Neutral Citation Number: [2026] EWHC 628 (Ch)

Claim No: PT-2025-000244

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD

7 Rolls Buildings,
Fetter Lane, London,
EC4A 1NL

Date: 19 March 2026

Before:

THE HONOURABLE MR JUSTICE THOMPSELL

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THE ALL ENGLAND LAWN TENNIS GROUND PLC

Claimant

and

(1) SAVE WIMBLEDON PARK LTD
(2) HIS MAJESTY'S ATTORNEY GENERAL

Defendants

Mr Jonathan Karas KC, Mr James McCreath and **Mr Jonathan Chew** instructed by CMS Cameron McKenna Nabarro Olswang LLP for the **Claimant**
Ms Caroline Shea KC and **Mr Rupert Cohen** instructed by Russell-Cooke LLP for the **1st Defendant**
The 2nd Defendant being neither present nor represented.

Hearing dates: 16th to 23rd January 2026

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JUDGMENT

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Mr Justice Thompsell :

1. INTRODUCTION

1. This case concerns a possible obstacle to the plans of the All England Lawn Tennis Ground plc (the "**Claimant**") to extend the facilities available for the purposes of top-level tennis at Wimbledon using land that it has acquired from the London Borough of Merton ("**LB Merton**").

2. A number of local residents are opposed to these plans and have formed a company called Save Wimbledon Park Ltd ("**SWP**") to focus this opposition.

3. The land in question, which is referred to as the "**Golf Course Land**" is at Wimbledon, SW19, across Church Road from the All England Lawn Tennis Club. The Claimant holds both the freehold of that land, subject to a lease that was originally granted in favour of Wimbledon Golf Club Ltd on 8 May 1986 (the "**1986 Lease**"), and (separately and without merger) the leasehold interest under the 1986 Lease. I will refer to Wimbledon Golf Club Ltd and its predecessor club that held a lease of the Golf Course Land as the "**Golf Club**".

4. The Claimant intends to develop the Golf Course Land to construct 28 new grass tennis courts, a show court and associated facilities, to be made available to the All England Lawn Tennis Club, in particular for the Championships, one of the four Grand Slam tennis tournaments. The development is planned to include a new 9.4 hectare park open to the public, except during the Championships. The development will also require resolution of certain restrictive covenants in favour of LB Merton which are not in issue in these proceedings.

5. This case is not about the merits or otherwise of these proposals. That is a matter to be considered by the planning authorities. The proceedings in this court relate solely to the questions whether s.164 of the Public Health Act 1875 ("**PHA 1875**") applies to the Golf Course Land and whether, as a result, the Claimant is holding this land subject to a statutory trust that has the effect of dedicating the land to public recreation.

6. The Claimant is seeking a declaration that section 164 PHA 1875 did not apply to the Golf Course Land when in the ownership of LB Merton or alternatively, if LB Merton did so hold the Golf Course, the application of that section did not survive the sale of the freehold reversion by the Transfer, notwithstanding that any requirements for advertisement in s.123 of the Local Government Act 1972 ("**LGA 1972**") were not met. As will be explained in detail below, that section sets out a mechanism that may be followed where land is subject to a statutory trust of this nature to allow the property to be transferred free of the statutory trust.

7. SWP has been named as a representative party in accordance with my order of 10 June 2025. SWP is making the case that s.164 PHA 1875 does indeed apply to the Golf Course Land. It is also resisting the planned development in other ways.

8. The Claimant has agreed to pay SWP's costs of participating of this claim .

9. The Second Defendant is His Majesty's Attorney General. He has been joined as a party also under my order of 10 June 2025, following the decision of the Supreme Court in *Darwall and Anor v Dartmoor National Park Authority* [2025] UKSC 20 ("***Darwall v Dartmoor***")", where the court found that, where there is a contest that may affect the subsisting and future rights of the public, the public should be represented in these proceedings and that the Attorney General as the representative of the Crown is best placed to do this unless an authorised government department is otherwise clearly the appropriate defendant. It is a matter for the Attorney General as to how far he wishes to participate and in the current case the Attorney General has chosen not to participate.

10. One party that is not represented here is LB Merton. I understand that LB Merton was given the opportunity to participate but has chosen not to do so.

11. The parties who were represented in court have produced detailed and subtle arguments, through their skeleton arguments both running to some 40 pages plus appendices and through six days of submissions in court.

12. Before dealing with the detail of those arguments it is useful to provide a high-level summary of the arguments so as to orientate the reader.

2. SWP'S ARGUMENT IN SUMMARY

13. SWP objects to the development on a number of grounds, however only one ground of objection is relevant to the case presently before the court. This is, in summary, that the Golf Course Land both at the time of creation of the 1986 Lease, and at the time of the transfer of the freehold to the Claimant, was held by LB Merton for the purposes of PHA 1875, and that, as a result, s.164 PHA 1875 applied.

14. S.164(1) PHA 1875 is in the following terms:

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

15. It is common ground that, where s.164 PHA 1875 applies, the land will become subject to a statutory trust. Land held pursuant to s.164, like that held under s.10 of the Open Spaces Act 1906 ("**OSA 1906**"), is subject to a trust for the purpose of public recreation - see: *R (Friends of Finsbury Park) v Haringey London Borough Council* [2017] EWCA Civ 1831 ("***Finsbury Park***") at [16] citing *Attorney General v Sunderland Corpn (1876) 2 ChD 634*. Where such a trust exists it is:

> "well established that the public have a statutory right to use the land for recreational purposes… Therefore, generally, the local authority owner "must allow the public the free and unrestricted use of it"…, and it cannot exclude the general public from it "even for a single day"."

16. It is common ground that the Claimant's proposals for the development of the land are incompatible with the statutory trust.

17. The application of a statutory trust of this nature was considered by the Supreme Court in *Rex (Day) v Shropshire Council & Ors* [2023] UKSC 8, [2023] AC 955 ("***Day v Shropshire Council SC***" or "***Day***")). As was said by Lady Rose at [2] in that case:

> "Where a local authority uses the powers conferred by …PHA 1875 … to acquire and provide recreation land or open space to the public, the land is subject to a statutory trust in favour of the public and members of the public have a right to go onto the land for the purpose of recreation."

18. Lady Rose went on at [41] to [49] to summarise the case law describing the nature of this statutory trust and at [50] to [51] to explain that such a "public trust" is not one that has the incidents of a private trust.

19. SWP argues that s.164 PHA 1875 applies to the Golf Course Land because:

a) it had originally been acquired by the Borough of Wimbledon ("**Wimbledon Corporation**" or "the **Corporation**"), along with other land forming part of what was originally the Wimbledon Park Estate at that time in the ownership of Lady Lane, under and for the purposes of the Wimbledon Corporation Act 1914 ("**WCA 1914**");

b) following the implementation of local government reorganisation in the 1960s (the "**1960s legislation**"), Wimbledon Corporation was abolished and its land was transferred to LB Merton;

c) the 1960s legislation also repealed all but a few sections of WCA 1914 and provided that land that was then being so held for the purposes of WCA 1914 was from 1 April 1965 to be held for the purposes of PHA 1875;

d) thus the Golf Course Land became subject to the statutory trust at that point, whether or not such a statutory trust had applied earlier;

e) following the principles in *Day v Shropshire SC*, the Claimant in relation to its acquisition of the freehold of the Golf Course Land and the Golf Club in relation to its acquisition of the 1986 Lease (and therefore the Claimant as its successor in title) took the land subject to the statutory trust; and

f) whilst it would have been possible for the land to have been sold free of the statutory trust had LB Merton complied with provisions in s.123 LGA 1972, it is common ground that these provisions were not complied with.

20. The relevant provisions of s.123 LGA 1972 are set out in full at [245] to [246] below. In broad terms they create a duty in a local authority that is selling land that comprises or is part of "open space" to advertise the disposal and to consider representations made to it. Where this is done the purchaser takes free of any statutory trust arising under s.164 PHA 1975.

21. SWP argues that it follows that, whilst the transfer remains valid as a result of a provision in s.128(2) LGA 1972, following the Supreme Court's decision in *Day,* the result of a transfer of land into private ownership was not sufficient to extinguish the trust, and therefore any title acquired by the Claimant was subject to the statutory trust, requiring the property to be kept available for public recreation.

3. THE CLAIMANT'S ARGUMENT IN SUMMARY

22. The Claimant has a number of objections to the arguments raised by SWP. In broad summary, its case is as follows:

    a) The Claimant denies that before the 1960s reorganisation of local government the Golf Course Land was ever held for the purposes of public recreation: it argues that the land had always been occupied as a private golf course.

    b) This being the case, the Claimant argues that it would be an absurd reading of the legislation implementing the local government reorganisation in the 1960s to find that this had the effect of turning what was private land into land that was subject to a statutory trust requiring the land to be available for public recreation.

    c) It argues that the legislation had no such effect. If the legislation is properly construed in accordance with its purpose and context, the court should conclude that the Golf Course Land was not being held for the purposes of WCA 1914 at the time of implementation of the reorganisation within the meaning of this legislation.

    d) It follows that:

        i. the land was not "open space" (and the Claimant argues did not form "part of open space") so as to engage the provisions of s.123(2A) LGA 1972, requiring advertisement of a sale or grant of interest in the land; and

        ii. that there was no requirement to rely on s.123(2B) LGA 1972 to free the land of a statutory trust, since no such trust had ever applied.

23. In the alternative, the Claimant argues that even if the land was subject to a statutory trust there are reasons why *Day* can be distinguished so that the Claimant holds the land free of the statutory trust.

24. The detailed arguments raised by both parties are best considered alongside a chronological analysis of how the ownership of the land has developed.

4. WIMBLEDON CORPORATION'S ACQUISITION AND USE OF THE LAND

A. The discussions leading to WCA 1914

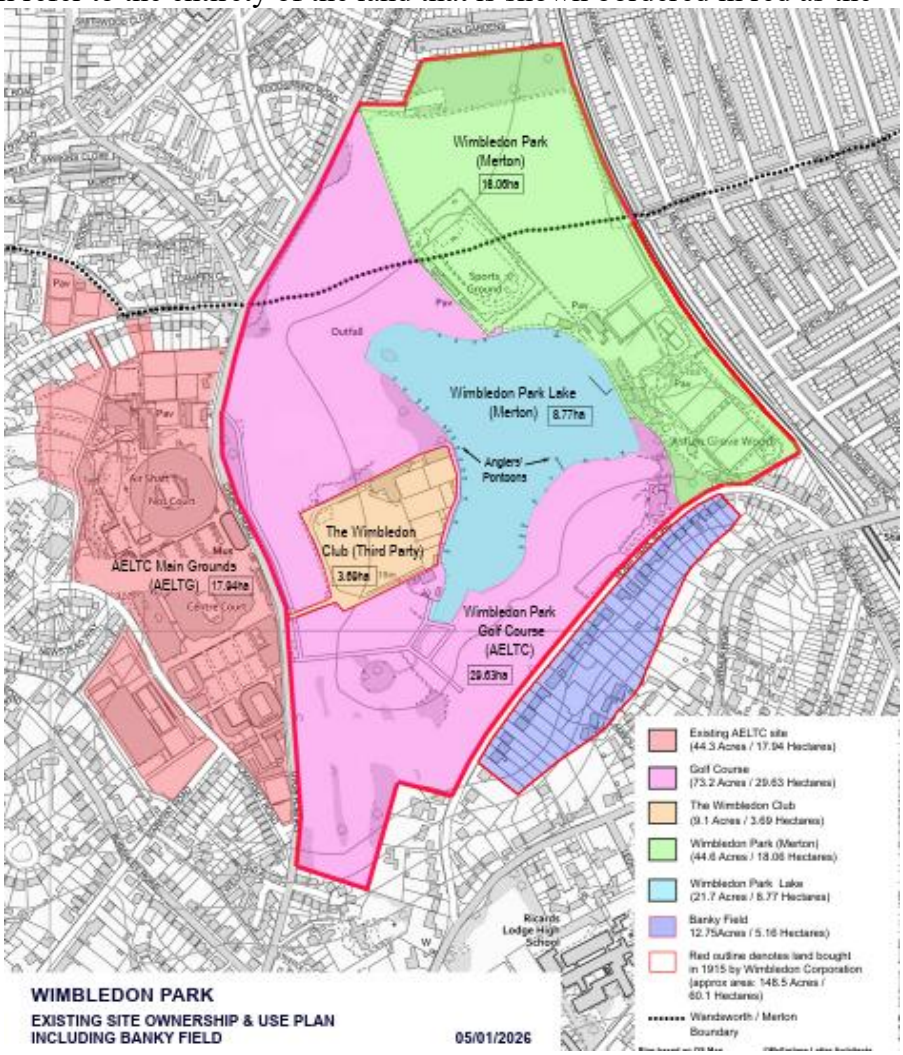
25. Wimbledon Corporation acquired the Golf Course Land in 1915 along with other land forming part of the Wimbledon Park Estate owned by Lady Lane.

26. A plan contained in the newspaper dated 10 January 1914, as part of an article explaining the intentions that Wimbledon Corporation had for the land, provides an illustration of the layout of the Wimbledon Park Estate around the time of Wimbledon Corporation's acquisition:

27. The Wimbledon Park Estate is delineated by a heavy black line. It is bordered by a road (Wimbledon Park Road) to the west and by a railway line along its north-eastern side. It crosses over the road marked as “Home Park Road” that runs south-east to North West, to include the land marked “C E”, which was known as “Banky Field”. The central feature of the Estate is the lake (which formed part of the 1911 lease to the Golf Club mentioned below). The “golf links” are marked on the plan to the south-east and south-west of the central part of the Estate. It is worthwhile noting that the broadly rectangular enclave to the west side of the map near the centre (indistinctly marked “Cricket Ground”) was excluded from the Wimbledon Park Estate, having been previously sold to a sports club and that the section marked “A” and indistinctly marked “Polo Ground” had been leased to a polo club.

28. A more modern plan is set out below showing the modern ownership and use. I will use this for the purpose of illustrating terms that I will use in this judgment. However, my use of this plan should not be regarded as any judicial approval of the precise borders of the various plots of land I describe – this was not a matter of evidence before me.

29. I will refer to the entirety of the land that is shown bordered in red as the "**Wimbledon Park Estate**" or the "Estate". This excludes a conclave currently marked in buff colour, and entitled "the



Wimbledon Club (Third Party)" which I will refer to as the "**Cricket Club Land**". This, as I have noted, was never acquired by the Wimbledon Corporation. The land that I am referring to as the "**Golf Course Land**" is that shown in pink and marked "Wimbledon Park Golf Course". It may be noted that the precise boundaries of land leased to the Golf Club changed between 1915 and the time of the 1986 Lease. In particular, in the early leases the Wimbledon Park Lake (the "**Lake**") shown in blue on the plan was in earlier times part of the land leased to the Golf Club, but this was not the case at the time of the 1986 Lease. The land marked in green at the North East is what I will refer to as the "**Park**". The land to the south-east shown in a bluish purple represents the **Banky Field**, which was originally part of Wimbledon Park Estate but which was sold off for housing development in early 1927. I will also refer to "**Home Park Field**", which I understand to be the historic name for the area within the Park roughly where the tennis courts are shown at the eastern end of the Park.

