

A child wearing a pilot's cap and goggles is standing in a grassy field, holding a string attached to a large, striped kite that is flying in the air. The scene is captured in a blue-tinted, semi-transparent style.

Public open spaces and development

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Introduction

The conflict between the need for open spaces for recreation and the availability of land for residential development has resulted in another interesting Court of Appeal decision in *R (oao Peter Day) v Shropshire Council and others* [2020] EWCA Civ 1751 which considered the careful and more wide ranging analysis of the subject by Mrs Justice Lang at [2019] EWHC 3539 (Admin). The focus in the Court of Appeal was on the important point as to whether a statutory trust of open space held in favour of the public survives a disposal which does not comply with statutory requirements. The judgment of Mrs. Justice Lang also covered the establishment of such statutory trusts and whether they can be extinguished by informal appropriation for another purpose. These issues arose in the context of a challenge to the grant of planning permission for the residential development of part of an open space.

1. Background

Shropshire Council granted a planning permission for a residential development on land in Shrewsbury claimed by the Greenfield Community Group (“GCG”) to be part of the Greenfields Recreational Ground (“the Recreation Ground”). The history of the matter started with a petition in November 1924 on behalf of residents of the Greenfields District seeking the provision of playing fields due to the danger to children of fast moving traffic. By 1926 two pieces of land had been purchased by Shrewsbury Borough Council (“the Borough Council”) with the assistance of loans from the Ministry of Health. These pieces of land were combined to form the Recreation Ground. It was contended on behalf of GCG that the land subject to the residential planning permission (“the Site”) was part of the Recreational Ground and so subject to a statutory trust in favour of the public which prevented the planning permission from being implemented. In addition the grant of a right of way over the car park serving the Recreation Ground in favour of the Site was challenged as a wrongful interference with the enjoyment by the public of the land held on statutory trusts.

2. Statutory trusts

Open space acquired by a local authority pursuant to section 9 Open Spaces Act 1906 (“the 1906 Act”) is held by it subject to the statutory trusts contained in section 10. This section provides that the open space is held 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 to maintain and keep the open space in a good and decent state.

Not all playing fields or recreational grounds will have been acquired under the 1906 Act. In this case consideration was given as to whether the land had been purchased under section 107 Municipal Corporations Act 1882 or section 164 Public Health Act 1875 (“PHA 1875”). It is also possible that reliance could have been placed on a local Act of Parliament or earlier Acts such as the Public Improvements Act 1860.

¹Section 20 defines “open space” as meaning “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 or the remainder of which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied”.

Unlike the 1906 Act some legislation such as the PHA 1875 did not expressly impose a statutory trust. Despite this it has been held that such land is subject to a trust for the purpose of public enjoyment. It is not a private or charitable trust but one created and governed by statute. When such trusts apply the Council is a trustee with the beneficial ownership accruing to the local residents. The Council is not an occupier for the purposes of rating but a custodian of the land. However, the trusts are not absolute as they are subject to the authority's statutory power to appropriate the land for a different purpose (discussed in section 4 below) and the statutory power to sell the land (see section 6 below).

3. Imposition of statutory trust

Mrs. Justice Lang had two factual issues to determine when deciding whether the planning permission land was subject to a statutory trust for the public. One factual issue was whether the statutory power under which the land comprised in the Recreation Ground was purchased imposed such a statutory trust. The other factual issue was whether the site was part of the Recreation Ground.

In order to decide the first issue careful consideration was given to minutes of meetings of the Council's Estates Committee in the 1920s and 1930s together with plans prepared in that period which show the Recreation Ground. Particular note was taken of the recording in the minutes of borrowings from the Ministry of Health to fund the purchase of the two pieces of land comprising the Recreation Ground. Such an ability to borrow to defray the costs of exercising powers in the PHA 1875 was expressly conferred by section 233 PHA 1875. This indicated that the purchase was pursuant to the PHA 1875 as was suggested previously by Shrewsbury Town Council ("the Town Council") when opposing an application to register the Recreation Ground as a town or village green.

