Act: see paragraph 28 above), important for the purposes of this appeal, provides:

> "Where under the foregoing provisions of this Part of this Act or under any other enactment, whether passed before, at the same time as, or after, this Act, a local authority purport to acquire, appropriate or dispose of land, then—
>
> (a) in favour of any person claiming under the authority, the acquisition, appropriation or disposal so purporting to be made shall not be invalid by reason that any consent of a Minister which is required thereto has not been given or that any requirement as to advertisement or consideration of objections has not been complied with, and
>
> (b) a person dealing with the authority or a person claiming under the authority shall not be concerned to see or enquire whether any such consent has been given or whether any such requirement has been complied with."

34. Finally, section 131 provides, so far as relevant, that:

> "Nothing in the foregoing provisions of this Part of this Act…—
>
> (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 [1906 Act]…".

The Issues

35. Before us, with leave granted by the court below, the Appellant relies on three grounds of appeal.

Ground 1: It is submitted that Lang J erred in concluding that, upon disposal of the Development Site to the Developer even without compliance with the requirements of section 123(2A), the statutory scheme had the effect of extinguishing the section 10 trust over that land. However, that was not a conclusion the judge in fact drew; and, in argument, this ground was developed into a submission that the judge erred in holding that any subsisting rights under the statutory trust (i) were not enforceable and (ii) even if not enforceable, were not a material consideration for the purposes of the planning decision.

Ground 2: The judge erred in considering the public recreation rights over the Retained Part were *de minimis* and immaterial to the planning decision.

Ground 3: The judge was wrong to conclude that it was highly likely that the LPA's decision on the planning application would have been the same had it not erred as it did; and therefore wrong to deny the Appellant relief and dismiss his claim for judicial review.

36. The LPA served a Respondent's Notice which (i) sought to uphold Lang J's substantive order on additional grounds, namely those set out in its skeleton argument (which included the submission that the Town Council's obligations under statutory trust in respect of the Site ceased once it had permanently disposed of all interest in and control over the Site); and (ii) cross-appealed against the costs order, seeking an order that the Appellant pay the LPA's costs of the claim.

37. The grounds of appeal and the LPA's response therefore give rise to the following issues:

Issue 1: Following disposal of the Development Site by the Town Council without compliance with the statutory requirements, did the section 10 trust attaching to the land (with its concomitant rights and obligations in respect of public recreation) subsist; and, if and insofar as the rights and obligations continued, are they enforceable?

Issue 2: If that right of public recreation under the section 10 trust subsists, whether or not enforceable, was it a material consideration for the purposes of determining the Developer's application for planning permission?

Issue 3: In relation to the Retained Part, did the judge err in finding that it is highly likely that the LPA would have granted planning permission even if it had known that that land was subject to a section 10 trust?

Issue 4: Insofar as the LPA erred in law in its planning decision-making, is it highly likely that it would have granted planning permission as it did had it not so erred?

Issue 5: Was the judge's order that there be no order for costs wrong?

Issue 1: The Statutory Trust upon Disposal of the Site

38. In relation to the issue of whether the section 10 trust subsisted over the Development Site after the disposal of the freehold of that land by the Town Council, whilst Mr Goodman was coy about whether he considered that Lang J held it did or did not, in our view her judgment is clear: she made no finding either way, but rather, in favour

of the Appellant, proceeded on the assumption that rights under the trust continued (see [120]: "… insofar as they subsisted…"). On her analysis, it was unnecessary to go further. However, in his skeleton argument drawn into the Respondent's Notice as we have described, Mr Garvey relied on the proposition that the trust ceased on disposal of the land; and the issue was fully explored before us in argument.

39. Mr Goodman's primary submission on this issue was focused and attractively simple. A section 10 trust is a creature of statute, and it cannot be discharged except under express statutory provision. The only such provision is section 123(2B) of the 1972 Act, which expressly frees land from such a trust on disposal where the statutory requirements have been met. Where, as here, the statutory requirements have not been met, the trust remains extant. It is a tenet of statutory construction that Parliament does not use empty words; and so it must be inferred that, but for section 123(2B), the trust would subsist on disposal. By making specific provision for the discharge of the trust when the statutory requirements had been met, it must be inferred that, although section 128(2)(a) ensured that the disposal of the land to the disponee Developer was valid and legal title to it passed, it was the Parliamentary intention that the trust subsists when those requirements have not been met. It would be wrong to imply any power to discharge over and above section 123(2B); and, Mr Goodman submits, unnecessary because there are other statutory powers that are available for that purpose.