30. At the point that Wimbledon Corporation acquired the Golf Course Land, that land was already the subject of a lease in favour of the Golf Club. A lease had been originally granted to the Golf Club in 1900 for 10 years from 25 December 1900. A contemporary newspaper report confirms that the Golf Club was a private members' club. In 1906, that lease had been surrendered so as to allow a new lease granted on 9 April 1906 to the Golf Club for a further ten years from 25 December 1905. A further lease was granted on 15 September 1911 for a ten-year term from 25 December 1911. Thus, by the time that Wimbledon Corporation acquired the freehold of the Wimbledon Park Estate on 29 December 1915, the lease of the Golf Course Land still had some six years to run.

31. As early as January 1912 a newspaper report appeared which stated that Wimbledon Corporation was considering "a proposal to purchase the beautiful expanse of ground known as Wimbledon Park and its extensive lake". The report inaccurately stated that the ground was leased to the Golf Club, whereas only part of it was so leased. The report listed the advantages of the purchase:

> "it is obvious that, should the park fall into the hands of the builders and be cut up and built over with small houses such as are to be seen in the adjacent districts… The interests of the Borough would be materially affected"

such an effect might include:

> "the rateable value of the large estates and important houses which surround the park on the Wimbledon side would at once appreciate to a considerable extent, with the result that the rates would be increased."

32. It is clear that in acquiring the Wimbledon Park Estate, and in promoting what became WCA 1914, Wimbledon Corporation was looking for flexibility in what it would do with the ownership of the Wimbledon Park Estate. This was apparent from a Parliamentary Notice relating to the WCA 1914 as advertised in the Surrey Comet, on 15 November, 1913. This explained that the proposed Act provides for the acquisition of the Estate

> "for such purposes as may be contained in the intended Act".

33. The notice then went on to list a (non-exclusive) wide-ranging variety of proposed purposes or powers. These included powers:

i) to hold, use and appropriate portions of the Wimbledon Park Estate;

ii) to improve and extend the parkland and buildings;

iii) to lay out, form, maintain and convert grounds for cricket and other games;

iv) to use the land for meetings assemblies and other purposes;

v) to provide spaces for military drill and exercise;

vi) to provide buildings, enclosures, pavilions, stands, lavatories, kiosks, seats and other conveniences;

vii) to allow letting for games and other purposes;

viii) to appropriate any portion of the Estate for the purposes of "public utility instruction or benefit for such period and on such conditions as the Corporation may think fit";

ix) to appropriate any portions of the Estate to a golf course and golf links; "to permit the use thereof by clubs and other bodies to be let on lease";

x) to make provision for bowling greens, cricket grounds, lawn tennis grounds, croquet and other games and recreation;

xi) to provide accommodation for volunteer or territorial forces and other educational purposes;

xii) to provide for the letting of rights of selling and supplying refreshments to the public resorting to using the Wimbledon Park Estate;

xiii) to appropriate all or any part of the Wimbledon Park Estate for any special purpose which the Corporation may now or hereafter be authorised to acquire; and

xiv) to lease and sell Estate land, including for building leases.

34. The flexibility sought can also be seen from the consultation that Wimbledon Corporation made of its ratepayers, which allowed ratepayers a formal vote on whether to go ahead with the acquisition. Wimbledon Corporation was seeking the flexibility to apply four different schemes. As part of this consultation Wimbledon Corporation set out an official statement as to the scope and objects of the proposed Act. The following reasons were given in support of the Corporation's acquisition:

a) in the interests of the health and well-being of the people generally, to "secure "lungs" in districts where the population is increasing rapidly";

b) to meet a need to conserve or enhance the attractiveness of the town;

c) to help meet the need for playing fields;

d) to avoid losing amenity so as to prejudice the rateable value and therefore income of the borough;

e) the fact that the opportunity of acquiring the property "as an open space" might be lost (as the Council had secured an option to purchase the land that was time-limited).

35. The consultation document set out a summary of the four schemes for the use of the Wimbledon Park Estate, and the expected effect of each scheme on the rates:

a) to devote the whole 155 acres to be purchased for the use of the public;

b) to devote about 25 acres of the land to the use of the public and lease the remainder to clubs for golf or other games;

c) to devote about 60 acres of the land to the use of the public and lease the remainder (about 95 acres) for golf; and

d) to sell certain parts of the land and to devote the remainder to the use of the public.

36. One may take from this consultation document, and from other contemporaneous discussion, two points. The first is that Wimbledon Corporation was not solely concerned with preserving land for the use of public recreation (although it was, at that point, concerned to maintain "open land" in the sense of land that would not be significantly built on). The second is that Wimbledon Corporation, as promoter of the proposed Act, was concerned to preserve very substantial flexibility to use the land for various purposes.

B. The provisions of WCA 1914

37. WCA 1914 received Royal Assent on 7 August 1914. This was three days after the United Kingdom declared war on Germany.

38. The provisions of WCA 1914, insofar as they may be relevant, can be summarised as follows.

39. The recitals to the Act include the following:

> "And whereas it would be of great local and public advantage if certain lands (in this Act referred as 'the Wimbledon Park Estate') comprising one hundred and fifty-five acres or thereabouts and situate as to one hundred and twenty-two acres or thereabouts in the borough and as to thirty three acres or thereabouts in the metropolitan borough of Wandsworth in the county of London were acquired by the Corporation".

40. The recitals went on to note that the Corporation had already entered into a provisional agreement for the purchase of the Wimbledon Park Estate and that it was:

> "… expedient that the Corporation should be empowered to purchase the same and that the use management control appropriation and disposition of the Wimbledon Park Estate should be regulated and controlled in accordance with the powers and provisions in this Act contained".

41. S.5 provides a power for Wimbledon Corporation to:

> "purchase by agreement subject to any existing tenancies the Wimbledon Park Estate…[and to] "enter into and carry into effect any contracts or agreements necessary or proper for the purpose and [the Corporation] "shall hold and may use manage control and dispose of the Wimbledon Park Estate… For the purposes and subject to and in accordance with the powers and provisions set forth in this Act.

42. S.7 provides that Wimbledon Corporation:

> ".. shall have the control and management of the Wimbledon Park Estate and other lands acquired and held in connection therewith together with all buildings now existing or hereafter erected thereon ..."

43. The section goes on to list a number of powers that include:

a) powers to improve and extend the parklands and buildings and to construct and maintain grounds for games and sports etc., spaces for military drill and exercise as well as pavilions, stands, lavatories kiosks and seats;
b) limited powers of leasing for 21 years for games or recreation or supplying refreshments to the public resorting to the Estate, and to permit buildings for such purposes;
c) powers to set apart and appropriate any portion of the Estate for public utility instruction or benefit;
d) to lay out and maintain grounds for games (and provide equipment) and recreation;
e) to engage officers servants and workmen to perform any services connected with the Estate; and
f) with the consent of the Local Government Board, to appropriate all or any portion of the land "for any special purpose 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 lands".

44. S.8 provided a separate power to hold use and appropriate part of the Estate for the purposes of a municipal golf course and thereon maintain a golf course including a pavilion and make charges and make bylaws in connection with such a golf course.

45. S.9 authorised the temporary use of part of the Estate "for the purposes of a public walk pleasure ground public park or recreation ground". During such periods the lands so used "shall be deemed to be public walks or pleasure grounds within the meaning of the Public Health Acts".

46. Ss.10 and 11 are important to the arguments in this case, and in particular to the Claimant's argument that the Golf Course Land was never appropriated for the purposes of public recreation.

47. S.10 required that Wimbledon Corporation

> "from and after the expiration of a period of five years from the passing of this Act appropriate and maintain not less than twenty acres (not being land covered with water) of the Wimbledon Park Estate for the purpose of a public walk pleasure ground public park or recreation ground".

48. S.10 thus imposed a duty on Wimbledon Corporation within a certain period both to appropriate at least 20 acres of land to one of the purposes listed and, having done so, to maintain that land for that purpose.

49. S.11 provided that from and at such appropriation,

> "the provisions of the Public Health Acts as amended and extended by this Act shall apply thereto as if such portion had been acquired by the Corporation in pursuance of section 164 of the Public Health Act 1875".

50. S.11 thus deemed PHA 1875 to apply, rather than directly causing it to apply. I think it was accepted by both sides, however, and certainly I consider, that where s.11 was to be so deemed to apply, it gave rise to the same statutory trust that applies where s.164 PHA 1875 applies directly.

51. Two aspects of the interpretation of these provisions have been the subject of argument.

52. First, there has been a question whether the power of permanent appropriation provided by s.10 was a power that could be exercised only once or whether it was a continuing power. I am persuaded by the arguments of Ms Shea KC, representing SWP, that the wording of the provision can only be construed as a one-off power that had to be exercised within the time period stated (as the same was later extended by other legislation) and could not be exercised after that period.

53. Secondly, there is a question whether it could be regarded as an appropriation under s.10, if Wimbledon Corporation appropriated some part of the Estate for the purposes of *private* recreation (or as a *private* pleasure ground). This is relevant since it could be argued that at the point Wimbledon Corporation took a decision to grant a new lease to the Golf Club it was thereby appropriating the Golf Course Land to a purpose of private recreation.

54. On the wording of s.10 this looks at first sight to be possible: the list of purposes listed in the section include "recreation" and "pleasure ground" without those words being proceeded by the word "public". However, on this point, I am persuaded by Mr Karas KC (representing the Claimant) that the purpose of public enjoyment must apply to all the purposes listed in s.10 because the result of an appropriation under s.10 would be to deem PHA 1875 to apply. This then would engage s.164 of that Act and thereby presumably therefore impose the statutory trust for public recreation – which would be incompatible with the nature of a *private* recreation ground (or pleasure ground).

55. Returning to the list of relevant provisions, s.12 authorised the grant of building leases on the Estate with the consent of the Local Government Board. S.13 authorised the sale of land or ground rents, again with the consent of the Local Government Board. Both these powers of disposal were subject to s.14 which limited disposal to 75 acres.

56. Ss.15-16 were the financial provisions in relation to the Estate. S.15 provided that any expenditure in pursuance of Part II, other than expenditure defrayed out of borrowed money was to be defrayed out of the rents and revenue of the Estate and thereafter out of the district fund or rate. S.16 set out a priority order for the application of the revenue derived from the Estate, in summary: firstly, expenses of the Estate; secondly, payment of interest on borrowing; thirdly, capital repayments on borrowing; with the remainder carried forward to the district fund or rate.

57. Part X of WCA 1914 contained financial provisions, including power to borrow.

58. S.155 (significantly, as we shall see) provided that the powers of WCA 1914:

> "shall (except where otherwise expressly provided) be deemed to be in addition to and not in derogation of any other powers conferred … under any other Act of Parliament Charter law or custom and the Corporation … may exercise such other powers

and be entitled to such other rights and remedies as if this Act had not been passed…".

59. Whilst WCA 1914 is fulsome in enumerating the wide range of powers to be granted to Wimbledon Corporation, it is less clear on what are the purposes of the Act (which will become important when we come to consider the provisions of the 1960s legislation). S.5 refers to the "purposes of the Act", but nowhere are those purposes spelled out.

C. How the land was dealt with by Wimbledon Corporation

60. Throughout the period during which Wimbledon Corporation owned it, the Golf Course Land remained in use by the Golf Club, originally under the terms of the 1911 Lease and thereafter under the terms of further leases granted by Wimbledon Corporation to the Golf Club.

61. These included a lease in 1919 (the "**1919 Lease**"); a 1922 Indenture, which regularised the boundary to the west of the Lake between the Golf Course and what was then still allotment land - a small land swap to reflect the boundary on the ground; a 1925 lease; and a 1934 agreement for lease under which a new clubhouse was constructed by Wimbledon Corporation in anticipation of a further long lease.

62. That lease (the "**1936 Lease**") was granted, with ministerial consent, on 20 June 1936, pursuant to powers under s.164 of the Local Government Act 1933 ("**LGA 1933**"). The 1936 Lease could not have been granted under WCA 1914 since its 30 year term was too long for it to come within the leasing powers under s.7 and its size (94 acres) was in excess of the 75 acre limit on disposals imposed by s.14.

63. As regards the remainder of the land, it appears that during the First World War and shortly thereafter it was mostly used for allotments, except for Banky Field which from 1917 was used as a (temporary) public open space and a section to the north-east that was wooded. Banky Field was later sold on terms that allowed development of housing on the area.

64. The Corporation applied for and obtained three statutory extensions of time to comply with its obligations under s.10 WCA 1914 to appropriate and maintain not less than 20 acres of the Estate "for the purpose of a public walk pleasure ground public park or recreation ground". These extensions (under the Wimbledon Order 1920; the Wimbledon (Extension of Time Order) 1922; and the Wimbledon Order 1923) eventually provided the Corporation with extensions until 31 December 1927.

65. Banky Field was sold in early 1927 to be developed as housing.

D. What, if any, land was appropriated by the Corporation under s.10?

66. The Claimant's case is that the Corporation did, within the time allowed, comply with the requirement of s.10 WCA 1914 by appropriating the Park for those purposes, but did not appropriate the Golf Course Land, (or Banky Field) under s.10.

67. SWP in its Defence admits, given both the existence of the Corporation's duty and the fact that the Corporation took steps to extend the time within which the appropriation

was to take place, that there is likely to have been an appropriation of at least 20 acres of the Wimbledon Park Estate under s.10. However, it notes that the Claimant does not plead any facts supporting its assertion that the appropriation was allegedly made in relation only to the Park, and nor does it give any reason supporting such a limited appropriation.

68. In argument, Ms Shea argued that either all the Wimbledon Park Estate was appropriated under s.10 or none of it was.

(i) The test for appropriation

69. In relation to what is required to show an appropriation, Ms Shea referred me to the case of *R. (on the application of Adamson) v Kirklees MBC* [2020] EWCA Civ 154 [2020] 2 P. & C.R. 9 ("***Kirklees***"). I agree that this case provides a very useful analysis of what is needed to demonstrate appropriation.

70. Here the question arose whether land (which had been used for some 80 years as allotments) had been statutorily appropriated for use as allotments. If the land had been "purchased or appropriated for use as allotments" the consent of the minister was required under s.8 of the Allotments Act 1925 before it could be appropriated to some other use.

71. On appeal to the Court of Appeal, the council argued that appropriation of land held by a local authority for one purpose required a conscious and deliberative process if it were intended that the land be held for another purpose and that no such formal decision had been taken. The fact that the site had been used as allotments for at least 80 years was not enough.