On the basis of the history it was held that the Recreation Ground had been purchased under either section 164 of the PHA 1875 or section 9 of the 1906 Act and so was held by the Council "on a statutory trust for the benefit of the residents of the area" (para. 80). It was held from the evidence of the plans produced that the site originally comprised part of the Recreation Ground (para. 14).

4. Ability to appropriate

Parish and community councils have the statutory power conferred by section 126 Local Government Act 1972 to appropriate land owned by the authority for a different purpose. This allows open spaces owned by an authority to be appropriated to a different purpose. Any land so appropriated will be freed from the statutory trusts arising under section 164 PHA 1875 or section 10 of the 1906 Act (section 126(4B)).

The definition of "open spaces" for the purposes of the LGA 1972 is more restricted than that in the 1906 Act (see footnote 1 in section 2 above). For the purposes of appropriation 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". This difference could have been important as the Site was overgrown and thus arguably could have been outside the scope of the statutory power of appropriation.

Importantly, in the case of open spaces there is a specified procedure to be gone through before the appropriation can be made. Subsection (4A) of section 126 requires that (i) notice of the intention of the appropriation is given referring to the land advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated; and (ii) any objections to the proposed appropriation are considered.

The facts of this case (discussed in section 5 below) raised issues which have been considered by the courts in earlier cases. If the specified statutory procedure is not complied with does this prevent the land being validly appropriated? Can a valid appropriation be inferred from the conduct of the relevant authority? The answer is that if the specified statutory requirements are not complied with then there will have been no valid appropriation.

²James LJ in *Attorney-General v Sunderland Corporation* (1876) 2 Ch. D 633 as applied by Hickinbottom LJ in *R (Friends of Finsbury Park) v Haringey LBC* [2018] PTSR 644 at para. 16. See also *R (oao Naylor) v Essex County Council* [2014] EWHC 2560 (Admin) and *R (oao Barkas) v North Yorkshire CC* [2014] 2014 UKSC 31 Lord Neuberger at para. 45.

³See, for example, *Churchwardens and Overseers of Lambeth Parish v London CC* [1897] AC 625 and *Burnell v Downham Market UDC* [1952] 2 QB 55.

5. Evidence of appropriation

In this case a portion of the Recreation Ground was authorised to be used as allotments in World War II on condition that it was reinstated within six months of the end of the war. In fact the use as allotments continued until after 1953. When that use ceased the area became a wilderness until in the late 1970s a tree nursery was established by the authority which continued until the late 1990s or 2000. Thereafter there is a dispute as to whether local residents used the Site. However, there was no evidence the site had been formally appropriated for another purpose or that a resolution had been passed to that effect or that any notice had been advertised of such an intention or that any ministerial consent had been given authorising such appropriation. In consequence there was no proof that there had been a valid appropriation of the Site for a purpose other than as an open space. It was, therefore, to be treated as still subject to the statutory trusts.

The learned judge left open whether in fact use as an allotment was a different statutory purpose to recreational use even though for such purposes the public had more restricted access (para. 100).

6. Disposal of open space

By virtue of section 127(1) LGA 1972 a parish or community council has the ability to dispose of any land provided that if the land is open space the authority must comply with certain requirements. These are set out in section 123(2A) LGA 1972 and are similar requirements as regards advertising the intention to sell and consideration of objections as apply to a proposed appropriation (see section 4 above).

Section 123 then goes on to provide that where an authority disposes by virtue of section 123(2A) of land held upon statutory trusts due to section 164 PHA 1875 or section 10 of the 1906 Act that land will be freed from the statutory trusts.

7. Effect of disposal which does not comply with section 123(2A)

This then leads to the core issue in this case. The Borough Council had disposed of the Site to the Town Council as part of the local government reorganisation in 2010. The Town Council then applied for planning permission and obtained a grant of outline planning for residential development. Most of the Site was sold on by the Town Council to a development company (“the Developer”) in October 2017. A right of way to provide access to the transferred part of the Site was granted in favour of the Developer by the Town Council over the part of the site retained by it which comprised part of the Recreation Ground’s car park (“the Retained part”).

