

Wimbledon Park Golf Club

OPINION

Summary.

1. I am asked on behalf of the Greater London Authority (“the GLA”) to state my opinion about the answers to certain questions which have arisen in relation to land at Wimbledon Park Golf Club.

2. For the reasons and subject to the observations and assumptions which follow, based on the material I have seen, in my opinion:

- (1) the property in question is held under section 164 of the Public Health Act 1875;
- (2) Merton Council was obliged to advertise proposals to dispose of that property under s123(2A) of the Local Government Act 1972, both in 1981 and in 1993. I gather that it did not do so;
- (3) therefore, the decision in *R ota Day v. Shropshire Council* [2023] AC 955; [2023] UKSC 8 is engaged. I have reservations about whether that case is fully secure as an authority. But taken at face value, the decision in *Day* indicates that both the 1981 lease and the reversion expectant on its termination, are subject to a statutory trust in favour of the public, for the purposes of recreation, binding on the current tenant/reversioner; but
- (4) it would be highly imprudent for any member of the public to act as if entitled to enter the Golf Course, without the sanction of the Court. No number of barristers’ opinions can outweigh a decision of the court. Barristers advise: only the Court decides;
- (5) it will be plain from this opinion and from the competing views known to be taken by the objector and the promoter, that there is scope for debate about the correct analysis.

Events in their statutory framework.

3. So far as immediately relevant, in or about 1914 the corporation of the borough of Wimbledon acquired the ownership in fee simple of the land known, or formerly known, as the Wimbledon Park Estate (“the Estate”), subject to any

existing leases. It did so under the powers conferred by a local Act obtained for that and other purposes, entitled the Wimbledon Corporation Act 1914 (“the 1914 Act”). So far as material, s5 of the 1914 Act conferred powers on the corporation to acquire the Estate and also as follows:

“... and the Corporation shall hold and may use manage control and dispose of the Wimbledon Park Estate and other lands so acquired by them for the purposes and subject to and in accordance with the powers and provisions set forth in this Act.”

The “powers and provisions” to which s5 refers include power to grant building leases: s12. They also include powers to let or appropriate land to some particular purpose or use: eg, s7(2) (lettings for terms of up to 21 years for games or for purposes of recreation); s7(4) (appropriate for purposes of public utility instruction or benefit), s7(7) (with the consent of the Local Government Board) and s10 (to which I will refer further, below). In particular, among the other “purposes” intimated by s5 for which the Estate or part of it might be held, managed, controlled or disposed of, was a “municipal golf course” under s8. This provided as follows:

“8.-(1) The Corporation may hold and use and appropriate for the purposes of a municipal golf course such part of the Wimbledon Park Estate and other lands acquired and held in connection therewith as may be necessary or expedient for that purpose and may thereon maintain alter regulate manage and use a golf course with all proper and convenient houses pavilions works buildings and conveniences and may in connection therewith appoint and pay officers and servants.

(2) The Corporation may make charges for the use of such golf course and may permit the use thereof by any club or other body subject to such conditions as they may think fit.

(3) The Corporation may make and enforce byelaws with respect to such golf course and for regulating the use thereof and the conduct of persons using the same or resorting thereto.”

4. S14 of the 1914 Act provided that not more than 75 acres of the Estate should be demised and leased on building leases, or otherwise disposed of, under s12 (building leases) and s13 (disposal).

5. Other provisions in the 1914 Act of possible materiality are: ss7(2) and (3), which contained power to grant leases for terms not exceeding 21 years for the purposes of, respectively, public recreation and cafés; s7(5), which contained power to appropriate any part of the Estate for any “special purpose for which the Corporation whether as a municipal education or sanitary authority or otherwise are now or may hereafter be authorised by statute to acquire and hold land”, subject to the consent of the Local Government Board; s12, which empowered the Corporation to grant building leases; s13, which empowered the Corporation to

dispose of land within the Estate; and s14, which capped the amount of land that could be dealt-with under ss12 and 13 to 75 acres.

6. I have already mentioned s10 of the 1914 Act. This required the corporation to appropriate not less than 25 acres of the Estate

“for the purpose of a public walk pleasure ground public park or recreation ground”.

That is only subtly distinguishable from the purpose described in s164 of the 1875 Act (“public walks or pleasure grounds”). I understand that what s10 required to be done was duly done. The area so appropriated is situated to the north east of the Golf Course. It is known as “Wimbledon Park”. S11 of the 1914 Act provided that land appropriated under s10 should be held “as if” it had been acquired in pursuance of s164 of the Public Health Act 1875.

7. As of 1963, another part of the Estate was known as the “Wimbledon Park Golf Links and Club House” (“the Golf Course”). The Golf Course was subject to a lease (“the Lease”) dated 10th April 1961, in favour of the Wimbledon Park Golf Club Limited (“the Club”). The Lease was for a term of 38 years and 3 months from 1st October 1960. It permitted the Club to use the Golf Course for “golf cricket football tennis hockey lacrosse croquet or bowls or other game or games approved in writing by the Corporation or for the grazing of horses cattle or sheep”: clause 3(3). It prohibited the erection of any structure without the Corporation’s consent not unreasonably to be withheld: clause 3(14).

8. The Golf Course had previously been the subject of other leases, including one for a term of 30 years from 24th June 1935 and so due to expire on 23rd June 1965. The 1935 lease had been preceded by an agreement dated 29th June 1934. Recitals (2) and (3) recorded:

“(2) Under and by virtue of the provisions of Section 115 (2) of the Wimbledon Corporation Act 1914 the corporation may with the consent of the Local Government Board borrow such money as may be necessary for any of the purposes of the Act which include (inter alia) the management of the Wimbledon Park Estate with power on such Estate or part thereof to maintain alter regulate manage and use a golf course with all proper and convenient houses pavilions works buildings and conveniences

(3)The Corporation have agreed to grant to the Club a new Lease of the demised premises on the terms hereinafter mentioned and to advance to the Club a sum not exceeding Ten thousand one hundred and forty one pounds towards the building by the Club of a new Club House with all necessary offices and outbuildings thereto as herein after mentioned which said sum the Corporation have agreed to borrow under the powers of the Wimbledon Corporation Act 1914 and all such other powers (if any) them thereunto enabling”

The reference in recital (2) to the corporation's "power on such Estate or part thereof to maintain alter regulate manage and use a golf course with all proper and convenient houses pavilions works buildings and conveniences", is a reference to s8. That power in s8 arises in relation to land within the Estate over which the corporation had exercised its power in the opening words of s8: to "hold and use and appropriate for the purposes of a municipal golf course".