72. The Court of Appeal agreed. The principal judgment was given by Lewison LJ and was unanimously agreed by the Court of Appeal. He found (at [34]) that there was no general definition of "appropriation" in statute or case law. He reviewed previous cases, noting that:

    i) In *R. (Malpass) v Durham CC* [2012] EWHC 1934 (Admin) the question was whether the council held land as open space, either under the Public Health Act 1875 or under the Open Spaces Act 1908. (I think this was meant to be a reference to OSA 1906.) In this case the appropriation needed to be made under ss.153 and 165 LGA 1933. Under those provisions, to be a valid appropriation the local authority (i) must have concluded that the land was not required for its existing purposes and (ii) was required to obtain ministerial approval for that appropriation. Lewison LJ considered that the decision of the judge in that case was based on a lack of evidence that either of these two conditions had been satisfied.

    ii) In *R. (Beresford) v Sunderland City Council* [2003] UKHL 60; [2004] ("***Beresford***") 1 A.C. 889 the Corporation (which had wide powers under the New Towns Act 1965) had identified land in its 1973 town plan as "parkland/open space/playing field" and had laid out the land as such and maintained it. Commenting on that case in *R. (Barkas) v North Yorkshire CC* [2012] EWCA Civ 1373; [2013] 1 W.L.R. 1521 ("***Barkas CA***"), Sullivan LJ considered (at [36]) that the statutory approval of the corporation's new town

plan in 1973 by the minister, which had the effect of granting planning permission for the development of the land as 'parkland/open space/playing field', when coupled with the subsequent laying out and grassing over of the land, was sufficient to amount to an 'appropriation' of the land as recreational open space. This analysis was agreed by Lord Carnwath when the matter reached the Supreme Court (see *R. (Barkas) v North Yorkshire CC* [2014] UKSC 31; [2015] A.C. 195) ("***Barkas SC***") at [85]. Lewison LJ in *Kirklees* (at [42]) noted that this provided:

> "a useful indication of the importance of a planning designation coupled with subsequent use."

iii) *R. (Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin) was an example where the appropriation of land to a particular purpose had been argued to have taken place under s.122 LGA 1972, and so was conditional on the council having made a positive decision whether or not the land was required for its previous purpose before that appropriation. It was for that reason that the suggestion that appropriation could be inferred from use alone was problematic.

iv) In *Ramsgate Town Council v Thanet DC* [2018] EWHC 3042 (Ch) the question was whether land that had once been held for allotment purposes had been appropriated to different uses. The court found that there had been appropriation by Thanet seeking and obtaining ministerial consent for the appropriation, since "there are no statutory formalities required for an effective appropriation".

73. After considering these cases, and the case of *R. (Day) v Shropshire Council* at first instance ([2019] EWHC 3539 (Admin)), ("***Day v Shropshire HC***"), Lewison LJ stated at [51]:

> 51. Plainly, the best way of showing that such appropriation has taken place is by recording it in a formal resolution or minute of the meeting of the local authority that took the decision in question. But I do not read the case law as requiring any particular evidence to be produced to the court in order for it to be able to conclude that the necessary deliberative process has taken place; or that any required conditions have been satisfied. It may well be that the mere fact that land has been used for a particular purpose is insufficient evidence from which to infer that such a process has taken place; but that is a question of evidence rather than law. In evaluating the evidence, a court must also make allowances for the fact that, where the event alleged to have given rise to the appropriation took place many decades ago, many relevant documents may have been destroyed, lost or mislaid.

74. After consideration of the Supreme Court's decision in *R. (Lancashire CC) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 1238 (Admin) ("***Lancashire CC***"), he added (at [55]) that:

> "55. In my judgment, the Supreme Court must be taken to have agreed with Ouseley J:
>
> i) that it is permissible, in appropriate circumstances, to infer the existence of resolutions that have been lost;
>
> ii) that there is evidential significance in the identity of the council's committee that manages the land; and
>
> iii) that there is evidential significance (albeit limited) in how the land was in fact used.

75. In the end Lewison LJ found in *Kirklees* that there had never been an appropriation of the land for the purpose of the allotments, having considered all the evidence in that case.

76. With those observations in mind, I turn to the evidence for or against appropriation in the case before me.

(ii) The evidence for appropriation: minutes and newspaper reports

77. First, I note that the Corporation had an obligation under s.10 WCA 1914 to appropriate and maintain not less than 20 acres of the Estate for the purposes set out in that section, which, as I have stated, amount to the purposes of public recreation. The presumption of regularity would suggest that, in absence of evidence to the contrary, the Corporation should be regarded as having complied with its statutory obligation. This point is fortified by the fact that the Corporation took the trouble to obtain extensions to the time it had to comply with s.10.

78. In *Kirklees* Lewison LJ appears to have accepted an argument (recorded at [67(vi)]) that in appropriate circumstances it may be legitimate to infer from long use that appropriation has taken place because of the presumption of regularity, although in the case before him the presumption did not apply because the council already had wide powers of land management. In the case before me, the presumption of regularity has substantially more force since in this case Wimbledon Corporation was under a statutory requirement to make an appropriation.

79. Secondly, I note that, whilst no one has been able to find a minute specifically using the words "appropriation", there are numerous indications of the intention of the Corporation to devote the Park to purposes of public leisure:

    i) On 8 March 1923 the minutes of the Corporation's General Purposes Committee record that the Borough Surveyor was instructed to submit a scheme for the development of Wimbledon Park estate including "(a) the provision of hard tennis courts, bowling greens, etc.; (b) the erection of pavilions; (c) the planting of belts of trees so as to enhance the amenities of the Estate; (d) the dredging of the lake; the laying out of accommodation roads on the Estate; and (f) the lay-out of building plots, for residential purposes";

    ii) on 27 April 1925 a sub-committee of the General Purposes Committee, the Wimbledon Park Estate Sub-Committee, considered a plan submitted by the

Borough Surveyor showing proposals "for the development of that portion of the Wimbledon Park Estate **outside the area proposed to be leased to the Wimbledon Park Golf Club**" (emphasis added) alongside his estimate of the costs of developing the layout and formation of terraced tennis courts. The sub-committee approved the plan and resolved that, when approved by the Council, the plan be undertaken in stages;

iii) Various minutes of the General Purposes Committee and of the Wimbledon Park Estate Sub-Committee chronicle various decisions between 28 September 1925 and 24 November 1927 to go ahead with the development of the land outside the Golf Course Land (and not including Banky Field, which had been earmarked since 1925 for housing development), and to pay for and obtain loans from the Ministry of Health for these purposes. They chronicle the development of tennis courts, pavilions, a tearoom, conveniences, two bowling greens; improvement of ditches; and the general lay out of paths and shrubs pathways, tree-planting and drainage.

iv) On 30 September 1925, the sub-committee (i) approved the principle of disposing of Banky Field and (ii) acceded to the request of the Allotment Committee to allow plot holders to continue as tenants at will "until the land is actually required for development for recreative purposes". This indicated an intention that the former allotment land (including the Polo Ground) was to be used for (public) recreational purposes.

v) The minutes of the General Purposes Committee dated 15 June 1926 include a report about the construction of the tennis courts. Arrangements were being put in place for the formal opening of the courts on 19 June 1926. The same minutes record the acceptance of a tender for the construction of conveniences on Home Park Field. According to a local historian, the tennis courts were indeed formally opened on this date by the Mayor and by Suzanne Lenglen, a leading female player at that time.

vi) It is clear from the Wimbledon Park Estate Sub-Committee's minutes of 13 January 1927 that the use of allotments had ceased.

80. Minutes of the Wimbledon Park Estate Committee of 24 November 1927 and 15 December 1927 included reports of the progress in developing the Park. The November minutes showed that a loan had been sanctioned by the Ministry of Health for the purposes of two putting greens and resolved that these be proceeded with forthwith; a pavilion was in the course of being constructed. Almost all the paths had been constructed; arrangements that have been put in place for the sale of refreshments required to be renewed. The minutes in December show that almost all the paths had been created; and a tea chalet was in the course of being designed. An application had been received from the Wimbledon Park Bowling Club applying for permission to use the new greens as soon as they were constructed.

81. By the end of 1927, whilst some of the development of the Park was not yet fully completed, it is clear that the Corporation had sought to dedicate the Park to public recreation and was actively pursuing the development of Park. The tennis courts were clearly operational, and the bowling greens and putting greens were in the course of construction, although not yet in use by the public.

(iii) The evidence for appropriation: maps relating to planning

82. Apart from the evidence found in the minutes of the Corporation's committees, the other evidence to be considered is that from contemporary maps, in particular those relating to planning.

83. On 5 January 1927 the Corporation passed a resolution to prepare a Town Planning Scheme pursuant to s.1 of the Town Planning Act 1925.

84. A map which appears to be in a folder created by the Ministry of Health headed "Preliminary Statement", within that headed "Borough of Wimbledon Town Planning Scheme 1926 Map No.2, shows the entirety of the Wimbledon Park Estate (other than the lake, Banky Fields and the Cricket Club Land) in a colour which appears to indicate, according to the Legend or Key provided, "Existing Space: "Public Open Spaces". It makes no differentiation between the Park and the Golf Course Land. It shows Banky Field in a different colour. It is unclear, however, what is meant here by "Public Open Spaces" – the Cricket Club Land, which we know to have been in private ownership is shown as an area "reserved for public open spaces", perhaps reflecting an option that the Corporation had taken over this land, but which was never exercised. Given that this seems to be a map supporting a proposal rather than the result of any resolution, I am disposed to give it little weight.

85. A more authoritative map (the "**1928 Map**") bears the legend:

> "This is the Map No. 2A referred to in the Instrument of the Minister of Health dated the 10th day of October 1928 approving the Preliminary Statement of proposals for development in connection with the Wimbledon Town Planning Scheme".

It is signed by the Assistant Secretary at the Ministry of Health, with the date 13 November 1928. This map also shows most of the Park and the Golf Course Land in the same green as one another (although this green now appears slightly darker at the top of the map, that is probably to do with how the map was stored). The northern part of the Park appears in grey, but that is probably because it was not part of this Town Plan as it was in the neighbouring borough of Wandsworth.

86. The colours in the 1928 Map are difficult to match to the Legend or Key provided, but probably it is correct that the Park and the Golf Course are shown in the same colour in the Key as "Public Open Spaces". The Legend also shows "Area reserved for Open Spaces" and under that heading a category of "Public Open Spaces" in a similar green with some crosshatching - but no part of this map appears with that crosshatching. The Cricket Club Land this time appears in green with a thick black box around it. This appears to match what is described in the Key as "Private Open Spaces".

87. There is a similar map to the 1928 Map found in part of a file of documents relating to a variation of the Town Plan undertaken in 1947. This map, (the "**1932 Map**") bears Wimbledon Corporation's seal (attested by the Mayor and the Town Clerk) and a certification by the Town Clerk that

> "This is a copy of the "Map No. 4 illustrating the proposals contained in the Final Scheme adopted by resolution of the Town Council on 27 April 1932".

88. The 1932 Map uses a Legend or Key that is similar, but not identical, to that of the 1928 Map to illustrate land use. In this case the map is marked with a warning that:

> "The following particulars are inserted for convenience only; they do not form part of the Scheme or Map and do not affect the construction of the Scheme"

89. The Legend to the 1932 Map shows, under the main heading "Existing", that areas in green without a border are "Public Open Spaces". There is a separate heading for "The land held by Corporation under and subject to the Wimbledon Corporation Act 1914" which appears in a similar green, but with an orange border. The Wimbledon Park Estate (other than most of Banky Field) is all shown in green with an orange border. Again, under a heading "Area reserved for Open Spaces", the Key shows "Public Open Spaces" in a similar green with thick crosshatching (but there is no land marked in this way on the map) and "Private Open Spaces" in a similar green with a black border. The Cricket Club Land is shown in green with a black border.

90. Finally, I would refer to a map produced by the Valuation Department of the Town Planning Committee of London County Council on 7 December 1934 following the survey undertaken to identify areas of more than half a mile away from public open space or a children's playground (the "**1934 Map**"). Interestingly, this shows only the Park coloured as a public open space – the Golf Course Land is not marked as such.

91. The fact that this map was produced by the Valuation Department suggests that it was based on the records used for purposes of rating. It is known that the Golf Club did pay rates. This is seen, for example, from a copy of the Parish of Wimbledon Valuation List for Ward A for 1928. This shows the Golf Club as occupier of the Golf Course Land being subject to rates but shows that Wimbledon Corporation was not obliged to pay rates in relation to the tennis courts or any other part of the Park. It is established law that land that is subject to a statutory trust for public enjoyment, and used as such, is not regarded as being "occupied" by its owner, and so is not the subject of rates. The fact that Wimbledon Corporation was charging rates on the Golf Course Land but not on the Park is a strong indication that it regarded the latter but not the former as being occupied not by the Corporation but by the public and is indicative that the Park but not the Golf Course Land had not been given over to the use by the public.

92. Some caution is needed in relying on the evidence of rating, since liability for rates depends upon the actual occupation of land, rather than who had a right to occupy land. Nevertheless, the fact that, as a rating authority, the Corporation considered that the Park was being occupied by the public, and the Golf Course Land was not, is certainly relevant to the evaluation that needs to be made as to whether there was an appropriation under s.10, and the extent of that appropriation.

(iv) Was there appropriation of the Park?

93. The actions taken by Wimbledon Corporation in laying out the Park as shown by the extensive minutes I have referred to above, were clearly within the powers of the

Corporation under s. 7 WCA 1914. It is also clear that the purpose of this laying-out of the Park was public recreation of various types.

94. The Corporation had two separate powers under WCA 1914 to allow the Estate to be used for public recreation. There was a temporary power under s.9 (which had been used while the Banky Field was being used for public recreation) and the power, and requirement, under s.10 to appropriate and maintain permanently not less than 20 acres of the Estate for the purposes set out in that section.

95. There is no suggestion in any of the minutes or otherwise that the substantial expenditure on laying out these facilities was for the purposes of the temporary power under s.9 or that the requirements of s.9 were followed - s.9(4) required that during any period of temporary allocation to these purposes the Corporation must exhibit and keep exhibited at each gate or entrance to the relevant part of the Estate a notice specifying the period during which the same is to be used for the public recreation purposes.

96. In view of this, and in view of the expenditure that the Corporation was taking on it seems overwhelmingly likely that the Corporation was implementing a decision to appropriate the land that had been laid out for public recreation (i.e. the Park) in accordance with s.10 rather than to allow temporary user public recreation under s.9.

97. We see from *Kirklees* at [51], which I have reproduced at [73] above, that determining whether an appropriation has been made is a matter for the court to determine on the evidence. Elsewhere in *Kirklees* one can find authority for the propositions that it is permissible in appropriate circumstances to infer the existence of resolutions that have been lost and that there is evidential significance in how the land has in fact been used. This by itself may not be enough, but in appropriate circumstances it may be legitimate to infer from long use that appropriation has taken place because of the presumption of regularity. That presumption may be displaced if the use of the land for a public benefit is compatible with another power that the council in question possessed (so that the long use is compatible with there not having been an appropriation) but that consideration does not apply here.