The disposals did not comply with section 123(2A). What was the effect of this as regards the statutory trusts? Were they freed from them or did those statutory trusts continue because if they did then the residential planning permission could not be implemented and in deciding the planning application this would have been a material consideration to take into account which it was not by the committee? No advice was given to the planning committee that the Site had been subject to statutory trusts.

With regard to this issue there are three material provisions in the LGA 1972. These are:

(i) section 128(2)(a) - provides that an acquisition, appropriation or disposal is not invalid as regards a person claiming under the local authority by reason that a ministerial consent has not been given or any requirement as to advertisement or consideration of objections has not been complied with. This means that in this case the Developer was the legal owner of the Site transferred to it and the Town Council was the owner of the Retained part. This provision does not, however, free the disposed land from the statutory trusts.

⁴Section 270 of the LGA 1972 incorporating the definition in section 336(1) of the Town and Country Act 1990.

⁵Western Power Distribution Investments Limited v Cardiff CC [2011] EWHC 300 (Admin) concerning section 122 LGA 1972; R (oao Goodman) v Secretary of State for Environment, Food and Rural Affairs [2015] EWHC 2576 (Admin) again concerning section 122 LGA 1972; and R (oao Malpass) v Durham CC [2012] EWHC 1934 (Admin) concerning section 163 and 165 LGA 1933).

(ii) section 128(2)(b) - provides that a person dealing with the authority or claiming under it “shall not be concerned to see or enquire whether such consent has been given or whether any such requirement has been complied with.” The issue was whether this has the effect of freeing a successor from such statutory trusts.

(iii) section 131(1) – provides that nothing in the provisions of this part of the LGA 1972 will authorise the disposal of any land in breach of trust excluding land subject to trusts relating to public walks or pleasure grounds or under section 10 of the 1906 Act. This serves to emphasise the ability of an authority to dispose of such land excluded from the operation of section 131(1) in accordance with section 127.

These provisions do not expressly provide a comprehensive regime dealing with all circumstances in which an authority disposes of land subject to the statutory trusts. What is to happen if the authority has not complied with the requirements in section 127(1) and in the event of a failure does it matter whether or not the disponee was aware of the failure.

The argument on behalf of the GCG was that section 128(2) merely protected the validity of the disposal but did not free the land from the statutory trusts. In *R v Pembrokeshire CC ex parte Coker* Lightman J. had not accepted an argument that this subsection did not protect against a challenge in judicial review proceedings. However, it was emphasised by Elias J. in *R (oao Structadene Limited) v Hackney LBC* that the protection only applied if the failure was limited to obtaining ministerial consent or complying with the requirement to advertise or consider objections.

Support for GCG’s argument was claimed from the decision of Goff LJ in *Laverstock Property Limited v Peterborough Corporation*. In that case the plaintiff had entered a conditional contract with the council for land comprising open space but subsequently with the council’s agreement went into occupation before the contract became unconditional and built offices. The Minister’s consent did not come so the agreement remained unconditional. The plaintiff developer sought an order that the land be transferred to it on the ground that no consent was needed. Reliance was placed on section 165 LGA 1933 (the predecessor to section 127 LGA 1972). The claim was held to be blocked by section 171(d) of the LGA 1933 which was the predecessor to section 131 LGA 1972 but which unlike section 131 did not have excluded from its operation trusts relating to public walks or pleasure gardens or imposed by section 10 of the 1906 Act.

Mrs. Justice Lang held that section 128(2)(b) protected a buyer from the statutory trusts so that they could not be enforced against the buyer (para. 118). She did not feel that it was necessary to decide whether the statutory trusts had ceased which she left undecided.