9. From this it appears that by 1934, at the latest, the corporation regarded itself as having already decided to "hold and use and appropriate" the Golf Course "for the purposes of a municipal golf course". It would not otherwise have had the borrowing power in s115(2) of the 1914 Act, on which it relied in order to raise £10,140 towards the building by the club of a new club house etc. I have noted that some press cuttings in 1913 suggest that, at that time, there was no appetite to convert the Golf Course from a private members' club to a municipal course. But what was written about this in the press in 1913 cannot control, or even influence, this topic.

10. The material provided to me does not suggest that the corporation took a decision to deal with the Golf Course on a basis different from that which had underpinned the transaction in 1934, at any point prior to the moment some 30 years later when it was abolished. The minutes of a council meeting on 18th February 1959 record that the Club had enquired about the possibility of extending the 1935 lease or granting a new one. They record that the council's officers presented a report which

"dealt with the suggestion that the Council might exercise the powers contained in the [1914 Act] by the provision of a Municipal Golf Course at Wimbledon Park and, further, the development of the frontage land for housing purposes."

That is ambiguous. But absent fuller particulars of the report, my preferred inference is that the officers were probably explaining the *vires* which would enable the council to grant a new lease (or an extended lease) to the Club: that is to say, they were explaining that s8 of the 1914 Act was available and sufficient, presumably when combined with other powers. That is more plausible than that the officers were suggesting that the council might, or should, instead act under some other power in the 1914 Act, or otherwise, without reliance on s8. It is possible to read the minutes as suggesting that the council was considering, and rejecting, a proposal to take the Golf Course "in house". But even if so, that would not be conclusive against the council continuing to regard itself as holding and using and having appropriated the Golf Course as a municipal golf course under s8: rather, it would suggest that there was a debate about the method by which to give effect to the purpose (municipal golf course) for which the Golf Course was

held / used / appropriated. The resolution which was eventually passed on 9th September 1959 was to grant a new lease “on terms and conditions similar to those as in the existing [ie, 1935] Lease, but subject to” certain variations. The 1914 Act is cited as one of the origins of the powers for the leasing but without reference to any particular section.

11. All of this is compatible with the council not having taken a decision, prior to the grant of the Lease, to deal with the Golf Course on a basis different from that which had underpinned the transaction in 1934. That basis, as I have indicated, was that the council “held and used and appropriated” the Golf Course “for the purposes of a municipal golf course” under s8.

12. In 1963, the government embarked on a reorganisation of local government in and around London. So far as relevant, the principal object appears to have been to reduce the number of local authorities. Legislation was needed. The Local Government Act 1963 was enacted. Part I dealt in broad terms with the intended reorganisation. S4 of the 1963 Act had the effect of placing incoming authorities into the shoes of outgoing ones, in relation to public general Acts. But many of the details, including those which might arise under local Acts, were entrusted to ministerial decisions. So far as material, under s84(1) the minister had power to make such

“incidental, consequential, transitional or supplementary provision as may appear to him ... to be necessary or proper for the general or any particular purposes of this Act or in consequence of any of the provisions thereof or for giving full effect thereto ... and nothing in any other provision of this Act shall be construed as prejudicing the generality of this subsection”.

Such provision as appeared to the minister to be “necessary or proper” under this power, was to receive effect through one or more statutory instruments, subject to the negative resolution procedure. By s87(2), s84 included the power to repeal or revoke

“any Greater London statutory provision which appears to that Minister to have become spent, obsolete or unnecessary or to have been substantially superseded by any enactment or instrument which applies or may be applied to the area, persons or things to which or to whom that provision applies”.

Apart from such provision, the provisions of local Acts were to continue to have effect but with “any necessary modification” such as substituting the incoming authorities for the outgoing ones: s87(1).

13. Among the “provisions” made by the minister under s84 were the London Authorities (Property etc) Order 1964 No 1464, made on 14th September 1964 and coming into effect on 25th September 1964; the Local Law (South West London Boroughs) Order 1965 No 532, made on 19th March 1965 and coming

into operation on 1st April 1965; and the London Government Order 1965 No 654, made on 25th March 1965 and coming into operation partly on 31st March 1965 and partly on 1st April 1965.

14. Article 16(2)(b) of the 1964 Order (hereafter, “Article 16”), provided materially:

“(2) Subject to the provisions of articles 12 to 15—

...

(b) all contracts, deeds, bonds, agreements and other instruments subsisting in favour of, or against, and all notices in force which were given by, or to, an authority named in column (1) of Schedule 4 (or of any extension thereof as aforesaid) shall be of full force and effect in favour of, or against, the authority specified in respect of such authority in column (2)”

Read with Schedule 4, this had the effect of putting the Golf Club (by reason of the Lease) into the same position against Merton LBC, as it had been in, in relation to the Corporation of Wimbledon.

15. So far as immediately relevant, the effect achieved by other provisions in those instruments was:

- (1) on 26th September 1964, to transfer the property belonging to the corporation of Wimbledon, to the borough of Merton. This included the Estate and, in turn, the reversion then expectant on the Lease of the Golf Course;
- (2) on 1st April 1965, to repeal the 1914 Act except (materially) for s8, which was now to “apply to” the London borough of Merton; and,
- (3) also on 1st April 1965, to provide that land “held for the purposes of” s5 of the 1914 Act should be held instead “for the purposes” of s164 of the Public Health Act 1875: see the 1964 Order, Article 32 and Schedule 5 (as “extended” in 1965), Para 1 (hereafter, “Article 32”).