98. Wimbledon Corporation was under a statutory requirement to make an appropriation (and did not require any ministerial permission or any other particular formality in order to do so). This consideration, coupled with the clear intent evidenced in minutes over a number of years to devote at least the Park to uses of public recreation, and the consistent treatment of the Park over the ensuing years as being dedicated to public benefit, leads me to the conclusion that there must have been a decision by the Corporation to appropriate at least the Park to the purposes of s.10 WCA 1914.

(v) Was there appropriation of the Golf Course Land?

99. This then leaves the question whether the Corporation went further and in fact appropriated the entirety of the Wimbledon Park Estate (other than Banky Field) for the purposes of s.10 WCA 1914.

100. The Claimant puts up a number of strong arguments as to why this could not be the case. In summary,

i) the Corporation's granting of leases providing the Golf Club with exclusive possession was incompatible with the Golf Course Land being appropriated under s.10 (and so being deemed to be subject to s.164 PHA 1875 pursuant to s.11 WCA 1914);

ii) the Corporation's affixing of a seal to these leases would have required a formal resolution of the Corporation, constituting therefore a formal decision not to appropriate this land under s.10;

iii) the evidence of the laying out of land for a public benefit that I have summarised above relates only to the Park and did not apply to the Golf Course Land;

iv) the public have been excluded from the Golf Course Land at all times while the land was in the ultimate ownership of the Corporation - there are (as I accept) numerous instances in the minutes of the Corporation's committees demonstrating the intention of the Corporation to keep the land fenced off from the public;

v) the Golf Course Land was not treated by the Corporation for rating purposes as being land where occupation was by the public rather than by the Golf Club.

101. SWP has a number of counter-arguments as to why the appropriation made by the Corporation for purposes of s.10 should be considered to extend to the Golf Course Land.

102. First, the evidence of the 1928 Map and of the 1932 Map show that the Corporation made no distinction between the Park and the Golf Course Land, apparently marking both of them in the same way, and in the case of the 1928 Map as "Public Open Spaces".

103. For a number of reasons, I do not find this argument to be persuasive.

104. First, it is unclear what is meant by "Public Open Spaces", and certainly it is not clear that this is a reference to the purposes listed in s.10 WCA 1914, or any of them. It could just mean spaces that are in the ownership of a public body and are open (in the sense of unbuilt upon) spaces. In fact, such an interpretation may be supported by the fact that in the 1932 Map, (only 4 years later) the same land is shown as "The land held by Corporation under and subject to the Wimbledon Corporation Act 1914".

105. Secondly, as shown by *Kirklees* at [42], whilst planning designation may be important as an indicator of appropriation, this is only where "coupled with subsequent use". This must mean subsequent use for the public purpose for which the putative appropriation was made. The evidence in our case is that the subsequent use of the Golf Course Land throughout the period in which Wimbledon Corporation held it was for the purposes of a private Golf Club and not for public recreation.

106. Thirdly, we have the evidence of the 1934 Map, which although it was not produced by Wimbledon Corporation, but rather an organ of the Town Planning Committee of London County Council, also had a planning purpose and it would have been surprising if Wimbledon Corporation had not been consulted in relation to it. This map clearly makes a distinction between the public use of the Park and the private use of the Golf Course Land. The point that it was likely based on how land was being treated for rating

purposes does not detract from this. The rating treatment itself demonstrated that Wimbledon Corporation did not consider that the land was being occupied by the public.

107. A second argument made by SWP is that permitting land to be used by a private club in return for payment for use for sports purposes is not inconsistent with public rights.

108. In support of this point, SWP cites *Burnell v Downham Market Urban District Council* [1952] 2 QB 55 ("***Burnell***") and notes that in the same vein, s.52(2) of the Public Health Act 1961 expressly provides that where land is set apart for the purpose of any game the authority may permit the exclusive use by any club or body of any portion of the part set aside, imposing a changes if it thinks fit.

109. There are two answers to this point.

110. The first is that what we are seeking to do here is to infer from the actions of Wimbledon Corporation its intentions as regards appropriation in 1927. The Corporation could hardly be expected to have been thinking about *Burnell* which was decided some 25 years later, or the provisions of a 1961 Act. In fact before *Burnell* the major cases dealing with this point was *Lambeth Overseers v. London County Council* [1897] A.C. 625 (referred to as the "***Brockwell Park Case***"), where the extent that the public was excluded from parts of the land in question was significantly less than that in *Burnell,* and the case of *The North Riding of Yorkshire County Valuation Committee v. Redcar Corporation*, [1897] A.C. 625, where it was held that a local authority, who owned a considerable area near the foreshore and used and managed it substantially as an amusement park, were rateable in respect of their occupation of it.

111. The second is that this argument takes what was decided in *Burnell* too far. The court had to determine whether the local authority had departed from a requirement in the local Act under which it was holding land

> "upon trust for the perpetual use thereof by the "public for the purposes of exercise and recreation pursuant to the provisions of the Open Spaces Act, 1906."

112. The land in question had been laid out with a football and cricket pitch, two hard tennis courts had been made and a wooden pavilion erected. The council had let the tennis courts to local clubs for their exclusive use for certain hours after 6 p.m. and it had entered into an agreement with the local football and cricket federation under which the council granted to the federation the right to use the cricket or football pitches on certain days with the right to close the field on a limited number of agreed days and on those days to make a charge for admission. The closure lasted on those days for one hour and a quarter and for a total period of 40 hours in any year. The Lands Tribunal had held that the council were not in beneficial occupation of the field for rating purposes.

113. The Court of Appeal held that the actual user of the land did not involve such a departure from the obligation to allow the public free and unrestricted use to justify the conclusion that the council had in fact assumed the character of rateable occupiers. The right of the public to "free and unrestricted user" did not involve the proposition that any member of the public could at all times gain access to the field without payment. The question of when the exclusion of the public was such as to take the land outside the public

purposes for which the land was held was one of degree. The Lands Tribunal was entitled to conclude that the limited exclusion of the public resulting from the council's agreement with the local clubs was ancillary to their management of the field as an open space within the meaning of OSA 1906.

114. The limited exclusions of the public that were considered to have been justified in *Burnell* were of an entirely different nature to what was happening on the Golf Course Land, where the public were excluded entirely (except as licensees of the Golf Club) from what amounted to the majority of the total land area of the Wimbledon Park Estate (after the disposal of Banky Field). As Evershed M.R. said, this is a matter of degree. My clear finding in the case before me is that the extent of the exclusion of the public from the entirety of the Golf Course Land was incompatible with the use of that land for public benefit as would apply had the land been appropriated for the purposes of s.10 WCA 1914.

115. Neither can I accept an argument advanced by Ms Shea and her junior Mr Cohen that it would have been compatible with the land being appropriated under s.10 (so that it was to be dealt with as if s.164 PHA 1875 applied) for the land then to be used under other powers under WCA 1914 (such as the power to grant a lease for 21 years or less) that are incompatible with public use.

116. I think they were arguing that this was possible even if this were an exclusion that was beyond the degree that might be compatible with a statutory trust for public use allowed for by Evershed MR in *Burnell*, although only if that power were given in a local Act or in a general Act that was specific in overriding the provisions of PHA 1875 or OSA 1906 (a proposition that Mr Cohen derived from *Blake v Hendon Corporation* [1962] 1 QB 283 ("***Blake***")).

117. In support of this proposition Mr Cohen referred me to the judgment of Hickinbottom LJ (with whom the other members of the Court of Appeal agreed) in *Finsbury Park*. Hickinbottom LJ found (at [17] to [18]) that where a statutory trust for public use exists

> '…it is well established that the public have a statutory right to use the land for recreational purposes…. Therefore, generally, the local authority owner "must allow the public the free and unrestricted use of it" (*Lambeth Overseers v London County Council [*1897] AC 625, 631, per Lord Halsbury LC), and it cannot exclude the general public from it "even for a single day": *Attorney General v Loughborough Local Board* The Times, 31 May 1881, recently quoted and confirmed in *Western Power Distribution Investments Ltd v Cardiff County Council* [2011] NPC 25, para 16, per Ouseley J.
>
> 18. However, of course, that general rule bows to contrary legislative provision…"

118. There are at least three reasons for rejecting this argument.

119. First, *Finsbury Park* was about the lawful use of statutory powers in the face of a public recreational trust – it was accepted (at [56]) that such powers would need to be used lawfully and not to frustrate the legislative purpose. In the case of the Golf Course Land,

it would have frustrated the legislative purpose of allowing land to be appropriated for public recreational use if the Corporation were to enter into arrangements to exclude the public entirely for a long period of years. This is something the court should take into account in determining whether there was indeed a decision to appropriate the Golf Course Land under s.10.

120. Secondly, if this argument can be applied in such a broad manner, it seems to give very little meaning to the idea of permanent appropriation required by s.10. As we have seen, WCA 1914 expressly gave very wide powers to the Corporation. As well as limited powers to sell and to lease, these included under s.7(7) a power:

> "with the consent of the London Government Board to appropriate any part of the Wimbledon Park Estate for any special purpose 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 lands".

If such wide powers were allowed to override a public trust created by the deemed application of s.164 PHA 1874, then it is difficult to see what permanent appropriation under s.10 would achieve.

121. Thirdly, this argument runs counter to the key finding in *Day* that "very clear words indeed" are needed in order to be effective in extinguishing the public's rights under the statutory trusts created in public walks and pleasure grounds under s.164 PHA 1875. It is easy to see how powers of the type considered in *Finsbury Park* (such as to close a park for a few days in order to run a music festival) could be considered as giving rise to a clear (but temporary) suspension of the public's rights under the statutory trust. But much clearer language would be needed for the court to conclude that the grant of powers in WCA 1914 that would have the effect of excluding the public from the entirety of the Golf Course Land, either permanently or for a period of years, could be considered as being intended to allow the Corporation to override public rights under statutory trusts created through the appropriation of land under s.10 so as to invoke s.11. I do not consider that WCA 1914 had that effect and, more importantly, find it overwhelmingly unlikely that Wimbledon Corporation would have considered that it had that effect, and therefore overwhelmingly unlikely that the Corporation would have thought it right to appropriate the Golf Course Land under s.10 whilst at the same time consistently taking steps to exclude the public.

122. It may be noted that, even on the argument put forward by Mr Cohen that the 1911 Lease and the 1919 Lease were compatible with a public trust, as they were made subject to powers in WCA 1914, the 1936 and the 1961 Leases were granted outside WCA 1914 pursuant to a general act (LGA 1933) that was not specifically overriding the public trust. Mr Cohen answers this point by explaining that the Corporation would not have understood this in 1936 before *Blake,* and after *Blake* when they granted a further lease in 1961, they had forgotten that they had appropriated the land to public recreational use. This explanation is far less convincing than the simpler explanation that the Corporation had never intended to, and in fact never did, appropriate the Golf Course Land under s.10.

123. Another argument made by SWP is that the Corporation always considered the Wimbledon Park Estate as a whole. If the Corporation "appropriated" some part of the

Estate, then it must also have appropriated the Golf Course Land, since it treated the whole Park in the same way. The Court should draw inferences from the fact that none of the surviving documents purported to separate the Golf Course Land from the Park in terms of its management or designation, and to conclude that the entire Wimbledon Park Estate (save for Banky Field) was appropriated under s.10.

124. In support of this argument, SWP draws attention to the common treatment of the Park and the Golf Course Land in the maps that I have summarised above, and generally within its planning; so that when giving evidence in relation to the development of a planning scheme in 1927, the Borough Surveyor could write that:

> "The existing Public Open Spaces within the area of the proposed scheme are:--
>
> "..."Wimbledon Park 122 acres within the Borough. 94 acres are leased to a Golf Club and there are 20 hard Tennis Courts constructed by the Corporation, and 10 Bowling Greens are now in course of being laid down."

125. As I have mentioned, however, it is unclear what is meant by "Public Open Spaces" - the phrase might just denote unbuilt upon spaces in the ownership of a public body, rather than denoting to the leisure of the public under s.164.

126. SWP also considers it relevant that a single committee, for most of the relevant period, the Wimbledon Park Estate Committee, managed both the Park and the decisions that needed to be made by the Corporation in relation to the Golf Course Land. As we have seen from *Kirklees* quoting *Lancashire CC* (see [74] above):

> "there is evidential significance in the identity of the council's committee that manages the land".

127. I place very little weight on this point. Whilst the identity of the committee managing the land might be relevant in one case (for example if land where there was a question whether it has been appropriated to use as an allotment was being managed by an allotments committee) the fact that the same committee both dealt with the laying out of the Park and the dealings with the Golf Club concerning the lease has very little evidential value as regards the Corporation's intentions regarding the scope of appropriation that it was considering.

128. In my view the evidence that there was such common treatment of the Park and the Golf Course Land that any decision made about appropriation must have been made in relation to the two areas of land viewed as a whole is very substantially outweighed by the evidence that they were in fact treated differently. A more important consideration is the fact that where instructions were given for laying out of facilities for public benefit, the committee concerned would expressly or impliedly limit these points to the Park. When bye-laws were made, these expressly were applied to the "pleasure park" – which was defined as excluding the Golf Course Land. Most pertinently, whilst the Park was unarguably being laid out for the benefit of the public, the Golf Course Land was the subject of deliberate decisions to grant new leases which were incompatible with public use, and to provide for the maintenance of fences and other barriers that would keep the public out.

129. Weighing up all this evidence and all these arguments, my conclusion is that it should be inferred from the evidence that the Corporation did comply with s.10 by appropriating at least 20 acres of the Wimbledon Park Estate to the purposes outlined in s.10 and that the land so appropriated comprised the Park but not the Golf Course Land.

5. THE 1960s LEGISLATION

130. During the 1960s the government of the day determined to reorganise the way that local government in London was administered. The legislation to implement this, insofar as it is pertinent to the issues before me, may be summarised as follows.

131. The principal provision was the London Government Act 1963 ("**LGA 1963**"). According to the recital to the Act this was:

> "An Act to make provision with respect to local government and the functions of local authorities in the metropolitan area; to assimilate certain provisions of the Local Government Act 1933 to provisions for corresponding purposes contained in the London Government Act 1939; to make an adjustment of the metropolitan police district; and for connected purposes."

132. S.1(1) LGA 1963 established new administrative areas to be known as London boroughs. By s.1(1)(b) of that Act, coupled with Schedule 1 to the Act, Wimbledon Corporation was merged with the neighbouring borough of Mitcham and the district of Merton and Morden to create Merton LB and (under s3(1)(b)) ceased to exist as from 1 April 1965. These new administrative areas formed part of the larger administrative areas to be known as Greater London.

133. S.84 was headed "Supplementary and transitional provision". S.84(1) made provision for the Minister for Housing and Local Government, or another appropriate minister to:

> "make such incidental, consequential, transitional or supplementary provision as may appear to him -
>
> (a) 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; or
>
> (b) to be necessary or proper in consequence of such of the provisions of any other Act passed in the same session as this Act as apply to Greater London or any authority therein or any other area or authority affected by Part I of this Act;
>
> and nothing in any other provision of this Act shall be construed as prejudicing the generality of this subsection."