8. Retained part

It was also argued that the right of way granted by the Town Council over the Retained part was a breach of the statutory trusts and so was a material consideration which should have been taken into account when considering the planning application. Mrs. Justice Lang considered that any interference with the use of the Recreation Ground was de minimis and would not have affected the planning decision if the existence of the statutory trusts had been appreciated.

9. Planning consequences

It followed from the decision of Mrs. Justice Lang with regard to the status of the Recreational Ground that the Council had failed to take into account the history of the statutory trusts, had received flawed advice and had failed to take account of a material consideration. In consequence the committee had failed to ask the right questions and to acquaint itself with relevant information arising from the history of the site. However, as the statutory trusts had ceased to be enforceable Mrs Justice Lang held that even if such failures had been remedied it would have made no difference to the outcome of the planning application and so the learned judge exercised the power conferred by section 31(2A) Senior Courts Act 1981 and dismissed the challenge to the residential planning permission.

[¶][1999] 4 All ER 1007

[¶](2001) 82 P & CR 25

[¶][1972] 3 All ER 678

A further ground was put forward for challenging the planning permission that the planning committee had failed to give reasons for its decision. In the absence of a statutory duty such a requirement may be implied under the general law. Lord Carnwath in the CPRE Kent case *supra* stated at para. 59 that reasons may be required if there has been substantial public opposition to the application which has been granted against the advice of officers for a project which involves “major departures from the development plan or from other policies of recognised importance”. Mrs Justice Lang held that this application did not fall in that class of application. The committee had acted in accordance with the officer’s recommendation albeit that it was flawed.

10. Appeal

The focus of the appeal was whether the decisions of Mrs. Justice Lang were correct that the statutory trusts were not enforceable against the Developer and that those trusts did not constitute a material consideration. In considering this issue the Court of Appeal tackled head on whether as a result of the disposal to the Developer the statutory trusts had ceased to exist. It was recognised as in the Court below that the statutory trusts do not constitute a private trust but “is a statutory construct, in respect of which Parliament alone has determined the obligation and rights involved” (para. 21). This means that as a creation of statute the circumstances in which such land can be disposed of will be determined by statutory provisions (para. 25). It was recognised that one difference between a charitable or purpose trust and the statutory trusts is that land subject to statutory trusts is held by the local authority to allow the enjoyment of the land by the public as an open space and so “the land and the trusts are inseparable” (para. 21).

The conclusion reached by the Court of Appeal was that the statutory trusts did not continue after a disposal if either the statutory requirements in section 123(2A) have been complied with or when the statutory requirements are not complied with the buyer had no actual knowledge of the failure to comply with the statutory procedure (para. 45 and 51). In those last mentioned circumstances it is immaterial whether the authority was aware that it had failed to comply with the statutory requirements (para. 48). In contrast a buyer with such knowledge will take subject to the burden of the statutory trusts although it would take the legal title subject to a possible obligation to transfer back to the authority (para. 51).

The focus when determining whether the land continues to be subject to the statutory trusts is on whether the buyer has actual knowledge (see para. 52). It is possible that the existence of the statutory trusts may be protected by registration although that was not the case in this matter. A provision in a section 106 agreement may require the creation of an open space which will be subject to statutory trusts when established. Such a planning obligation is a local land charge and may be registered. The constructive notice arising from the obligation constituting a local land charge or from it being registered will not be sufficient to cause a buyer to take land subject to the statutory trusts. Actual knowledge will decide that outcome. For the developer/buyer this may create a difficulty as a practical issue will be whether the developer/buyer’s absence of actual knowledge of the failure on the part of the disposing authority to comply with the statutory requirements can be proved. How will those acting for a prospective purchaser from such a developer/buyer be satisfied if they know of the failure? The Court of Appeal’s decision provides clarity but it does not mean the removal of all problems for buyers of open space from a local authority.

⁹Para. 49 for duty of local planning authority (citing Lord Carnwath in *R (oao CPRE Kent) v Dover DC* [2017] UKSC 79 at para. 62) and para. 120 for failure of Council

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