16. It appears to be common ground that none of the orders made under the 1963 Act was *ultra vires*, or that any would be *ultra vires* if given either of the competing interpretations of the promoters and the objectors. I think that this is rightly common ground, in view of the breadth of the discretion entrusted to the minister by s84 of the 1963 Act.

17. Merton LBC in turn granted a new lease of the Golf Course in 1986. In 1993, it disposed of the Golf Course to a third party outright. On neither occasion did it operate the provisions in s123 of the Local Government Act 1972 as to

advertisement, which apply when a local authority disposes of land held under s164 of the 1875 Act.

Assumptions.

18. The papers provided to GLA by the parties and, through the GLA, to me, do not make clear certain matters which might conceivably have a bearing on how to interpret the 1964/1965 Orders, in relation to which I therefore make the following assumptions:

- (1) Was the Lease excluded by order of the county court, from the provisions of Part II of the Landlord and Tenant Act 1954? Nothing in the papers I have seen suggests that any such order was made.

Having regard to the extended definition of “business” in s23(2) of that Act, it follows and I assume that the Club as tenant under the Lease enjoyed the prospect of continuance and/or renewal of the Lease, under Part II of the 1954 Act.

- (2) How much, if any, of the 75 acres allowable for disposal under ss12 and 13 of the 1914 Act, had the Corporation disposed of under those provisions?

Comparing the plan at p674 of Enclosure 12 (described as “060 Transfer of the golf course to AELGT”) with the plan at p106 (described, inaccurately but presumably sufficiently, as “003A Conditional Agreement for the Sale of land at Wimbledon Park (Original)”), it is not obvious to me that the power can have been exercised at all. The shape of the boundary at the north of what is now Wimbledon Park looks different on the two plans — but this appears to be because Wimbledon Park includes land in this area that did not form part of the Estate but was acquired in addition to the Estate: rather than because land originally within the Estate has been sold out of it.

I therefore assume that the powers of disposal in ss12 and 13 were not used by the Corporation, prior to 1965.

- (3) What land, within the Estate, passed to Merton LBC pursuant to the 1964/1965 Orders? Did it include anything apart from the Golf Course and Wimbledon Park? This is of potential relevance to the interpretation of the 1964/1965 Orders.

Based on the material I have seen, I assume that it included the Golf

Course and Wimbledon Park — and nothing else. This implies that any other part of the Estate which had vested in 1914, had by then been sold-off on such terms that it ceased to be “held” by the corporation at all.

- (4) How did Merton LBC deal with the Estate administratively after the vesting? This, too, is of potential relevance to the interpretation of those orders, as it might be admissible and relevant as contemporaneous exposition.

I assume that Merton LBC immediately (or soon) treated Wimbledon Park as held under s164: that is consistent with byelaws that I have seen. I also assume that it did not similarly treat the Golf Course.

The issue.

19. There has emerged a proposal for development to take place on the Golf Course. This has attracted opposition. Among the arguments of those opposed to the proposal, is the proposition that the Golf Course was within the land held “for the purposes of” s5 of the 1914 Act within the meaning of Article 32, so that it came to be held instead “for the purposes of” s164 of the Public Health Act 1875 with effect from 1st April 1965. If that proposition be correct, then a complicated situation would ensue which would or might prevent the proposal from receiving planning permission or, if planning permission be granted, would or might impede its successful implementation. The promoters disagree. They say that land should only be regarded as held “for the purposes of” s5 of the 1914 Act within the meaning of Article 32, if it had already been appropriated for recreation purposes under s10 of the 1914 Act.

20. The main question in my instructions is whether I agree with the objectors or the promoters.

Discussion.

21. Lord Hodge summarised the correct approach to statutory interpretation in *R (on application of O) v. SSHD* [2023] AC 255; [2022] UKSC 3 at ¶¶29–32. Further authoritative guidance, of particular relevance to the present case, appears from Lord Millett’s speech in *R (Edison First Power Ltd) v. Central Valuation Officer* [2003] 4 All ER 209; [2003] UKHL 20 at ¶116:

“The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless.”

Examples can be found of this being carried so far as to strain considerably, or sometimes even ignore, what would otherwise be the ordinary meaning of the language. As Lord Blackburn stated in *River Wear Commissioners v. Adamson* (1877) 2 App Cas 743 at 764:

“... I believe it is not disputed that what Lord Wensleydale used to call the golden thread rule is right, viz., that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity, or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which though less proper, is one which the Court thinks the words will bear.”

To similar effect, more recently, Lord Briggs said in *Settlers Court RTM Co Ltd v. First Property Services Ltd* [2022] 1 WLR 519 at ¶54:

“It is well established that the court will lean against a construction of legislation which produces absurd or unworkable results, if there is an alternative construction which does not do so.”

22. Other *dicta* to the like effect can easily be found. They all indicate that the threshold for displacing the “golden rule” — of giving effect to the ordinary meaning of the language — is high.

23. In the present case, the promoters and the objectors agree that the ordinary literal meaning of the language used in Article 32 supports the objectors’ interpretation. I agree with that assessment. The question, therefore, is whether the circumstances are such as to justify displacing that meaning with some other and, if so, what meaning.

The view that Article 32 caused the Golf Club to vest in Merton LBC under s164 of the 1875 Act.

24. The objectors’ interpretation depends on the proposition that, for the purposes of the 1964 Order, the Golf Course falls to be considered as “held for the purposes” of s5 of the 1914 Act at the moment when the 1964 Order operated upon it.

25. S5 of the 1914 Act is so worded as to accommodate and, indeed, invite an analysis in which land within the Estate will continue to be “held” for the purposes of that section, even after it has been put to some more specific use, or even appropriated for some more specific use, identified in other provisions of the 1914 Act. So, for example, on the wording used in s5, it is linguistically possible to describe land “appropriated” under s10 for use for public recreation, as continuing to be being “held for the purposes” of s5, even though s11 provides

expressly for any such land to be treated “as if” acquired under s164 of the 1875 Act. In fact, it is common ground that the Golf Course falls within Article 32 applying what has been called by the promoters a “literal” reading.