40. Mr Garvey denied that section 123(2B) is determinative in that way. He accepted that an express provision that, where statutory requirements are met, then on disposal land that had been the subject of a section 10 trust shall be freed from such a trust, might create an inference of construction that, where such requirements were not met, then the trust shall continue. However, looking at the statutory scheme as a whole, he submitted that that inference could not be sustained. In particular, a section 10 trust effectively runs with the land, in the sense that section 10 trust obligations on a local authority cannot be divorced from ownership and/or control over the relevant land by that authority; and the statute does not impose any obligations on a third party. Therefore, on a disposal of land, the disponee (whose legal title and interests are protected by section 128(2)(a)) is not obliged to allow the public access to the land at all. The trust, if it were to continue, would be wholly empty and unenforceable. However, section 123(2B) only being effective on a disposal, there would be no statutory mechanism by which that trust could be brought to an end. Parliament cannot have intended that there should be a perpetual unenforceable trust attaching to such land. As his primary argument, he submitted that Parliament can only have intended that the trust cease upon a disposal, even where the statutory requirements have not been met.

41. Whilst we consider that some strands of each of these arguments have force, we are unable wholly to accept either. In our view, the correct analysis of the statutory provisions is as follows.

42. As we have described (see paragraph 27 above), until the 1947 Act, a local authority could not dispose of land subject to a section 10 trust. The relevant power of disposal is now found in section 123 of the 1972 Act; but that power is only exercisable if there has been compliance with the statutory requirements of section 123(2A) for advertisements and consideration of objections. Where those requirements are met,

the consequences of the disposal for any section 10 trust are set out in section 123(2B): by virtue of the disposal, the land is freed from the trust.

43. Where an authority purports to dispose of land subject to a section 10 trust without complying with the section 123(2A) requirements, section 123(2B) has no application; but section 123 has to be read with section 128(2), which applies on a disposition whether or not the section 123(2A) requirements have been met and which is expressly for "… the protection of purchasers".

44. Section 128(2) is in two parts. Section 128(2)(a) is focused on the legal title of the disponee. Even where a disposal of land subject to a section 10 trust is made without the section 123(2A) requirements having been met, it ensures that the disposal is valid and that the disponee has valid legal title following that disposal. Thus, whatever the circumstances of the disposal and irrespective of what is or should be in the mind of the authority and the disponee, it overcomes any argument that the disposal was void (and therefore the disponee has no legal title) because the authority had no power to make it.

45. As section 128(2)(a) deals with the legal title in all circumstances, section 128(2)(b) must be concerned with something other than legal title, otherwise it would be otiose. It provides that a disponee "shall not be concerned to see or enquire whether any… [section 123(2A)] requirement has been complied with". That is a classic formula for setting at nought any argument based on constructive notice, i.e. it provides that the disponee is not to be fixed with constructive notice of a failure to comply with those requirements. As section 128(2)(a) renders any reference to constructive notice redundant for the purposes of the legal title, in our view this can only be construed as giving the disponee title to the land free from the section 10 trust where he has no more than constructive notice of that failure. In other words, he will take the land without the burden of the section 10 trust unless he has actual knowledge that the requirements have not been met.

46. In coming to that conclusion, amongst other things, we have taken into account the following four matters raised in argument before us.

47. First, Mr Goodman submitted that this section 128(2) "safeguards the validity of title but imports no expectation to the landowner to develop the site as they wish". However, section 128(2)(b) provides that a person claiming under the authority (e.g. a disponee such as the Developer in this case) "shall not be concerned to see or enquire" whether any of the statutory consents or requirements has been complied with. In our view, that is inconsistent with the trust continuing. It is to be noted that it is in negative mandatory terms ("… shall not…"). Such a provision would be odd – indeed, positively misleading – if Mr Goodman's construction were correct. In our view, it clearly *does* give rise to an expectation by a "person claiming under the authority", such as the purchaser of the freehold, that the disponee will not be constrained in law by any aspect of a statutory trust where the statutory requirements have not been complied with by the disposing authority. On Mr Goodman's construction, if a purchaser of the freehold followed – indeed, given the mandatory terms of section 128(2)(b), one could say "obeyed" – section 128(2)(b) and did not concern himself with the question of whether the necessary consents had been given and requirements complied with, he would risk obtaining legal title to land subject to a perpetual statutory trust which, leaving aside the inherently unlikely (e.g. he was

committed to building only a bandstand on land which he properly considered to have no relevant restriction on development), may effectively deny him the opportunity to develop or use the land at all whilst leaving him with that interest in the land which he purchased (and any private law remedies the purchaser may have). As Mr Garvey submitted, that would make the apparent benefit given by section 128(2)(a) a positive burden, and belie the heading and apparent purpose of the section, namely "… protection of purchasers". That the trust ceases on disposal in these circumstances is, in our view, entirely unsurprising, given the general inseparability of the land and the trust that we have described (see paragraphs 21-23 above).