134. Sub-section (2) listed various particular types of provision that might be the subject of such an order. These included:

> "(a) with respect to the transfer and management or custody of property (whether real or personal) and the transfer of rights and liabilities;"
>
> …
>
> "(c) for applying, amending or repealing or revoking, with or without savings, any Act passed or any instrument under an Act made before 1st April 1965;
>
> …
>
> and
>
> "(e) for any of the matters specified in section 148(1)(a) to (h) and (2) of the Local Government Act 1933".

The provisions permitted by the reference to s.148 LGA 1933 referred to at (e) were

> "… incidental, consequential or supplemental provisions with respect to administrative and judicial arrangements as may be necessary or proper for the purposes of"

a scheme or order being made, and within that general category included various types of provision that were specifically listed. This list included (at (e)) provisions that:

> "(e) may determine the status of any area affected by the scheme or order as a component part of any larger area, and may extend to any altered area the provisions of any local Act or statutory order which were previously in force in a portion of the area, or exclude from the application of any local Act or statutory order any part of the altered area to which it previously applied…".

135. One of the orders made under s.84 LGA 1963 was The London Authorities (Property Etc.) Order 1964 (the "**1964 Order**").

136. The 1964 Order was made in exercise of the powers under s.84 LGA 1963. So far as material, it provides as follows:

137. By article 16(2) and Schedule 4:

i) all properties and liabilities vested in or attaching to Wimbledon Corporation were thereby transferred to LB Merton; and

ii) all contracts and deeds subsisting in favour of the Corporation were to be of full force and effect in favour of or against LB Merton.

138. By article 1, "land" was defined to include

> "land covered by water and any interest or right in, to or over land".

139. "Land" therefore included the whole of the Wimbledon Park Estate including Wimbledon Corporation's freehold reversionary interest in the Golf Course Land.

140. By article 4 ("**Article 4**") where land (subject to certain exceptions that are not relevant to this case) was held by an authority for two or more purposes:

> "it shall be deemed for the purposes of section 23 of [LGA 1963] and 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."

141. A question arises whether the remaining part of the Wimbledon Park Estate was to be regarded for the purposes of Article 4 as one undifferentiated parcel of land (held for two purposes) or whether the freehold reversionary interest in the Golf Course Land held by Wimbledon Corporation, and subsequently LB Merton, should be regarded as being separate to the unencumbered (except in relation to the statutory trust) interest in the Park. In my view, they were not to be regarded as one single plot of land because:

i) in my view, Article 4 was intended principally to deal with the circumstances where two or more purposes were being pursued on the same physical area of land (or roughly the same area of land). It was not intending to deal with two substantial areas of land fenced or walled off from one another where there was a clear distinction between different uses on the two areas of land, as we see on the Wimbledon Park Estate where there is a clear distinction between one parcel of land that is being used for public recreation following an appropriation under s. 10 WCA 1914 and other land that has been clearly fenced off and is being used by a private golf club and in which the Corporation has only a reversionary freehold interest; and because

ii) there is no evidence that the two parcels of land were treated as such for these purposes, in that there is no record that the Corporation (or LB Merton) determined which was to be the single purpose applicable to all the land, if it were to be regarded as a single holding of land.

142. Article 9, although not directly relevant to the fate of the Wimbledon Park Estate, is interesting for the light it throws on one of the issues that is relevant to this case. This is the issue whether land can be held by a local authority without being considered to be held for a particular purpose. Article 9 envisages that there may be land that is held by an authority (in this case the London County Council or the county council of Middlesex) that is "not allocated to any purpose" or which is "no longer required for the purposes for which they are held".

143. Article 32 ("**Article 32**") and Schedule 5 are at the heart of SWP's argument as to the basis on which the Golf Course Land is currently held.

144. Article 32 is in the following terms:

> "any lands held for the purposes of an enactment specified in columns (1) and (2) of Schedule 5 (or of any extension thereof contained in any further order under section 84 of [LGA 1963] made before 1st April 1965 and transferred by the Act or this

order to any authority shall be held by that authority for the purposes of the enactment specified in respect of such first-mentioned enactment in column (3)."

145. Schedule 5 is entitled "Appropriation of Land to other Enactments". It contains three columns headed respectively as follows "(1) Chapter"; "(2) Enactment under which land is held"; and (3) "Enactment the purpose of which land is to be held".

146. It may be noted that there is a slight disjunct between the language of Article 32 itself and the heading in column (2) of Schedule 5. Article 32 requires identification of "any lands held for the ***purposes*** of an enactment specified in columns (1) and (2)", whilst the heading in column (2) of Schedule 5 does not mention "purpose", and instead refers to an enactment under which land is "held". Ms Shea argued that this was because in practice the two terms were substantially interchangeable - if land is held under an enactment then it is held for the purposes of that enactment: the words "for the purposes of" were "mere surplusage": "to say "land is held for the purposes of the Act" just means it is held under that Act".

147. I do not agree that the concept of "purposes" is so disposable in this context. I consider that the better interpretation is that to come within Article 32 the relevant land must be held for the *purposes* of an enactment specified in columns (1) and (2) and that is not necessarily the same as "held under" that enactment. Article 32 is the operative provision, and the headings in Schedule 5 have no operative effect in themselves, they are merely a convenience to indicate generally what the column beneath the heading is about. I do not think that the difference in language should lead to a conclusion that the two phrases are interchangeable.

148. In its original iteration, Schedule 5 did not include any specific reference to land held by Wimbledon Corporation. However, a provision was inserted into Schedule 5 by article 44(l) of The London Government Order 1965 (the "**1965 Order**") taken with Schedule 5 to that order so that Schedule 5 to the 1964 Order was amended to include the following entry (amongst others):

"(1) *Chapter*	(2) *Enactment under which land is held*	(3) *Enactment for purpose of which land is to be held*
4&5 Geo. 5.clxiv	The Wimbledon Corporation Act 1914, section 5	The Public Health Act 1875, section 164"

149. Where I refer to the 1964 Order (or any of its provisions) in the remainder of this judgment, I am referring to the 1964 Order as amended by the 1965 Order.

150. SWP argues that it follows from this addition into Schedule 5 that the entirety of the Wimbledon Park Estate, which had been acquired and was being held under and for the purposes of WCA 1914, including the Golf Course Land was from 1 April 1965 held under s.164 PHA 1875. This was so even though the then current lease of the Golf Course Land remained in full force and effect as a result of the provisions of article 16(2) of the 1964 Order (which, as we have seen, continued in full force and effect

against LB Merton any contracts, deeds, bonds, agreements and other instruments subsisting in favour of Wimbledon Corporation).

151. The Claimant argues that the 1964 Order did not have this effect. It argues that SWP's construction is:

i) inconsistent with the proper application of the words of the 1964 Order to the facts as they stood in 1965; and

ii) would have substantially changed the status of the Golf Course Land, which had never been used for public recreation and had at all material times been subject to a lease to a private golf club which, at the date of the 1964 Order, had more than 30 years to run.

152. Finally, I should mention that The Local Law (South West London Boroughs) Order 1965 (the "**Local Law Order**") had the effect of repealing WCA 1914 with effect from 1 April 1965, subject to exceptions. Those exceptions included s.8, which empowered the use of the Estate as a municipal golf course. Also preserved was s.87 of the Wimbledon Corporation Act 1933 which provided powers to the Corporation to enter into arrangements for charging for car parking on the land. These powers were vested in LB Merton (see Part II of Schedule 3).

153. SWP argues that these powers would be superfluous if LB Merton had acquired the Golf Course Land without it becoming subject to s.164 PHA 1875, but I cannot see why this would be the case.

154. SWP has sought to strengthen its arguments as regards the intended meaning of the 1964 Order by reference to some internal comments contained in an internal file created by the Ministry of Housing and Local Government in a folder relating to the drafting of the Local Law Order. However, I ruled against the use of this material based on the considerations discussed in the Supreme Court decision in *Re Agriculture Sector (Wales) Bill* [2014], 1 WLR 2622, at [38] to [39], to the effect that to take account of internal documents of this kind in interpreting legislation would be:

> "wholly inconsistent with the transparent and open democratic process under which Parliament enacts legislation".

155. The key arguments of the Claimant and SWP turn on the interpretation of the detail of this legislation. Before turning to the detail of these arguments, it is useful to summarise the principles that the court takes into account when interpreting legislation.

6. THE RELEVANT PRINCIPLES OF INTERPRETATION

156. I do not think there was much disagreement between the Claimant and SWP as to the relevant principles of interpretation. Both agreed that interpretation involves looking at the words of the statutory provision in its context. However, each would emphasise particular aspects of these principles.

157. SWP's counsel in their skeleton argument argued as follows:

> "The courts in conducting statutory interpretation are seeking to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision". *R (N3) v Secretary of State for the Home Department* [2025] [2 WLR 386 [61] - [63]]. A leading statement of principle was given by Lord Hodge DPSC in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department*:
>
> > "Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained."
>
> If on an informed interpretation of the enactment in question, there is no real doubt that the grammatical interpretation is that intended by the legislature, then the enactment is to be given its grammatical meaning. This is often referred to as the plain meaning rule: *Pinner v Everett* [[1969] 1 WLR 1266 at 1273] Only where the plain meaning produces absurd or unworkable results will the court lean against that construction, if there is an alternative construction which avoids such results: *Settlers Court RTM Co Ltd v FirstPort Property Services Ltd* [[2022] 1 WLR 519 at [54]]."

158. In my view, the last sentence of this passage goes too far in suggesting that the case there cited ("***Settlers Court***") supports the proposition that *only* where the plain meaning produces absurd or unworkable results will the court depart from a plain meaning rule. The relevant words in the passage cited are as follows:

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

There is no suggestion here that these are the only circumstances where the court will depart from the "plain meaning rule".

159. The Claimant referred me to the approach summarised in *Darwall v Dartmoor* at [15], quoting Lord Hodge DPSC in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2023] AC 255, himself quoting Lord Reid and Lord Nicholls in other cases. All these judges emphasised the importance of context. A few excerpts from the passages referred to at [15] illustrate the approach:

> > "Normal principles of statutory interpretation are engaged. The courts in conducting statutory interpretation are seeking to

> ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision"
>
> "The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used'."
>
> "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."
>
> "Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context."

160. In a similar vein, the Claimant referred me to *R.(PACCAR) v Competition Appeals Tribunal* [2023] 1 WLR 2594 at [40]-[41] ("***PACCAR***"). Again, a few excerpts (including quotations from other eminent judges) illustrate the approach to be taken:

> "there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose…."
>
> "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."
>
> In the second, Lord Mance JSC said (para 10):
>
> "In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance... In this area as in the area of contractual construction, 'the notion of words having a natural meaning' is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391 C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme."
>
> The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it."

161. The Claimant's counsel also cite Nugee LJ in *Virgin Media v NTL* [2024] EWCA Civ 843, [2024] Pens LR 14 ("***Virgin Media***") at [65]-[68] for the proposition that there is

no tension between treating the words as the primary source and interpreting them in context. It is worthwhile quoting these paragraphs in full:

> "65. These principles may appear to be in tension but I do not think that in truth they are. As Lord Sales said in the most recent summary we were referred to, that in PACCAR, the basic task for the Court interpreting a statutory provision is clear, namely to identify the meaning of the words in question in the particular context (at [40]). He went on at [41] to refer to the numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose, concluding as follows:
>
> > "The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it."
>
> 66 The same point was made even more forcefully in one of the passages which he cites, namely the statement by Lord Mance JSC in *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] UKSC 25; [2011]
>
> 1 W.L.R. 1546 at [10] as follows:
>
> "In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance. They represent the context in which individual words are to be understood. In this area as in the area of contractual construction, "the notion of words having a natural meaning" is not always very helpful (*Charter Reinsurance Co Ltd v Fagan* [1997] A.C. 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme."

162. To the extent that there is any difference between the approach advocated on behalf of SWP and that advocated on behalf of the Claimant, I consider that I am in good company in favouring the latter approach of starting with the legislative purpose and scheme and considering the words of the statute in that context, rather than an approach of looking at the words of the statute and departing from the plain language only if the plain words produce a result that is absurd or unworkable.

163. I do not think that it is in dispute that the proper approach to interpreting primary legislation applies equally to secondary legislation. If there is any dispute on this point, I consider that the Claimant's counsel in their skeleton argument make good on this proposition by reference to *Virgin Media,* where the Court of Appeal construed regulations from 1993, 1997 and 2013 in the context of statutory history from as far back as 1975.

164. Having regard to the above authorities in relation to how the relevant legislative provisions are to be approached, I now turn to the detail of the arguments made on each side.

7. INTERPRETING THE 1964 ORDER

165. In approaching these arguments, I am following the guidance derived from the cases that I have cited. I am approaching the words used in the legislation in the light of their context and the purpose of the statutory provision.

166. The key question at the heart of this dispute is the interpretation of the language of Article 32 and Schedule 5 of the 1964 Order, and in particular what is meant for the purposes of these provisions by the phrase "held for the purposes of" s.5 WCA 1914.

(i) The implications of the statutory background

167. It is useful first to consider the purposes of LGA 1963 and of the 1964 Order.

168. I have set out at [131] above the purposes of LGA 1963 according to the recital to that Act. It is clear from that recital that the purpose of the Act was to "make provision with respect to local government and the functions of local authorities in the metropolitan area".

169. It is equally clear from its content that the Act was principally concerned with the reorganisation through the creation of new London Boroughs (and of the new Greater London Council) and the transfer of property rights and obligations from the previous authorities to these new authorities. I agree with the Claimant that the purpose of LGA 1963, and therefore of any orders made under it, was to make provision for the reorganisation. Certainly, there was no stated intention to improve the provision by local authorities of land for public recreation by reallocating land that had not previously been used for public recreation to that use.

170. Turning to the 1964 Order this does not state any other purpose within the Order itself. It may be understood that its purpose follows that of its parent act, LGA 1963. That understanding is confirmed by the Explanatory Note to the Order which states that:

> "This Order makes general provision consequential on the London Government Act 1963 in relation to property, liabilities, contracts etc. notices, and actions and proceedings and causes of action or proceeding".

171. There is an argument that s.84 LGA 1963 (as I set out at [133] above) extends the sort of thing that may be undertaken by an Order made under that Act. That section made provision for the exercise of "incidental, consequential, transitional or supplementary provisions", but these were intended to apply only to the extent they were:

> "necessary or proper for the general or any particular purposes of this Act or in consequence of any of the provisions thereof or giving full effect thereto".