26. Moreover, by the time the 1964/1965 Orders came into effect, the Estate had been maintained in a state of essential openness since 1914 (and, of course, before then) — despite the powers in the 1914 Act to grant building leases on as much as 75 acres and to dispose of that amount of land, including for development. The only other express powers in the 1914 Act to dispose of land in the Estate were for the granting leases for terms not exceeding 21 years: in s7(2) “for games or for the purposes of recreation”; and in s7(3) for cafés etc — neither of which hints obviously at the prospect of any part of the Estate being used for development purposes as distinct from being maintained, essentially, for recreation, albeit not necessarily open to the public. It is true that, in 1965, the 1961 Lease still had 30 or so years to run and (on the assumption I have made) with a prospect of continuance under Part II of the 1954 Act. But the Lease was on terms which preserved the openness of the Golf Course by prohibiting the erection of any structures without the landlord’s consent not unreasonably to be withheld; and which limited the pressure for development, by restricting the permitted uses to those which were recreational. Thus, the Lease did not intrude far, or permanently, on the openness of the Estate. Openness was clearly one of the features of the Estate which it was the object of the 1914 Act to preserve for the good of the community: the cap of 75 acres on land that might be made available for development makes this pellucid, quite apart from the other provisions which focus so heavily on uses which, in the paradigm case, involve the outdoors.

27. The 1914 Act conferred, or might have conferred, a degree of flexibility in relation to use and disposal of land within the Estate, which was foreseen at the time, in 1914, as having the potential to be useful. But, by 1965, events had shown that this flexibility was no longer needed, or desired, by the community served by the corporation; the openness of the whole Estate had become a settled part of the area; and this openness was preferred, compared with the prospect of development even on the 75 acres allowable for that purpose. Under those changed conditions, in 1965, there was simply no perceived need to preserve any of the residual flexibility which, in 1914, had been taken by the Corporation just in case it might be needed: by 1965, events had shown sufficiently that it was not needed, or was not perceived to be needed.

28. Indeed, were it otherwise, then it would have been straightforward to carry the 1914 Act onwards for the benefit of Merton LBC: that is the default position

in relation to public general Acts (s4 of the 1963 Act) and indeed in relation to local Acts (s87(1) of the 1963 Act) — and the same effect could easily have been reproduced for the Estate, if this were the intention. The argument of the promoters seeks in effect to secure the default position, despite the use of a distinctively different drafting technique which deliberately departed from the default position.

29. The overall object of the 1963 Act and the 1964/1965 Orders was to effect a reorganisation, rather than any radical change, in local government in London. However, against the backdrop just summarised, it cannot be described as radical or even surprising to have committed the whole of the land in the Estate to use for the purposes of s164 of the 1875 Act for the future, whatever might have been its exact status in the past.

30. It might be said that where Article 32 refers to “for the purposes of” s5 of the 1914 Act, the intended reference is to land held for the purposes of s5 and for no other more specific purpose, such as the purpose in s10 (in relation to Wimbledon Park) or a purpose in s7(2) or s8 (in relation to the Golf Course). But on the assumed facts, the Golf Course and Wimbledon Park were the only parts remaining in the Estate which needed to be dealt with. On this narrow approach to the meaning of Article 32, Wimbledon Park was held for the purposes of s10, not for the purposes of s5, and so fell outside the scope of Article 32. This left the Golf Course. This might be regarded as being held under some more specific power than s5: for example, s7(2), or s8. If so, on this narrow approach to the meaning of Article 32, the Golf Course (being held for some such more specific purpose) was — like Wimbledon Park — equally not held for the purposes of s5, and so equally fell outside the scope of Article 32. But if so, there was no land within the Estate to which Article 32 could apply. That would be a surprising outcome.

31. Moreover, it is rational to expect that the 1964/1965 Orders, between them, would leave no doubt about the purposes for which land formerly owned by the Corporation will fall to be held by Merton LBC as incoming authority. If Article 32 operated by vesting the whole of the Estate in Merton LBC under s164 of the 1875 Act, then the 1964/1965 Orders fulfil this expectation. By contrast, if some part or parts of the Estate, not identified by those Orders, falls outside the scope of what is covered by Article 32 and vested in Merton LBC to be held for the purposes of s164 of the 1875 Act, then it is uncertain what are the purposes for which Merton LBC holds those unidentified parts. That is hardly a rational outcome: indeed, it would suggest that the 1964/1965 Orders were incoherent.

32. This is all the more so, when one reflects on Article 4(1) of the 1964 Order.

This provided that in cases where land is held for more than one purpose, the purpose for which it should be treated as being held should be the subject-matter of a “determination”. That might conceivably have been applied in the present case, by a “determination” ahead of 1965 that (say) the Golf Course was held for the purposes of s7(2) or s8 of the 1914 Act — such that it would fall outside the scope of Article 32. But there is no evidence of any such “determination” having been made. Thus, the opportunity to cleanse the Golf Course of being regarded as held for the purposes of s5 of the 1914 Act, and treated instead as being held for the purposes of some other provision, was not taken.

33. Statutory provisions should be construed consistently with the principle of legality and with an expectation that only clear language will authorise an interference with private rights. For the continuing vitality of this principle see, eg, *Manchester Ship Canal Company Ltd v. United Utilities Water Ltd* [2024] UKSC 22 at ¶20. The Lease in favour of the Golf Club carried with it immediate rights enforceable against the Corporation, as well as the possibility of rights of continuation or renewal under Part II of the 1954 Act which would also have been enforceable against the Corporation. But to the exact same extent as any of those rights were enforceable against the Corporation, they were continued by virtue of Article 16 — without any complication arising from s164 being engaged for the future in relation to the reversion. Accordingly, the objectors’ interpretation fully respects the principle of legality.

34. Against that background and under those circumstances, there is no justification for departing from the ordinary meaning of the words used in Article 32. It is possible that some, or all, of the land in the Estate was “held for the purposes” of provisions in the 1914 Act which were additional to s5. But, because of the particular wording of s5, that did not prevent such land from being described, accurately, as “held for the purposes” of s5.