48. Second, for section 128(2)(b) to apply in this way, it does not matter whether the authority inadvertently or knowingly disposed of the land without complying with the statutory requirement; although, of course, if it did so knowingly, then the authority and/or individual officers or councillors may be open to civil and/or criminal sanctions.

49. Third, we do not consider that Mr Goodman's submission that it is unnecessary to imply the power to discharge such a trust over and above the power in section 123(2B) because there are other statutory powers that are available for that purpose to be of any great force. As an example – we assume the most compelling example he was able to find – Mr Goodman referred us to section 203 of the Housing and Planning Act 2016 and its predecessor, section 237 of the 1990 Act. However, these are/were aimed at a different matter, namely the overriding of rights etc which attach to land at the expense of other land in the form of (e.g.) an easement. Thus, section 237 of the 1990 Act allowed the overriding of interests or rights defined (in section 237(2)) as "… any easement, liberty, privilege, right or advantage annexed to land *and adversely affecting other land*…" (emphasis added). Section 203 of the 2016 Act is in very different terms, but it still purports to deal with "Power to override easements and other rights"; and, where such rights are overridden, the relief available under section 204 is compensation in money terms. Although we did not hear full submissions on this issue, section 203 is clearly not aimed at statutory trusts for public benefit. In our view, these provisions do not assist with the interpretation of the 1972 Act.

50. Fourth and finally, section 131 of the 1972 Act does not assist with this question of statutory interpretation, merely confirming that disposals of land by a local authority in breach of trust etc, excluding the statutory public recreational trust with which we are concerned, are not authorised by the Act.

51. We have therefore dealt with a disposal of land subject to a section 10 trust (i) where the section 123(2A) requirements are met, and (ii) where they are not met but the disponee does not have actual knowledge of that failure. In each case, the disponee takes the legal title of the land without the burden of the trust. However, one other situation may occur, namely where a disponee takes with *actual* knowledge of the non-compliance with the section 123(2A) requirements. That situation is covered by neither section 123(2B) nor section 128(2)(b) as we have construed it. They are circumstances which do not arise in this appeal, and we hope are unlikely to occur in practice; but, if they were to do so, then it seems to us that the disponee would take the legal title but the section 10 trust would continue. We acknowledge that, despite the general linking of the land and the trust which we have described (see paragraphs 21-23 above), the ownership and control over the land would then be divorced from

the local authority's obligations under the enduring section 10 trust. However, we see nothing unfair, disproportionate or odd about a disponee in such circumstances being saddled with land which remained subject to the statutory trust for public use and enjoyment. The means by which effect would then be given to the trust does not arise for decision in this case and has not been argued before us; but an obvious route would be a transfer back to the local authority, a course which might well be enforceable against the disponee. Indeed, it seems to us that that (and the possibility of sanctions against local authorities and individual officers and councillors) would act as a salutary constraint on an authority and a potential developer agreeing to a sale of land subject to a section 10 trust without complying with the relevant statutory requirements. In any event, in our view, the statutory provisions are to that effect in those circumstances.

52. In any event, for the reasons we have given, we consider that, looking at the wording of the statutory scheme alone, where a local authority disposes of land subject to a section 10 trust without the section 123(2A) requirements being met, as a result of section 128(2)(a) and (b), the disponee obtains title to the land without the burden of the trust unless the disponee has actual knowledge of that failure.

53. We therefore turn to whether other considerations, e.g. of policy or the authorities, point towards a different construction.

54. In terms of policy, we accept that the construction we favour would in certain circumstances leave the land in a state of limbo: whilst its public benefit as a recreation ground in the ownership of the local authority would have ceased, the disponee would probably be unable to develop the Site – or, at least, would have a challenging task to obtain planning permission to develop it because of the weight the LPA may give to the fact that the public nature of the land continues in law. Mr Garvey submitted that that could not have been the Parliamentary intention. However, on our construction, that could only occur if the disponee purchased the relevant land actually knowing that there had not been compliance with the statutory requirements for the disposal. As we have indicated, we see nothing disproportionate or odd about such a result. In practice, we accept that that may mean that the disponee and the local authority would have to come to an arrangement whereby the land would have to be restored to the authority to enable the requirements to be met and the land thus potentially released from the trust on disposal. But, in those circumstances, the disponee could not have any legitimate complaint; and, as a matter of policy, such a consequence would be perfectly understandable. We can see nothing in terms of policy that tends against the construction that we favour.