172. This is an important point. If a minister tried to make an Order under LGA 1963 for some purpose other than the "purposes" of the 1963 Act (which, as we have seen, relate to the creation of new authorities and the transfer of assets, liabilities and contracts etc, from the old authorities to the new authorities), that would be an improper use of this particular power, unless there was some particular circumstances that made the

provision "necessary or proper". The principle of regularity suggests that, if possible, the 1964 Order should be construed in a way that does not result in an improper use of the powers given under that order.

173. Taking into account the above provisions, I agree with the argument made by the Claimant that, in the light of the legislative scheme as a whole, the purpose of the 1964 Order was to identify which land was to be held under s.164 following the local government re-organisation and the transfer of existing functions. There is no suggestion on the face of that Order that the purpose was to change the status of land beyond that which was necessary to achieve that transfer. Indeed, the context points to the conclusion that the intention was not to change the status of the Golf Course Land (or the Park). Rather, the intention was to replicate as closely as possible the *status quo* as it was prior to the local government re-organisation.

174. Turning back to the key words that require interpretation within the 1964 Order, I have already noted a slight conflict of wording between:

i) Article 32 (which refers to land being held "for the purposes of an enactment") and

ii) the heading to column 2 in Schedule 5 to the 1964 Order which refers only to the "Enactment under which land is held"

and that I resolve this conflict by giving primacy to the words in Article 32, with the result that for land to be subject to Article 32 and Schedule 5, it must be held for the purposes of an enactment specified in columns (1) and (2).

175. It is therefore necessary to determine whether the Golf Course Land should be regarded as held "for the purposes of s.5 WCA 1914" within the meaning of this phrase in the 1964 Order.

(ii) When must the land be held under s.5 for the 1964 Order to apply?

176. I agree with the Claimant that this is to be determined as at 1 April 1965, the operative date of the 1964 Order. This follows from the use of the present tense in the phrase "land held for" in Article 32. It also ties in generally with the scheme of LGA 1963 (see for example s.4). The question, therefore, is for what purposes the Golf Course Land was being held - not for what purposes it was historically held, nor for what purposes it might be held in future.

177. The Claimant argues that that the category of land "held for the purposes of s.5" is not a fixed category, at the moment of acquisition or at all. Land can cease to be held for s.5 purposes.

178. I consider that the Claimant is correct in this also, since WCA 1914 contained powers of disposition and also included powers to appropriate land to a particular use. For example, s.7(f) allowed the land to be appropriated to

> "any special purpose 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 lands".

Had any land been so appropriated (for example to be used for a school), it would be perverse to regard that land as still being held "for the purposes of" s.5 - it would then be being held for the educational purposes authorised by another statute.

179. I agree therefore with the Claimant that it follows that identifying the land held for the purposes of s.5 as at 1 April 1965 is not the same as identifying the land originally acquired under that section in 1915. The Golf Course Land (along with the rest of the Estate) must be regarded as having been originally acquired for the purposes of s.5.

(iii) Was the Golf Course land being held under s.5?

180. However, the question remains whether the Golf Course Land was no longer being held for those purposes at 1 April 1965.

181. SWP argues that it was. The land was still held and it had not been formally appropriated to any other purposes. Until it was sold (as had been the case with the Banky Field) or formally appropriated to some other purpose it must be regarded as being held for the purposes of s.5.

182. This, SWP argues, is the straightforward meaning that would have been intended by Parliament. The Golf Course Land had never ceased to be held for the purposes of s.5, with the result that the 1964 Order has the effect of causing the Golf Course Land once transferred to LB Merton to be held under s.164 PHA 1875 because it was "held" under s.5 when the 1964 Order took effect.

183. The question whether at 1 April 1965 the Golf Course Land was being held "for the purposes of" under s.5 within the meaning of the 1964 Order needs to be considered in the light of s.5 itself, as well as being construed in accordance with the factual background and the purposes of the 1960s legislation (which as I have explained, was focused on the transfer of property, and not on changing the uses of property).

184. I have already set out in full (at [41] above) the provisions of s.5. It is important to note that the only thing s.5 says about the purposes of holding the land is that:

> "…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**" (emphasis added).

185. On the basis of this wording, the Claimant argues, and I agree, that, to be held for the purposes of s.5 at any given time, the land must be at the point held both for the purposes of WCA 1914 (whatever that means) and managed "in accordance with the powers and provisions set forth" in WCA 1914.

186. The Claimant also asks the court to note that s.155 WCA 1914 provided for the possibility that land be dealt with outside the "powers and provisions set forth" in WCA 1914. That section states:

> "All powers rights and remedies given to the Corporation by this Act shall (except where otherwise expressly provided) be deemed to be **in addition to and not in derogation of any other powers rights or remedies conferred upon them** or on any committee appointed by the council by Act of Parliament charter law or custom and the Corporation or such committee (as the case may be) may exercise such other powers and be entitled to such other rights and remedies as if this Act had not been passed…" (emphasis supplied)

187. The Claimant argues that, as nothing in s.5 or WCA 1914 derogated from other powers or rights of the Corporation found in other statutes, an exercise of those other powers or rights could result in the land no longer being held for the purposes and/or in accordance with the provisions "set forth" in WCA 1914 and so would no longer be held for the purposes of s.5.

188. By 1965, one of those extraneous powers was the power of letting under s.164 LGA 1933. A letting made under that power, but outside the letting powers "set forth" in WCA 1914, would not be made "in accordance with the powers and provisions set forth in this Act". Where a letting was made under that power rather than any power in WCA 1914 itself, that land could no longer naturally be described as being "held in accordance with the powers and provisions set forth in this Act".

189. It followed that, whilst the Park remained in 1965 held for the purposes of WCA 1914, the Golf Course Land was no longer held for those purposes since the Golf Course Land was subject to the 1961 Lease, and that lease (which was for a term of 38 years) had been made under s.164 LGA 1933. That lease could not have been granted under any of the powers under WCA 1914 - even though the lease did on its face make a somewhat blunderbuss reference to it being:

> "in pursuance of the Wimbledon Corporation Act 1914 the Local Government Act 1933 and of all other powers hereunto them enabling".

In fact none of the powers under WCA 1914 could have authorised the 1961 Lease. The only powers of leasing part of the Estate under WCA 1914 were those under:

i) s.7(2) to lease "for games or for purposes of recreation" "for such term not exceeding twenty-one years";

ii) s.7(3) to lease for not more than 21 years rights of refreshment (s.7(3)); and

iii) s.12(1) to grant building leases with the consent of the Local Government Board, which was subject to the aggregate cap of 75 acres under s.14, which would have been substantially exceeded by the 1961 Lease.

190. We have already encountered the difficulty that the purposes mentioned in s.5 WCA 1914 refer to holding for the purposes of WCA 1914 generally, but nowhere are those purposes defined within that Act. While she was making her opening argument, I asked Ms Shea what she considered to be the "purposes" of WCA 1914. She considered that

the purposes were really a reference to the authority to hold the land and manage it in accordance with the powers and provisions of that Act.

191. Against my objection that she appeared to be saying that the Corporation "can hold for the purpose of holding" she agreed that this did sound slightly circular but suggested that the reference to "purposes" was:

> "not in the sense of identifying those acts and activities which might be performed, or undertaken, or enjoyed or exercised under the Act. It means under the auspices of, for the purposes of this Act."

192. Ms Shea returned to this point in her closing argument as follows:

> "I wasn't able to give a very clear answer when your Lordship asked me about this on the first day. I'm not able to give a super clear answer today, because it's standard, as I understand it, standard local authority jargon. You hold land for purposes, and the purposes are the purposes of the Act under which the land is held. If we look at the purposes, and it might sound a bit circular, but the purposes are to hold the land and to manage them in accordance with the powers and provisions. So I'm going to come on shortly to a submission that actually "for the purposes" might not add very much; it's standard speak, but it may not add very much to just the "holding in accordance with the powers and provisions".

193. Later in her closing argument she suggested that it was a "false dichotomy" to draw too strong a distinction between purposes and powers and provisions – the powers and provisions are there as the basis on which the Corporation can deal with the land.

194. I consider that Ms Shea's analysis of what is meant by "the purposes of the Act" is very close to that put forward on behalf of the Claimant. As I have mentioned, the Claimant's argument is that to be held for the purposes of s.5 at any given time, land must be at the point held both for the purposes of WCA 1914 and "in accordance with the powers and provisions set forth" in WCA 1914. It seems to me that this argument is in line with Ms Shea's explanation of what are meant by the "purposes" of s.5 WCA 1914.

195. It follows that once the land was not being used in accordance with the powers and provisions set forth in WCA 1914 (and, I would add, not being used for any discernible purpose otherwise identified within WCA 1914) the land comprised in the reversionary freehold interest in the land held by LB Merton was no longer being held "for the purposes of s.5" within the meaning of the 1964 Order. I will refer to as this as the "'**no longer held' conclusion**".

196. SWP argues that the 'no longer held' conclusion does not follow because LGA 1933 does not in terms purport to change the basis on which an authority is holding land (or the purposes for which it is holding land). In my view this argument does not change the logic of the 'no longer held' conclusion outlined in the preceding paragraph.

197. Ms Shea had an argument based on the wording of s.155 WCA 1914 taken with s.5 WCA 1914. She argued that s.155 was subject to an express exception so that it did not apply "where otherwise provided" within WCA 1914. She argued that, as s.5 provided that the land was to be held, used, managed, controlled and disposed of "for the purposes and subject to and in accordance with the powers and provisions set forth in this Act", it was subject to that exception. S.5, she argued, had the effect that the *only* powers and provisions that could be used in respect of the land acquired under WCA 1914 were those set out in that Act.

198. There are two objections to this analysis:

i) First, the argument depends on imputing into s.5 the word "only" which is not a word used in s.5 and which runs counter to the patent intention of s.155 that WCA 1914 should provide additional powers to any statutory powers which Wimbledon Corporation may enjoy.

ii) Secondly, the effect of this reading of s.5 is to give no meaning to s.155 at all, at least in relation to the land acquired under WCA 1914. If the only powers or provisions that may be used in respect of the land acquired under WCA 1914 are those expressly set out in that Act then s.155 is completely meaningless. All dispositions of land made by Wimbledon Corporation otherwise than in accordance with specific powers provided under WCA 1914 (including the 1936 Lease and the 1961 Lease) would, under this reading, be rendered *ultra vires.*

199. Counsel for SWP suggest that s.155 might still have some meaning in relation to other things dealt with in WCA 1914 which do not relate to the Wimbledon Park Estate. This mitigates the second objection to some degree. Nevertheless, the reading contended for by SWP remains a fundamentally improbable reading and I reject it. If Parliament had meant s.5 to provide the entire universe of powers and provisions relevant to the Wimbledon Park Estate, it would have been much clearer in providing this.

200. SWP argues also that the 'no longer held' conclusion ignores the provisions of s.179(g) LGA 1933, which provides that:

> "Nothing in this Part of this Act shall –
>
> …
>
> (g) affect any provisions relating to the acquisition, appropriation or disposal of land by a local authority contained in any of the enactments set out in the Seventh Schedule to this Act or in any statutory order made thereunder, or the application of any capital money arising from such disposal, or, in so far as any of those enactments or orders contains provisions relating to the acquisition, appropriation, or disposal of land, or the application of capital money arising from land, empower a local authority to effect any transaction which might be effected under those provisions otherwise than under those provisions and in accordance therewith".

201. This is a straightforward and expected provision, making it clear that the additional powers provided under LGA 1933 did not reduce any powers applicable under any local Act (therefore including WCA 1914).

202. Ms Shea argued that this provision evidenced that LGA 1933 could not affect the power under which land was held on purposes for which it was held. However, I cannot see how this provision supports that argument. This provision says nothing about whether or not using powers under LGA 1933 affects any powers to *hold* land (or any other assets) or whether or not the exercise of powers under LGA 1933 affects the *purposes for* which any land is held. In fact, it is obvious that use of powers under LGA 1933 could affect the basis on which land is held and the purposes for which it is held, in that LGA 1933 included provisions to appropriate land to a different use, and such an appropriation clearly would affect the purpose for which land is held.

203. SWP argues also that the 'no longer held' conclusion cannot be correct since, if this were true, so that at the point that the 1964 Order came into force, the land was not being held for the purposes of s.5 WCA 1914, then it would be impossible to say under what statutory provision the land was then being held, and for what statutory purposes it was being held. This could not be under LGA 1933 as that Act provided powers (such as powers of disposition and of appropriation) rather than setting out a purpose or basis on which any particular land could be held.

204. This argument depends on an allied argument put forward on behalf of SWP that it was always necessary as a matter of local government law for land to be held under and for the purposes of a particular Act. This is argued on the basis that a local authority is a creature of statute and cannot do anything unless specifically empowered to do so. Ms Shea considered that it was a "trite proposition" that a local authority needed a power to hold property.

205. I challenged this proposition. It is obviously correct that a local authority would need a power to do something (such as to acquire land, or to dispose of it or to improve it or maintain it) and that this would normally be for a particular purpose outlined in a particular enabling Act. However, if a local authority were to acquire land lawfully and to be holding it after the Act under which it acquired the land were repealed, I could not see that this would mean that the authority was acting unlawfully by continuing, passively to hold the land.

206. Ms Shea was unable to refer me to any direct authority for this proposition, which she considered to be because Parliament had always been careful to avoid such circumstances arising.

207. She did later refer me to *R (Fewings) v. Somerset County Council* [1995] 1WLR 1037, but that case (which concerned the power of a local authority to ban foxhunting on land which it was holding under s.120(1)(b) LGA 1972 for the purposes of "the benefit, improvement or development of their area") merely provides authority for the (uncontested) proposition that a local authority requires power to take action. It is no authority for the proposition under consideration, that an authority must have some express power to continue to hold land where it had acquired that land lawfully, but the Act under which it had acquired land was no longer in force.

208. Ms Shea also took me to *Day v Shropshire* (HC) at [59] and [60] where Lang J, the judge at first instance, noted that the power of the local authority in that case to acquire the land in question "had to be derived from express statutory powers, since the local authority is a creature of statute and has no inherent common law powers to purchase or own land". This gets closer in that there is a mention of needing a power to "own land".

209. Nevertheless, in context it is looking at the power to purchase and I do not think that this case, at first instance, provides any real authority to resolve this question. I note that at [60] the judge was content despite an "absence of clear evidence spelling out under what statutory authority the land was acquired or held" to follow authority in assuming that:

> "the acquisition and holding was lawful, provided the use to which the land is put is permitted by some appropriate enabling legislation".

210. This latter passage is unhelpful to the case that Ms Shea was putting forward, since it suggests that there is no problem if it is not possible to identify under what provision land is being held as long as one can identify a power which allows the use being made of the land. Transposed to the circumstances now under consideration, this would mean that it would not be a problem that land previously held under WCA 1914 which fell outside the ambit of Schedule 5 of the 1934 Order had no identifiable purpose after WCA 1914 was (almost entirely) repealed as long as LB Merton continue to deal with the Golf Course Land under LGA 1933 (or its successor legislation).