The contrary view.

35. The most compelling analysis occurring to me in support of the view that Article 32 did not cause the Golf Course to vest in Merton LBC for the purposes of s164 of the 1875 Act, is this:

36. It is clear from the 1914 Act that it contemplates that different parts of the Estate held initially for the purposes of s5, might become held for other purposes including for the more specific purposes of other provisions in the 1914 Act. For so long as land within the Estate is held for such other more specific purposes, it is not also held for the purposes of s5: or, if it is also held for the purposes of s5, it is not only so held.

37. The purpose of the 1964/1965 Orders was to serve the reorganisation of local government implemented by Part I of the 1963 Act. It was no part of the mischief to which Part I was directed either (i) to enlarge (or diminish) the areas of land in London over which the public was to have a right of recreation; or (ii) to remove flexibility as to the way in which an incoming local authority might use land with which it came to be vested as a result of the reorganisation.

38. It would be rational to expect a scheme of reorganisation to preserve those matters absent good reason, especially if disturbance of the arrangement would have the potential to produce complexity and/or uncertainty without good reason: see, by analogy, *per* Lord Briggs in *TfL v. Southwark LBC* [2020] AC 913 at ¶¶41–43.

39. The reorganisation was an immense project. Even a cursory glance at the 1964/1965 Orders amply demonstrates that point. It entailed identifying and dealing with a huge volume of detailed material. As usual in this country, it all had to be done without unlimited resources. What is more, it was done against the background of a tight timetable, evidenced by the terms of the Orders (with cut-off dates in 1964/1965), imposed no doubt for political reasons. The task of coordinating all the work involved, with input from numerous bodies, was clearly a vast undertaking. It is therefore unrealistic to expect the drafting to have dealt perfectly with each detail. Equally, therefore, in cases of doubt, it is appropriate to apply an approach which seeks to give effect to what, overall, appears to have been the reorganisation purpose for which the 1964/1965 Orders were made; and to treat those orders as having had an enlarged effect (going beyond what was needed to reorganise pre-existing arrangements by transferring them to incoming authorities) only where justified by clear language.

40. Viewed as a scheme affecting the Estate, the striking thing about the 1964/1965 Orders, is that they refer specifically to two provisions in the 1914 Act so far as material to the Estate: (i) s5; and (ii) s8.

41. Those references were made against a factual context in which (on the assumptions I have made) the Estate, likewise, was used for two distinct purposes: (i) recreation space available to the public, and (ii) a golf course to which the public had no general right of access.

42. Where Article 32 refers to land held “for the purposes of s5”, it refers to land held only for such purposes and for no other purpose. This is because if “for the purposes of s5” means “for the purposes of s5 — whether or not also held for more specific purposes” then it produces consequences which are surprising. This may be illustrated by taking the case of a building lease granted before 1965 under

s12. If land held under s8 is regarded for these purposes as held for the purposes of s5, then the same logic suggests that the reversion on such a lease is, to the same extent, held for the purposes of s5 — which is so absurd that it could only be right if sanctioned by the most explicit wording. The answer to that extreme example on the facts might be, and probably is, that there were no outstanding building leases in 1965. But I make the point by reference to s12 of the 1914 Act for reasons of illustration only. The potential complications that arise if land held for any more specific purpose of the 1914 Act is to be treated, willy-nilly, as if held for the purposes of s5, are clear. This suggests that some simpler outcome was contemplated and intended.

43. As applied to the Golf Course: land held for the purposes of s8 or for other specific purposes identified within the 1914 Act, is not held for the purposes of s5: or, at least, not only for such purposes.

44. The question raised by Article 32 is not whether the Golf Course would be correctly regarded as held for the purposes of s8 after a legal audit of the governance and decision-making of the corporation since 1914 — but, rather, whether it objectively appeared to be held under s5, rather than under some more specific provision such as s8, at the time when the 1963 Act and the orders made under s84 came to bear upon it. Nothing in the legislative history suggests that the 1963 Act, or the 1964 Order, or other orders under s84, were concerned to resurrect possible challenges to the legality of administrative measures taken in the past. They are detailed, workmanlike instruments, serving an important but limited role in a larger project. That project was replete with complexity — but no part of it was to revisit whether land which had come to be seen as held or used or appropriated for one purpose had been correctly, in point of strict law, formally divested of some other purpose in the past.

45. Applying the test of whether the Golf Course objectively appeared to be held for the purposes of s5, rather than for the purposes of some more specific provision such as s8, at the time when the 1963 Act and the orders made under s84 came to bear upon it: as of 1934, the corporation regarded itself as having “held and used and appropriated” the Golf Course as a municipal golf course. That is a purpose specific to s8 of the 1914 Act, not s5. Nothing in the copious material shown to me suggests that it had changed its mind about this as of 1962 or 1963 or 1965. That is one of the important facts about the background against which the 1964 Order falls to be construed. With that in mind, the Golf Course appeared objectively to be held specifically “for the purposes of” s8 of the 1914 Act, not s5 (or not only s5), when the 1964 Order operated on it.

46. It is conceivable that the corporation was mistaken in 1934 in treating the

Golf Course as if it was “held and used and appropriated” by them for the purposes of a municipal golf course. There might have been a deficiency of form, such that any “holding and use and appropriation” for such purposes might have been challenged on public law grounds, if a timely challenge had been mounted. Perhaps the leasehold arrangement was too exclusive for the corporation, properly, to have regarded arrangements with the club as having a sufficiently public element to justify the commitment of public funds or otherwise to deserve the label “municipal”. Perhaps s8 envisages as the paradigm case an operation carried on by the council itself, with private members clubs playing only a more subsidiary part than was achieved by the various leases of the Golf Course. Perhaps the prospect that the Golf Course might be used for other purposes as well as golf (though, notably, consistent with golf use) would have been a ground of challenge. All of those and no doubt others are potential reasons for questioning whether the arrangements made in relation to the Golf Course should have been regarded as pursuant to s8 of the 1914 Act.