55. Turning to the authorities, in granting permission to appeal to this court, Lang J said that, so far as she was aware, there is no previously decided case on the issues raised by a sale of public recreational land without the relevant statutory requirements being met. However, whilst it is common ground that there is no direct authority, Mr Goodman relied upon several cases which, he submitted, supported his construction that a section 10 trust can be discharged only under section 123(2B), namely Laverstoke (cited at paragraph 26 above), R v Plymouth City Council and Cornwall County Council ex part Freeman (1987) 19 HLR 328, R v Pembrokeshire County Council ex parte Coker [1999] 4 All ER 1007, R (Structadene Limited) v London Borough of Hackney (2001) 82 P&CR 328, The Mayor and Burgesses of the London Borough of Barnet v Barnet Football Club Holdings Limited [2004] EWHC 519 (Ch)

and R (Western Power Distribution Investments Limited) v Cardiff City Council [2011] EWHC 300 (Admin). However, we are unconvinced that these authorities offer any assistance, one way or the other, in respect of the construction of the statutory provisions with which we are concerned.

56. Laverstoke concerned the pre-1972 Act regime and is of no assistance to the construction of the relevant provisions in that Act.

57. Freeman concerned a lodge, the freehold of which was held by co-owning local authorities, and which was subject to a lease to Mr Freeman. The lodge, it was held, formed part of a country park pursuant to the Countryside Act 1968. The relevant local authorities wished to recover the building so that it could be used as an information centre; but the lessee applied to buy the freehold of the lodge and served a right-to-buy notice under section 5 of the Housing Act 1980. In response, the authorities purported to lease the lodge to one of their number (Plymouth City Council) without complying with the statutory requirements. This gave rise to a number of issues, none of which is directly relevant to this appeal.

58. However, the lodge, which was not open to the public, was held to be an open space subject to the provisions of the 1972 Act; and Mr Goodman relies upon this judgment to support the proposition that public open space need not be accessible to the public. However, although the court found that the lodge formed part of the country park, it was subject to a lease, for which the statutory scheme provides: the court did not suggest that, if and when the tenant obtained the freehold of the lodge under the Housing Act 1980 procedure, it would remain for perpetuity both subject to the statutory trust and inaccessible to the public.

59. For the purposes of this appeal, Coker and Barnet merely held that, although the lawfulness of a sale by a local authority of a leasehold or freehold may be challenged on the basis that there was non-compliance with the relevant statutory requirements, section 128(2)(a) of the 1972 Act protects the disponee's title and effectively limits relief available at public law to a declaration that the sale was unlawful. However, the confirmation in those cases that that provision protects the validity of title says nothing about whether public recreational rights over the land sold – which did not feature in either case – subsist. Those cases do not assist Mr Goodman here.

60. Structadene concerned a contract for the sale of land at an undervalue without the required consent of the Secretary of State contrary to section 123(2) of the 1972 Act (which is in similar terms to section 127(2): see paragraph 30 above). Mr Goodman relies upon the observations of Elias J at [28]-[30], in which, while noting that section 128(2)(a) protects a disponee from invalidity of title, the judge particularly emphasised "that this is not the same as saying that the purchaser should be treated as if the consent [of the Secretary of State] had been given" (at [28]). However, the straightforward and obvious point Elias J was making there, not relevant in the case before us, was that the statute gives no protection from unlawfulness by the authority other than the failure to comply with the relevant statutory requirements (in that case, to obtain the consent of the Minister).

61. The real issue in Structadene was whether "disposal" in the phrase "by virtue of the disposal" in section 123(2B) applied to a contract for the sale of land or only to

completion of the sale. Elias J held it was the latter. In doing so, with regard to the phrase "by virtue of the disposal", he observed (at [17(1)]):

> "These words suggest in my view that it is the very act of disposal that brings the trust to an end. It would be strange if this subsection meant that the authority was relieved of its duties once a contract to sell was made. One would not expect it to be free of its duties until it was no longer in a position to control the land in question, and that would be on conveyance. Yet if the respondent is right and the contact fixes the time of disposal, the making of the contract itself brings the trust to an end. If for some reason the conveyance never took effect, such as where there was a termination of the contract by mutual agreement, then it would seem that the authority would retain control of the land but apparently unencumbered by the former trust duty."

Insofar as these observations link trust duties with control of the relevant land, in relation to the issues in this appeal, they appear to support the construction we favour.