211. Ms Shea had a further argument, based on a contention that LGA 1933 could not, or should not, be regarded as having impliedly repealed any part of WCA 1914, which she made good by reference to comments at [25]-[26] in the case of *Hamnett v Essex County Council* [2017] 1 WLR 1155, to the effect that a later provision only repeals an earlier one by implication if it is so inconsistent with or repugnant to that other that the two are incapable of standing together.

212. This argument, however, in my view, and with great respect to Ms Shea, misses the point. The question is not whether LGA 1933 repealed or partially repealed WCA 1914, it is whether, for the purposes of the wording in the 1964 Order, the Golf Course Land should be considered as being held for the purposes of s.5 WCA 1914 when it was being held not for any discernible purpose mentioned in that section and not in accordance with the powers provided under WCA 1914.

213. Mr Karas, for the Claimant, did not consider there to be any conceptual problem if the result of LGA 1963 and the Orders made under it were to be to revoke WCA 1914 without deeming the land to be held under, and/or for, the purposes of some other Act. He argued that LB Merton would not thereby have been prevented from continuing to hold the reversionary interest in the Golf Course Land. Whilst it could not be said to be holding it under, or for the purposes of, any particular statute, it would still have had powers under other Acts (including in particular LGA 1933) that it could exercise at the point that it needed to undertake some further disposition of the land or to appropriate it to a particular purpose.

214. I consider that the Claimant's argument on this point is correct. It seems to me possible that a local authority could lawfully acquire and hold land under and for the purposes of a particular statute, but if those purposes ceased (or if that statute was repealed) its holding of the land would not automatically become unlawful.

215. I gain some support for this proposition from considering, for example, the provisions of s.165 LGA 1933, which provides a power to sell or exchange land (with consent of the minister) where that land is possessed by the local authority and "is not required for the purpose for which it was acquired or is being used". This envisages there may be land that is held but is no longer required for the purpose for which it was originally acquired. Logically, if the land is no longer required for that purpose, then it cannot be being held for that purpose.

216. Similarly, Article 9 of the 1964 Order envisages that there might be land that was "not allocated any purpose for which land may be acquired" and lands that were "no longer required for the purposes for which they are held".

217. The Claimant has three other more detailed arguments, in support of the Claimant's overall argument as to the interpretation of Schedule 5 of the 1964 Order.

(iv) The argument relating to absurdity

218. First, the Claimant argues that it would be an absurd, and/or unworkable, result if the result of the 1960s legislation - created for the limited purpose of bringing about the reorganisation of London government - was to impose a statutory trust on land that had never previously been dedicated to public recreation, and had always been used for the purposes of a private golf club. Therefore, the court should choose the alternative interpretation put forward by the Claimant that the Golf Course Land was not land held for the purposes of s.5 WCA 1914.

219. SWP had a number of arguments to counter this point.

220. First, it argues that the Golf Course Land had been appropriated under s.10 WCA 1914 (and therefore had been deemed to be subject to PHA 1875 under s.11 WCA 1914) and so there was nothing strange if the 1964 Order made provision for it to remain held for the purposes of s.164 PHA 1875.

221. I have already explained my reasons for dismissing the proposition that the Golf Course Land had been appropriated under s.10, and so I cannot accept this argument.

222. Secondly, SWP argues that its interpretation of what is meant by "land held for the purposes of" s.5 WCA 1914 (which it argues is the straightforward interpretation) should only be departed from if it produces absurd or unworkable results or some result that cannot reasonably be supposed to have been the intention of the legislature. The onus is on the Claimant to show that it produces absurd and unworkable results and the Claimant cannot discharge that burden in this case.

223. As I have pointed out above, I do not accept that this is the right way to approach the interpretation of the statutory provisions.

224. The task in hand requires interpreting what was meant in the 1964 Order by the reference to "land held for the purposes of" s.5 WCA 1914, and that can only be done by looking at the context alongside the words of the statutory provisions. I have set out my analysis of the statutory provisions. In my view they support the Claimant's position that these provisions were aimed at transferring to the new authorities the same property, rights, obligations and duties that the outgoing authorities held or owed and were not intended to change the basis on which any land was held.

225. Thirdly, SWP argues that there was nothing absurd or unworkable about this result, and there is no reason to believe that this result was not the intention of the legislature. It points out that even if the result of the 1960s legislation was that the Golf Course Land became the subject of a statutory trust for the purposes of s.164 PHA 1875 for the first time, this was not absurd or unworkable. This did not affect the lease that was at that time over the Golf Course Land – since article 16(2) of the 1964 Order kept in full force and effect any contracts or deeds subsisting in favour of or against the Corporation on the basis that these would apply instead to LB Merton. Whilst the reversionary interest in the land held by LB Merton became held under PHA 1875 and thereby was held subject to the statutory trust, this had no immediate practical effect whilst the 1961 Lease, which granted exclusive possession to the Golf Club, remained in force.

226. This argument does not provide a complete answer to the charge of absurdity. Even if it is accepted that article 16(2) overcame any difficulties arising from the 1961 Lease remaining in existence for the rest of its term, so that the statutory trust had no practical effect until this lease was terminated, there remains a substantial degree of absurdity. It seems overwhelmingly unlikely that, tens of years before the lease was due to terminate, Parliament, apparently with no consultation, intended to take away from the local authority holding the Golf Course Land (Wimbledon Corporation and then LB Merton) the flexibility previously enjoyed as to how this land was to be used.

227. There is also a degree of surrealism in the proposition that this happened apparently without anybody noticing until very recently when this argument was first mooted by Wimbledon residents opposed to the Claimant's proposed development. If this was the intention of Parliament, it appears that LB Merton, (which, it is fair to suppose, would have inherited staff involved in implementing the 1960s legislation) appears not to have been aware of it. In particular, the point did not arise:

    i) when (in 1966 and so not long after it acquired the Golf Course land) it granted a 60 year lease of part of the Golf Course Land (having obtained a partial surrender from the Golf Club) to the London Electricity Board for the purposes of constructing an electrical sub-station;

    ii) when it granted a new lease to the Golf Club on 8 May 1986; and

    iii) when it provided answers to Preliminary Enquiries in relation to the proposed sale of the freehold land to the Claimant in 1993 to the effect that LB Merton was not aware of any overriding interest affecting the land.

228. In each case there appears to have been no consideration that s. 164 PHA 1875 applied or how any of these transactions might be affected by a statutory trust.

229. Ministerial approval must have been sought for these dealings with the land and so it seems that national government also was unaware of the imposition of a statutory trust.

(v) The argument relating to other purposes of Schedule 5 (bye-laws)

230. Secondly, the Claimant points out that Schedule 5, as well as dealing with a transfer of the purposes for which land is held, also had an effect on what byelaws would apply to land. Under Article 33 of the 1964 Order:

> "Any bylaws in force for the regulation of any property transferred by the Act or the preceding articles of this order shall have effect as if they had been made by the authority to whom such property is transferred.
>
> Where any such byelaws were made for the purposes of an enactment specified in columns (1) and (2) of Schedule 5 … they may be amended or revoked by the said authority as if made for the purposes of the enactment specified in respect of such first-mentioned enactment in column (2)."

231. The Claimant argues that the purpose of this provision was to ensure the continuity of byelaws and not to extend byelaws to land that was not previously covered by bye-laws. This is true but I do not find it to be a particularly strong point in favour of the Claimant's case. The bye-laws applicable to the Park expressly, within their terms, limited their scope. They applied to the "pleasure grounds" which were defined to exclude the Golf Course Land and therefore did not apply to the Golf Course Land, so even if SWP's argument were to be correct that the Golf Course Land was being held for the purposes of s.5 WCA 1914, and so caught by Schedule 5 to the 1964 Order, those bye-laws would not on their terms apply to the Golf Course Land.

(vi) The argument relating to other land mentioned in Schedule 5

232. The next argument of the Claimant that I will consider has considerably more traction. This is that if SWP's approach to the interpretation of Schedule 5 is followed then this leads to an obvious nonsense when we consider at least one of the other holdings of land that are dealt with in Schedule 5.

233. The Claimant produced a schedule which grouped together the provisions made in Schedule 5 under a number of categories. There were 40 properties dealt with in that Schedule, of which 38 were made subject either to OSA 1906 or PHA 1875 by the Schedule. Generally, these had already been held for open space purposes without qualification. For some, there was some qualification (such as use of part of the land as a highway), which was incompatible with dedication to public recreation, but these qualifications, the Claimant considered, did not derogate materially from the proposition that the land was being used for similar uses both before and after the application to the land of Schedule 5.

234. However, there was at least one glaring example where interpreting Schedule 5 in the manner contended for by SWP would appear to lead to a nonsense.

235. I am referring here to a holding of land in Battersea originally known as the "Latchmere Allotments" and originally used as such and later known as the "Latchmere Estate". The relevant local authority was authorised to acquire this land under the London County Council (General Powers) Act 1900 ("**LCC(GP)A 1900**"). Under s.33 the authority was obliged to use some of the land as open space (under a precursor to OSA 1906). Under s.34 (notwithstanding restrictions contained in the Allotments Act 1832) the authority could use part of the land to erect lodging houses for the working classes – what we might today call social housing. Houses were built in accordance with this power and remained in in the ownership of the then relevant local authority in the 1960s.

236. This land was transferred under s.23(2)(a) LGA 1963: land held by a local authority for the purposes of its functions under the Housing Act 1957 was transferred to the new London Borough where that land was situated. Schedule 5 to the 1963 Order on its face applied to this land. Under the 1964 Order land held under ss.31 to 36 LCC(GP)A 1900 was to become from 1 April 1965 subject to OSA 1906. No distinction was made between the land that was currently being used for public recreation and that which had been built on and was used for social housing.

237. In this case it would be clearly absurd for land occupied by social housing tenants to be subject to a statutory trust under OSA 1906, even if that was subject to any existing tenancies.

238. SWP had no real answer to this point beyond saying that the precise circumstances of this land were not in evidence. I did not consider that any evidence was necessary for me to conclude that an utterly absurd and unworkable result arose if it was necessary to apply Schedule 5 to the Latchmere Estate in the way that SWP was arguing Schedule 5 should be applied.

(vii) Conclusion on the interpretation of the 1963 Order

239. Taken together the arguments raised by the Claimant have considerable, one might even say irresistible, force. The Claimant's argument that the words in the 1964 Order "land held for the purposes of s.5 [WCA 1914]" should not be taken as applying to the Golf Course Land as this land that was not being used for any discernible purpose under WCA 1914 and was being used in a way that was outside powers under that Act has the benefit of avoiding an interpretation:

    i) under which the 1964 Order must be taken as doing something that was neither within the purposes of its enabling Act, LGA 1963, nor "necessary or proper for the general or any particular purposes" of LGA 1963;

    ii) which has the at least partially absurd result in relation to the Golf Course Land that Parliament, apparently with no consultation, intended to take away the flexibility previously enjoyed to use the land for a number of different possible purposes;

    iii) which if applied consistently to the Latchmere Estate would give rise to an utterly absurd and unworkable result whereby public housing was impressed with a trust requiring it to be used for the purposes of public recreation; and

iv) which appears not to have been noticed or accepted either by LB Merton or by the responsible Minister, both of which continued to treat the land in a way that was incompatible with the interpretation put forward by SWP.

240. By contrast, SWP's interpretation, that land remained held for the purposes of s.5 WCA 1914 even where it was no longer being held for any discernible purpose under WCA 1914 and was administered using powers that were outside that Act rests almost solely on the proposition (which was not supported by any case law that was put in front of me) that once land is acquired under and for the purposes of a particular Act it must be considered to continue to be "held for the purposes" of that Act until it is sold or formally appropriated to some other use other some other Act.

241. It is clear to me that the Claimant has the better of this argument by a wide margin. I consider, therefore, that it is correct that s.164 PHA 1875 does not apply to the Golf Course Land. Whilst I have a discretion whether to make a declaration to this effect, it would be dereliction of my duty not to do so. I will therefore make the declaration that the Claimant is seeking to this effect.

242. Having determined to make such a declaration there is not technically a need for me to consider the alternative declaration that the Claimant has sought that, if LB Merton was holding the Golf Course Land under s.164 PHA 1875, the application of that section did not survive the sale of the freehold reversion by the Transfer, notwithstanding that any requirements for advertisement in s.123 LGA 1972 were not met.

243. Nevertheless, for completeness, and as I heard a great deal of argument on this point, I will consider this matter on the assumption (which I consider not to be correct, for the reasons I have given) that LB Merton acquired and held the Golf Course Land under s.164 PHA 1875.

8. SWP'S ARGUMENT BASED ON *DAY*

244. If LB Merton did (notwithstanding my finding to the contrary) acquire and hold the Golf Course Land under and for the purposes of s.164 PHA 1875, then, SWP argues that in the light of *Day* (so to speak) the Claimant, when it acquired the freehold of the Golf Course Land, and the Golf Club, when it acquired a new lease of the Golf Course Land in 1986, also took the land subject to the statutory trust.

245. The statutory provisions relevant to this question are under the LGA 1972, and in particular under s.123:

> "**123. - Disposal of land by the principal councils.**
>
> "(1) Subject to the following provisions of this section, … a principal council may dispose of land held by them in any manner they wish.
>
> (2) Except with the consent of the Secretary of State, a council shall not dispose of land under this section, otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained. …

> (2A) A principal council may not dispose under subsection (1) above of any land consisting of or forming part of an open space unless before disposing of such 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 disposes of land which is held:
>
> (a) for the purpose of section 164 of the Public Health Act 1875 …; or
>
> (b) in accordance with section 10 of the Open Spaces Act 1906 …,
>
> 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."

246. Also relevant is s.128(2)

> "**Section 128. - Consent to land transactions by local authorities and protection of purchasers.**
>
> "…
>
> (2) Where under the foregoing provisions of this Part of this Act… a local authority purport [sic] to acquire, appropriate or dispose of land, then –
>
> (a) in favour of any person claiming under the authority, the… disposal so purporting to be made shall not be invalid by reason … that any requirement as to advertisement or consideration of objections has not been complied with…"

247. The effect of these provisions is that where a statutory trust applies to land held by an authority, it must advertise its proposal to sell the land and consider any objections. If it does so, then the purchaser takes free of the statutory trust. The question of what happens if it does not do so was considered by the Supreme Court in *Day.*

248. The facts behind that case are as follows. Shrewsbury Town Council sold a parcel of land in 2017 that was subject to either a statutory trust for public recreational use pursuant to s.10 of the OSA 1906 or a s.164 trust - the Supreme Court considered it immaterial which was involved. The sale was conducted without advertising in compliance with s.123(2A) LGA 1972, as the local authority had been unaware of the trust's existence. The Town Council then granted planning permission for the developer to build houses on the land.

249. The Supreme Court held that the simple transfer of the land that had been subject to the statutory trust into private ownership was not sufficient to extinguish the trust. In particular, whilst s.128(2) did operate to allow the sale to be valid, it did not operate to extinguish the rights enjoyed by the public under the statutory trust. These only would have been extinguished if the local authority complied with the special procedure at s.123(2A) and s.123(2B).