47. But on the other hand, “municipal golf course” is not a term of art. There is no hard-edged rule of law preventing a golf course from being regarded as “municipal” where the role of the municipality is limited to being the landlord of a private golf club and providing public funds for a new club house etc. Neither is there any hard-edged rule of law to require the question of whether a golf club is “municipal” from being judged solely by reference to the terms of any lease. Other, collateral, agreements might also be admissible. Neither is there any hard-edged rule of law preventing land from being described as a “golf course” where it might be used also for other purposes which would be compatible with the playing of golf. In particular, s8 does not imply anything about the persons or classes of person who might use the golf course. It might or might not be *Wednesbury* irrational to conclude that a golf course is “municipal” because it is supported in one of the ways contemplated by s8 by “the municipality”. Indeed, s8 would hardly have been necessary in addition to the ample powers to lay out recreation and sports grounds etc found elsewhere in the 1914 Act, which could very easily have included “golf” among the named activities, if this were the limited reach of the legislative ambition: eg s7(4), 7(5).

48. Accordingly, whether or not it was lawful for the corporation to have proceeded on the basis that the Golf Course was “held and used and appropriated” by them for the purposes of a municipal golf course is a *Wednesbury* matter, not one of hard-edged law. See by analogy *per* Floyd LJ in *R ota Muir v. Wandsworth LBC* [2018] PTSR 2121; [2018] EWCA Civ 1035, at paras 33 and 34; and *per* Mould J in *R ota Wilkinson v. Enfield LBC* [2024] EWHC 1193 at para 77, describing such matters as “a question of fact and degree”. It is too late at this

junction to revisit questions about that. It was also too late to revisit such questions in 1964. It was remote from the legislative purpose of the 1963 Act and its subsidiary instruments, to raise the spectre of such matters.

49. Although the 1914 Act was repealed in almost its entirety, s8 was preserved. It is improbable that this was to enable Merton LBC to run a municipal golf course on the Estate in parallel with operation of the Golf Course under the Lease. That would imply sacrificing Wimbledon Park, which has long been dedicated as public open space under s10 of the 1914 Act. A second possibility is that the preservation of s8 was in order only to preserve for Merton LBC the possibility of taking the Golf Course “in house” after the expiration of the Lease. But given the history of the matter, with a succession of leases to the Golf Club dating back to 1914 and indeed before then, and with a then-current lease in favour of the Club with over 30 years still to run, the more natural inference is that s8 owes its preservation not only to the second possibility just described but also, and principally, to the perceived need to place Merton into the same position as the outgoing public body in relation to the Golf Course, to be sure that the existing arrangements or some adaptation of them could continue into the future so far as they related to the Golf Course: precisely without complications arising from a need to secure an effective appropriation of the Golf Course from s164 to some other use after the expiration of the Lease.

50. Further, Article 4(1) of the 1964 Order provided as follows:

“Where any land ... is held by an authority for two or more purposes, it shall be deemed for the purposes of ... this order to be held for such one of those purposes as is determined by that authority to be the purpose for which the land is, immediately before 1st April 1965, mainly used.”

Among the purposes of this provision is the removal of doubt about how Article 32 should operate upon the different types of land to which it applies. This, in turn, supports the view that Article 32 does not apply to land held for a joint purpose — which, in turn, supports the view that it applies only to land held for the stated purpose and no other. As applied to our case, Article 4(1) thus supports the view that Article 32 only applied to such parts of the Estate as were then held under s5 of the 1914 Act and for no other more specific purpose whether under that Act or otherwise.

51. The focus in Article 4(1) is on how land was actually “mainly used” at the relevant time. Also noteworthy is that Article 4(1) does not call for any particular form of “determination” to be made. Absent an express determination having been made under Article 4(1) in a case of land held for more than one purpose, it is appropriate — and necessary — to infer what determination must have been

made impliedly. The necessity to do so arises because Article 4(1) (like Article 32) does not contemplate a situation emerging in which land is held for joint purposes, after the reorganisation: at least, so far as such land might fall to be dealt with under Article 32. Inferring what determination was impliedly made involves having regard to the (i) the purpose for which land was, immediately before 1st April 1965, mainly used, viewed against the range of possible candidate powers; and (ii) how the overall statutory scheme applies to the result. That exercise would so substantially duplicate other parts of this opinion that I will not repeat it here.

52. An outcome in which any land held for a specific purpose under the 1914 Act but which is lacking any stated purpose in the hands of the incoming authority, is open to the criticism that it suggests an incomplete, or incoherent, statutory scheme, in which there is potential for uncertainty about the purpose for which such land is held in the hands of Merton as the incoming public authority. It would therefore have been preferable for Article 32 to deal explicitly with the matter. However, perfect coherence is not always achieved in schemes involving such Byzantine detail. Standing back from the detail and looking the overall scheme, the intended effect is clear enough. Wimbledon Park was not recognised as having been appropriated to some use separately from s5 of the 1914 Act; but it is clear from the preservation of s8 of the 1914 Act in favour of Merton LBC, that the same is not true of the Golf Course. The Golf Course was recognised, and assumed, to have been appropriated away from s5 of the 1914 Act, specifically to be used for the purposes of s8.

53. (It is partly for the reasons given in the preceding paragraph, that I consider the arguments in favour of regarding the Golf Course as having been held for the purposes of s8 in 1965 as a more compelling way to analyse the matter, than has found favour with the promoters to date. They prefer an analysis which sees the property as held for the purposes of s7(2) of the 1914 Act in 1965, or perhaps for some other purpose — but not for the purposes of a municipal golf course: no doubt, in case this might have attracted implications for the property in the hands of third parties. I do not think that it would have attracted any implications in the events which have unfolded: but there is little to be served by explaining my reasons).

54. The principle of legality favours the objectors' interpretation, because a scheme which subjected the Golf Course to s164 of the 1875 Act would have introduced doubt about the interplay between those two regimes: which should prevail, in particular in the event of the Club desiring to renew its lease under Part II of the 1954 Act?