62. Western Power concerned the redesignation of land owned by the local authority and held under section 164 of the 1875 Act as a nature reserve under section 21 of the National Parks and Access to the Countryside Act 1949. The redesignation took place without the required publicity of the intent to do so and without taking into account any objections made as a result of that publicity. Mr Goodman submitted that, if Mr Garvey's primary contentions (or, it follows, the construction we favour) were correct, the redesignation would have been good despite the default. However, that is not so: as confirmed in Freeman, a local authority cannot rely upon its own unlawfulness. The local authority in Western Power could not rely on the statutory provisions designed to protect third parties to render its own unlawful actions lawful.

63. Consequently, we do not consider that any of the authorities undermine the construction of the 1972 Act which we favour either.

64. Turning to the application of that construction to the facts of this case, as we have indicated, the Development Site was sold by the Town Council to the Developer without compliance with the requirements of section 123(2A), but the Developer did not have actual knowledge of that failure (indeed, it appears to be agreed that neither did it have constructive knowledge). Therefore, we would answer Issue 1, "No": following disposal of the Development Site by the Town Council without compliance with the statutory requirements, the section 10 trust and the right of public recreation over that land (and the concomitant obligations) did not subsist.

Issue 2: Material Planning Considerations

65. Issue 2 consequently becomes redundant: as the public recreational rights of the statutory trust did not subsist after the disposal of the Development Site to the Developer, the LPA did not err in not taking them into account as a material planning consideration in the decision to grant planning permission for the proposed development on the Site.

66. Nor are we persuaded by Mr Goodman's further submission that, irrespective of the legal status and the rights of access for the public, the Site nevertheless comprises "open space" which (as provided by paragraphs 97 of the National Planning Policy Framework ("the NPPF")) can act as a visual amenity, and the fact that a development would result in a diminution in open space would be a material consideration in planning terms in any event; because (i) this conflates a public "open space" for the purposes of the 1875 and 1906 Acts on the one hand, and for the purposes of paragraph 97 (as defined in paragraph 98) of the NPPF on the other, despite the definitional and conceptual differences; and (ii) on the facts of this case, the Officer's Report (which the LPA's planning committee, and thus the LPA itself, can be taken to have accepted and adopted) concluded that "the [proposed] development would have no significant adverse impact on the character and appearance *or visual amenity of the locality*" (paragraph 7.1: emphasis added). The LPA did, therefore, in any event take this material consideration into account.

Issues 3 and 4: The Retained Land

67. Mr Goodman submits that Lang J erred in concluding that, had the LPA known that the Retained Part continued to have a statutory public recreational trust attached to it, it would nevertheless have made the decision to grant planning permission. She was wrong to find that the effect on the recreational ground was *de minimis*: the weight to be given to the inevitable interference was a matter for the LPA through its planning committee.

68. We can deal with this ground very shortly. There is no force in it. The Retained Part is part of a car park for users of the recreation ground. It is not to be the subject of development; but will be used for access to the Site. However, the Officer's Report (as accepted and adopted by the Planning Committee) was of the view that "the additional vehicle movements would not be significant" (paragraph 7.3).

69. The LPA's error in not considering that this was land subject to a section 10 trust was therefore not material. Certainly, Lang J did not err in concluding that interference with the statutory public rights was *de minimis*, and consequently section 31(2A) of the Senior Courts at 1981 applied because, had the error not been made, the LPA's decision in relation to the grant of planning permission would have been no different.

Issue 5: Costs

70. By way of cross-appeal, Mr Garvey submitted that Lang J's costs order, that there be no order for costs on the claim, was wrong. The LPA succeeded in its defence of the claim – it "won" – and was therefore entitled to its costs, as restricted to £5,000 by the earlier costs restriction order. Although the judge found that the LPA had committed legal errors, namely that it failed properly to investigate the history and status of the Site, she concluded that the errors were not material because, if they had not been made, the LPA would have come to precisely the decision on the planning application to which it did come. In essence, she concluded there was no material legal error.

71. However, the judge had a wide discretion in relation to costs; and, in our view, she was entitled to conclude that the appropriate order was no order for costs for the reasons she gave in her costs ruling on 19 December 2019. The Appellant succeeded on all the heavily contested issues, upon which the time and effort of the parties and

the judge was largely expended. In those circumstances, in our view, Lang J was clearly entitled to conclude, as she did, that, on the basis of her analysis, the just, reasonable and proportionate order was for each party to bear their own costs.

72. That does not necessarily mean that that order should remain in place following this appeal, which concluded in favour of the LPA on a different basis. However, that is an issue which, if it is not agreed, should be the subject of further (written) submissions. Otherwise, we would dismiss the cross-appeal.

Conclusion

73. For those reasons, we dismiss both the appeal and the cross-appeal.