Evaluation.

55. Evaluating the arguments is not straightforward. I certainly cannot exclude the possibility of either interpretation, or of some other interpretation, being correct.

56. However, the opinion I have formed is that the interpretation preferred by the objectors is correct, essentially for the reasons I have already provided, which may be summarised as being that I do not consider the threshold for displacing the ordinary literal meaning of Article 32 to have been met.

57. By way of further explanation (and, to some extent, repetition):

- (1) Neither the promoters nor the objectors have referred to Article 16. Once that provision is borne in mind, it can be seen that the scheme effected by the 1964/1965 Orders on the objectors' interpretation is less radical or surprising, and gives rise to less uncertainty, than might otherwise have appeared. By contrast, the promoters' interpretation leaves unanswered the question of the purpose for which Merton LBC was to hold the Golf Course after the reorganisation had been completed, given the repeal of the bulk of the 1914 Act. Of the two interpretations, it is the promoters', not the objectors', which produces a less rational outcome from the point of view of the coherence of the statutory scheme.
- (2) Also unremarked by the promoters and objectors are ss4 and 87(1) of the 1963 Act. The effect for which the promoters contend is similar to the default position secured by those provisions for public general Acts and local Acts. If this had been the intended effect of the scheme enacted by the 1964/1965 Orders, it would have been straightforward to use wording like that found in s4 or s87(1) — perhaps making specific provision in the event that particular powers in the 1914 Act were no longer needed. The technique actually adopted, through Article 32 and the repeal of almost the whole of the 1914 Act, strongly suggests that this was not the intended effect; and what whatever flexibility might have been foreseen, in 1914, as desirable to obtain for the Corporation (compared with what was, or is now, available in relation to land held under s164 of the 1875 Act) had by 1965 proved not to be worth preserving (or, in 1965, was not perceived as worth preserving).
- (3) The argument of the promoters is stimulated by the inconvenience

which results from regarding the Golf Course as having been allocated, by Article 32, to be held for the purposes of s164 of the 1875 Act. That is an argument from the consequences. But the consequences in question have arisen, and arisen only, because Merton LBC did not treat the Golf Course as subject to s164 in 1981 or 1993. Therefore, they illustrate what potentially might go wrong — and has gone wrong — where a local authority fails to recognise the purposes for which it holds land, and any limits associated with its powers of disposition resulting from such purposes. It is illogical to invoke those same consequences as if they also illustrate, or even suggest, any irrationality or the like in the objectors’ interpretation of Article 32.

- (4) For reasons I have explained, giving to Article 32 the meaning which the promoters acknowledge is the “literal” meaning of the words used, produces an outcome which would have seemed unremarkable, and rational, when viewed in 1965. Article 16 fully vindicates the rights which the Golf Club possessed in 1965. To the extent that the imposition of s164 of the 1875 Act on the reversion of the Golf Course looks remarkable, and irrational, as at today’s date, this is because of what has eventuated since 1965, rather than because of any circumstance prevailing at that time. Hindsight is not available as an aid to statutory interpretation.

Opinions of other counsel.

58. There has been an exchange of opinions of counsel on the topic. On behalf of the promoters, in opinions dated 23rd June 2023 and 6th July 2023, Jonathan Karas, KC and Russell Harris, KC have expressed the view that when Article 32 refers to “the purposes of” s5 of the 1914 Act, the reference is only to such parts of the Estate as had by then already been dedicated to use under s164 of the 1875 Act. That view is derived not from any feature of the language but, instead, from the perceived adverse consequences of treating the Golf Course as if it were held under s164 of the 1875 Act. Those consequences are said to be so extreme as to justify implying words into the express language of the 1964 Order in the way they suggest at para 70 of Mr Karas’s opinion: as well as being land held for the purposes of s5, it is also (in their view) necessary for the land to have been appropriated under s10 of the 1914 Act, in order to vest in Merton for the purposes of s164 of the 1875 Act under Article 32. On behalf of the objectors, George Laurence, KC, has expressed the contrary view in his opinion dated 31st July 2023. In his opinion, the perceived adversity of the consequences has been

exaggerated and is in any event insufficient to justify implying the additional condition proposed on behalf of the promoters. On behalf of the London Borough of Merton, David Matthias, KC and Douglas Edwards, KC have expressed agreement with the views of Mr Karas and Mr Harris, in an opinion dated 11th September 2023.

59. I have considered the opinions provided to me. I need hardly say that they are all highly persuasive. My summary of them by no means does justice to the reasoning which they contain. I have been asked to state with whose opinion I agree. As will appear from the foregoing parts of this opinion, in which I set out my own view as to the most compelling points in favour of each side of the argument, I do not fully agree with any of the opinions I have seen. It is obvious or at least apparent from what I have written to what extent I agree, or depart from, the characteristically impressive reasoning which has found favour with other counsel. However, this is not a trial. Even if it were, it would not be productive — or appropriate — for me to attempt a more detailed critique of their opinions.

Consequences.

60. If I am right, then Merton LBC has held the Golf Course for the purposes of s164 of the Public Health Act 1875 since 1965. The normal incidents of land held for such purposes are modified in two respects. First, Merton LBC has the power in s8 of the 1914 Act which was preserved by the 1964/1965 Orders. This enables it to operate etc a municipal golf course. That is a somewhat protean power, but it does not extend to outright dispositions, in my view; or, at least, not to dispositions which fail to observe the formalities applicable to land held for the purposes of s164 of the 1875 Act. Secondly, by virtue of Article 16, it is (or was) subject to whatever rights belonged to the then-tenant of the Lease: both the term of years and any right of renewal etc under Part II of the 1954 Act. Subject to those matters, the whole of the Estate which transferred to Merton LBC was to be held for the purposes of s164 of the 1875 Act.

61. I gather that Merton LBC did not apply the formalities in s123 in 1981 when granting a new lease of the Golf Course, or in 1993 when disposing outright of the Golf Course. A lease in 1981 could potentially have been granted free of any question arising under s164 of the 1875 Act, if it could be shown to have been a lease to which the tenant had a right pursuant to Part II of the 1954 Act. But it was granted for a term of 55 years, which exceeds the 14 years allowable as of right under that Act. If for no other reason, therefore, the term created by the 1981 lease is itself subject to the *soi-dissant* trust created by s164, applying *R ota Day v. Shropshire Council* [2023] AC 955; [2023] UKSC 8. The same is true, *a fortiori*,

in relation to the disposal of the reversion in 1993. This in turn means that the public has not only a future right, but also a current right, to use the Golf Course for recreation.

62. That description of the consequences takes *Day* at face value. In fact, in my view, *Day's* case is problematic as an authority, because of the feature identified in paras 22 and 40 of Lady Rose's judgment, where she records it as being "common ground" both (i) that the land in question was held "under a statutory trust" and (ii) "that the disposal of the freehold of the land to CSE was valid". I should briefly record my own view that — contrary to what was common ground in *Day* — whatever duties are imposed on a public body holding land under s164 of the 1875 Act, fall away when that land is sold to a third party who acquires legal title to the land, whether or not the advertisement requirements in s123 etc of the Local Government Act 1972 have been satisfied. I think that to hold otherwise involves mis-interpreting s164 of the 1875 Act and s123 of the 1972 Act. It exaggerates the effect of s164 and, in relation to s123, it introduces private law concepts of trust, with implications for third parties who acquire with notice, in a provision which is plainly couched instead in terms that invite a conventional public law *vires* analysis. Parliament did not enact a regime in which a private person might end up owning land subject to a s164 "trust". It envisaged — and envisaged only — a situation in which the public body that holds land subject to s164 is also empowered, without much difficulty, to vacate the *soi dissant* "trust" by a simple process of advertisement. A regime in which a private person might end up owning land subject to a s164 "trust" divorced from the power to vacate the "trust" is an entirely judge-made construct which gives rise to intractable problems and for which there is no warrant in the statutory language or purpose.

63. In my view, on a correct analysis, a disposition which does not comply with the advertisement etc requirements is, simply, *ultra vires* — and, accordingly, liable to be challenged on conventional public law grounds using judicial review in the ordinary way, subject to the ordinary time limits and applying the ordinary *Jeyanthan* principle [2000] 1 WLR 354. These would indicate that the consequences of the breach of s123, not having been specified by Parliament, are for the Courts to determine. At one extreme, an unlawful sale might be undone by a quashing order in which case (potentially: I am not here expressing any view about the interaction of s123 with the Land Registration Act 2002) title will revert to the public authority and the s164 "trust" will be preserved. But, if an application for permission to commence judicial review is brought too late, then this outcome will not eventuate. Even if an application for judicial review is brought in time, there might be circumstances justifying the Court in declining to quash the disposition, in which event the sale, though unlawful, would stand and the third

party would continue to own the land unfettered by any s164 “trust”. In my view, this flows from a straightforward reading of s123, which clearly does not contemplate that any disposition will be made in breach of its requirements. Were it otherwise, then the result would be that although a public body might free itself of s164 restrictions by the simple method of making some advertisements, the land once sold to a third party is permanently fixed with such restrictions, because third parties cannot operate the advertisement etc provisions in s123. That is an absurd and disproportionate outcome. This is a strong indication that dispositions in breach of s123 are, simply, *ultra vires*. In *Day*, by contrast, it was common ground that dispositions in breach of s123 are *intra vires* but produce the consequence that the s164 “trust” survives in the hands of the third party disponent. This means that what, in fact, is the single critical matter from the point of view of practical implications — simply was not argued in *Day*. There are other authorities at the level of the High Court and Court of Appeal which might support the outcome assumed but not argued in *Day*. But these were largely influenced by rating law, where the idea of a trust was used as a metaphor to show that the public’s rights over land held under s164 left the legal owner with no sufficient interest to be regarded as having retained “beneficial occupation” for the purposes of rating. It is far from clear that this metaphor should be carried so far as to attract the consequences for third parties that are associated with a trust properly so-called. (I note that the 1906 Act by contrast with s164 uses expressly the word “trust”, but I question whether even for land held under that Act, as a matter of statutory interpretation, the expression “trust” was used in order to imply consequences for third parties.)

64. However, in light of the obvious potential for controversy about all of that, and because it is no part of the GLA’s functions to identify grounds of potential argument against the seemingly authoritative statement of the law in *Day*, it would be inappropriate to lengthen this opinion by further explaining my reasons or attempting further to explore the problems (meaning here the legal problems, rather than the practical inconveniences) which I consider reside within *Day*.

65. It follows — I admit, contrary to what I had expected when initially reviewing these papers — that in my opinion, based on the law as presently stated, on the basis that the consequences implied by the un-argued parts of *Day* are correct, members of the public have rights over the Golf Course, despite the 1981 lease and despite the 1993 transfer. It follows that the owner must make the land available to the public on a free and unrestricted basis, subject only to such limitations and restrictions as are consistent with that use and which serve the overall purpose of making the land available to the public for recreation. I do not think that this imposes on the landowner any obligation to maintain the land to a

particular standard, beyond the general occupier liability duties. Whether or not the court would actually grant an injunction in support of those rights at the suit of an ordinary member of the public, is a separate question, which does not arise for my consideration.

66. It would be highly imprudent for any member of the public to act as if entitled to enter the Golf Course, without the sanction of the Court. No number of barristers' opinions can outweigh a decision of the Court. Barristers advise: only the Court decides.

***R ota Wilkinson v. Enfield LBC* [2024] EWHC 1193.**

67. In a judgment delivered on 17th May 2024 in *R ota Wilkinson v. Enfield LBC* [2024] EWHC 1193, Mould J considered a number of topics broadly redolent of those which have arisen in the present case. He did so in rich detail and with extensive reference to the statutory framework and authorities. Having reviewed his judgment, I do not consider that it is inconsistent with my views expressed in this opinion.

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TIMOTHY MORSHEAD, KC
17th September 2024