250. SWP argues that the circumstances relating to the sale of the freehold of the Golf Course Land, and before that the grant of the 1986 Lease, are precisely the same as the circumstances in *Day* and therefore (assuming it is accepted that the effect of the 1964 Order was to subject the land to s.164 PHA 1875), the Golf Course Land remains subject to the statutory trust in the hands of the Claimant.

9. THE CLAIMANT'S ARGUMENT THAT *DAY* DOES NOT APPLY

251. The Claimant argues that, even if it is accepted that the 1964 Order had the effect SWP contends for, the circumstances are different to those in *Day*. In *Day* it was accepted on all sides that the land in question had been used for purposes of public recreation (see para [7]). It was an area of land which had historically been laid out as a pleasure ground, and which was in fact in use by the public at the time of the sale. It was not in question that in the hands of the local authority selling land, the land was subject to a statutory trust under s.164 PHA 1875 or s.10 OSA 1903 immediately before the sale.

252. The Claimant argues that the same is not true of the Golf Course Land, where the land in question had never been laid out for public recreation and had never been used for the public. The position is to be distinguished from that dealt with in *Day*, and dealt with differently.

253. This argument has essentially two parts:

i) first that the statutory trust had not, and still has not, yet arisen and

ii) secondly that in the absence of land being impressed with the statutory trust the effect of the law relating to land registration provides the Claimant with beneficial ownership free of any other interest.

254. An allied point, considered further below, is that the Claimant argues that until the land is laid out for public recreation and/or the public has been allowed to enjoy rights of public recreation, then the land is not to be regarded as "open space" for the purposes of the procedure at s.123(2A) and s.123(2B) LGA 1972.

A. The argument as to when a statutory trust arises

255. The Claimant advances the proposition that the mere vesting of land in a local authority under s.164 PHA 1875 is not sufficient to bring into existence rights exercisable by the public over the land – it is necessary for the local authority to take steps to lay out and make the land available for public recreation.

256. The Claimant draws support for this proposition from the decision of the Court of Appeal in *Blake* (which was relied on by Lady Rose in *Day*).

257. That case concerned an area of land acquired by the local authority in 1932 under s.164, and laid out as a park. It opened in 1934, and had been used since then as a park. The local authority claimed that the park should be exempt from rating on the basis that beneficial occupation was by the public rather than the local authority. The valuation officer opposed that claim.

258. The Court of Appeal found that the local authority in question had no choice but to "dedicate" land acquired under PHA 1875 s.164 to public use. However, the Court of Appeal made clear that it did not follow that the public had rights from the moment of acquisition. Those rights would only arise once work had been done to the land and arrangements made for its control and management as a park. Devlin LJ put it as follows at Page 299:

> "Of course the public right of free and unrestricted use does not begin the moment the local authority acquire the land which they intend to "dedicate" as a public park. Work may have to be done to the land and arrangements made for its control and management as a park. "Dedication" may not be an inapt word to describe by way of analogy the moment when, the purpose having been executed, the public enter into the enjoyment of rights similar to those which they enjoy over the highway."

259. The Claimant argues that in referring to "control and management", Devlin LJ must have had in mind both practical and physical arrangements as well as consideration and exercise of the power to make bye-laws (in PHA 1875 s.164). These would all have been a necessary precursor to the "public enjoyment of their rights" over the land.

260. Devlin LJ considered that the moment when beneficial ownership passed to the public was at the point that its use of the land commenced once the land was made available to the public. At page 301, when considering the findings of fact that the local authority would require to avoid being rated, he concluded as follows,

> "It is sufficient that it should appear from the case, as it does from this case, that land acquired by a local authority under section 164 of 1875 is being used by the public for the purposes set out in that section, and that they have free and unrestricted use of it (qualified, it may be, by a limited exclusion for ancillary purposes) for those purposes. That is sufficient material from which to infer that beneficial ownership has passed to the public and to negative occupation by the local authority."

261. The Claimant argues that it follows from *Blake* that, whilst

i) a local authority holding land that is subject to s.164 PHA 1875 would be under a duty to lay out the land for the purposes set out in that section (subject to any contrary statutory powers) and then to make the land available to the public, and

ii) a member of the public may be able to pursue remedies under public law to require the local authority to comply with that duty,

the public has no rights over the land itself, and no statutory trust exists, prior to the land being laid out and made available to the public. The public law duty on the local authority is not (or at least not necessarily) coterminous with the creation of rights over the land in favour of the public.

262. It may be added that, since LB Merton took the land subject to the 1961 Lease (which was expressly preserved by the 1964 Order) then LB Merton's duty (if it had one) to prepare the Golf Course Land for the public recreational use under s.164 PHA 1875 would not have applied until that lease came to an end.

263. Mr Cohen, for SWP put forward an argument that *Blake* had no such effect.

264. Mr Cohen first wanted to put his argument in the context of the nature of the statutory trust and for this purpose he took me to a number of cases.

265. He took me to *Finsbury Park* at [17] for the proposition that where a statutory trust (such as one under s.10 OSA 1906) exists, it is well established that the public have a statutory right to use the land for recreational purposes.

266. I was referred to *Barkas SC* at [20]-[21] where Lord Neuberger found that the land in question there had been subject to a statutory right in favour of the public "so long as land is held under a provision" such as the relevant provision in that case which gave rise to the statutory trust.

267. I was taken to *Day,* at [41]-[49] also dealing with the nature of a statutory trust. Mr Cohen took from the use of the word "consequently" in the first sentence at [44]:

> "The nature of the public's rights to use the statutory trust and consequently the extent of the council's rights in the land have also been considered in the context of disputes over the rateable value of the land in the hands of the local authority"

that the public's rights to use the land and the extent of the council's rights are coterminous: they arise together.

268. I did not, and do not, agree that one can derive from this passage any guidance as to when the public's rights under a statutory trust arise. I considered, and consider, that all that this is saying is that to the extent that the public have a right to use the statutory trust, that is limiting the council's rights (and therefore the requirement to pay rates).

269. Finally I was taken back to *Barkas SC* at [29], and particularly the finding there that, when land was purchased by a local authority under s.164 PHA 1875, the local authority could not lawfully use the land for any other purpose.

270. Mr Cohen then enumerated a number of statutory provisions that modified the strict application of that restriction found in *Barkas SC*, including notably s.52 of the Public Health Act 1961 ("**PHA 1961**") which (summarised broadly) allows a local authority to set apart part of a park or pleasure-ground for the purpose of cricket, football or any other game or recreation and allow that land to be used exclusively by a club or any other body of persons. This power applies if the land comprises no more than one third of the area of the park or pleasure ground and no more than one quarter of the total area

of all the parks and pleasure grounds provided by that local authority. Whilst this provision could not have been relevant to the Golf Course Land (which comprised more than one third of the Wimbledon Park Estate) it provided an example of how private rights might be allowed to exist under land held under s.164 PHA 1875.

271. A more pertinent example applied under the 1960s legislation, in that when the Golf Course Land was transferred to LB Merton to be held for the purposes of s.164 PHA 1875 (as we are assuming for the purposes of this part of the judgment), the land was also lawfully subject to the 1961 Lease as a result of article 16 (2) of the 1964 Order.

272. Pausing at this point, I will say that none of the considerations outlined by Mr Cohen above appear to me to have very much bearing on the proposition put forward by the Claimant that there is a distinction between:

i) the point at which a local authority acquires a duty under PHA 1875 to dedicate land to the use of public leisure (subject to the numerous statutory exceptions that Mr Cohen has outlined) and

ii) the point at which a statutory trust arises.

273. None of the cases cited by Mr Cohen as summarised above deal with this point – they are seeking to outline the nature of the statutory trust, not the point at which it arises.

274. If anything, the point made, that there are numerous statutory exceptions that allow a local authority holding land under PHA 1875 to use it in a manner that is incompatible with the dedication to use for the purposes of public leisure under s.164 PHA 1875, is better explained as being modifications to the duty of the local authority than as modifications to the rights of the public under a statutory trust.

275. For example, Mr Cohen argued that where a local authority used a power under s.52 PHA 1961 to provide exclusive possession for a lengthy period to one third of a public park to a private sports club, the public would still enjoy rights to use the affected land as a pleasure-ground, but this right would be subject to a complete defence that the exclusion of the public was lawful. The proposition that a legal right can meaningfully exist where that legal right can never be enforced is logically troubling. It is a much more satisfactory explanation to say that powers such as s.52 PHA 1961 modify the duty of the local authority such that the public right of use ceases in relation to the land affected.

276. Mr Cohen went on to make representations on what *Blake* decided. He pointed out that *Blake* was a case about liability for rates, and therefore was really focused on who was occupying the land, which was a different question as to beneficial ownership of the land. That is, of course, correct. Nevertheless, the ratio in *Blake* was very much focused on ownership and in particular the point at which a statutory trust arose so as to denude the local authority of beneficial ownership of the property. For example, as I have already quoted, at page 301 Devlin LJ says the fact of acquisition by a local authority under s.174 PHA 1875 coupled with the unrestricted use of that property:

> … is sufficient material from which to infer that beneficial ownership has passed to the public and to negative occupation by the local authority.

277. With great respect to the learned and eminent judge, the phrase "beneficial ownership" might be somewhat inapt since, as is pointed out in *Day*, the statutory trust is a form of statutory purpose trust rather than the equivalent of a private trust where the public are to be seen as beneficiaries. Nevertheless it is clear that Devlin LJ was finding that the statutory trust arose at the point of use by the public, rather than at the point of acquisition by the local authority.

278. Considering all the arguments put to me on this point, I conclude that the Claimant is correct in making a distinction between the *duties* of a local authority that acquires land for the purposes of s.164 PHA 1875 and the *rights* of the public arising from a statutory trust. The duties of the local authority arise at the point that the land is acquired (and may be modified by the use of powers under other statutory provisions). The rights of the public arise only when the land is made available for public recreation.

279. I derive further support for this conclusion from the decision in *Barkas CA*, which I have already mentioned in passing. In that case, the Court of Appeal had to consider whether, when local inhabitants indulge in sports and pastimes on a recreation ground provided for that purpose by local authority in the exercise of statutory powers, do they do so "by right" or "as of right". This question was important because it would affect whether there was an obligation for the land to be registered as a town or village green.

280. The land in question had all the appearance of a typical municipal recreation ground and had been laid out and maintained as a recreation ground by the relevant local authority under a 1936 Act that made provision for an authority to provide housing for the working classes.

281. The main judgment was given by Sullivan LJ. He noted that OSA 1906 creates (by section 10) an express statutory trust for public recreation. No provision for such an express trust is created by PHA 1875 or under the Act that he was considering, but he considered (at page 1535 in the WLR report of the case) that:

> "…I find it difficult to understand why the statutory approval of the corporation's new town plan 1973 by the minister, which had the effect of granting planning permission for the development of the land as "parkland/open space/playing field", when coupled with the subsequent laying out and grassing over of the land, was not sufficient to amount to an "appropriation" of the land as recreational open space in the sense in which Lord Walker used that word."

282. The sense that Lord Walker (in *Beresford*) had been using the word "appropriated" was not in the narrow sense of appropriation under section 122 of LGA 1972 (or, it may be assumed, any predecessor Act that introduced the concept of appropriation).

283. Further down on the same page, Sullivan LJ found that:

> "The minister's consent having been obtained and the field having been laid out and thereafter maintained as a recreation ground [under particular express statutory powers], it seems to me that it would be wholly unreal to conclude that the field had not been "appropriated for the purpose of public recreation" in

> the sense in which Lord Walker referred to "appropriation" in para 87 of his opinion in *Beresford*."

284. On the basis that the land had been appropriated for the purpose of public recreation by the borough council under an express statutory power to provide and maintain the land as a recreation ground, Sullivan LJ found that the land was being used by the public "by right" and therefore not "as of right".

285. These passages highlight a conclusion I have already stated that something more than mere planning designation is required in order for land to be considered to be "appropriated" (in this wide sense) to the purpose of public recreation. They are also consistent with the view that what Devlin LJ in *Blake* referred to as "dedication" is necessary for the statutory trust to apply and that this may apply at the point that the land is used for the purposes of public recreation.

286. Having reviewed all the arguments set out in this section, I conclude that, even if LB Merton acquired the land for the purposes of s.164 PHA 1875, the land would only become subject to a statutory trust if it was laid out for the purposes of public recreation and used as such by the public. Before that point there was a public law duty on LB Merton (which might be enforceable by a member of the public using public law remedies) but not rights under a trust that would run with the land.

B. Was the land laid out or used for public recreation?

287. The Claimant argues that the land was never laid out for the purposes of public recreation: it was laid out as a private golf course. Furthermore, it was never used, or allowed to be used, by the public for the purposes of recreation so as to bring into being a statutory trust.

288. SWP argues that there was public use. The members of the Golf Club and guests permitted to play on the course were anyway members of the public, and therefore there was nothing incompatible about granting an exclusive lease to the Golf Club and saying that the Golf Course Land was being used for public recreation.

289. SWP also argues that there is some evidence of at least one local (Dr Dawson) regularly taking a shortcut across the land, considering this to be a "customary route" but not going as far as considering that he had a right of way, and of other members of the public coming onto the land. SWP also takes a point that the evidence is not completely clear that the Golf Course Land was always completely fenced off so as to be inaccessible to the general public, although I did not find the evidence on this to be particularly satisfactory.

290. A further point is made that, in the negotiations for the 1986 Lease, LB Merton took pains to ensure that residents of Merton, and those with businesses there would receive reduced green fees and should have some degree of preferential treatment when being considered for membership of the Golf Club.

291. None of these points seem particularly relevant to the question whether the land was being used for public recreation. The fact that there may be trespassers on the land does not change the use of the land. There is ample evidence that both LB Merton (and before it Wimbledon Corporation) and the Golf Club were concerned throughout in

maintaining walls or fences to keep the public off the Golf Course Land. The fact that some people may have surmounted or found a way through the obstacles that were there is irrelevant.

292. SWP's counsel referred me to *Regina (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11 ("***Redcar***"). This related to a question whether land owned by a local authority should be registered as part of a town green within the meaning of s.15 of the Commons Act 2006, on the grounds that a significant number of the inhabitants of the locality had indulged as of right in lawful sports and pastimes on the land for at least 20 years and the land was still being so used.

293. Until around eight years earlier, the disputed land had formed part of the golf course which was regularly used by members of a private golf club. However, the local inhabitants had continued to use the land for informal recreation without interfering with or interrupting play by the golfers, and would wait until the play had passed or until they were waved across by golfers, so that there had generally been a cordial relationship between the golfers and the local inhabitants.

294. The inspector appointed to hold a non-statutory public inquiry to determine whether the land should be registered as a common, found that the local inhabitants' use of the land was "not as of right". He found that signs had been erected on the land having that effect; and that the local inhabitants had "overwhelmingly deferred" to the extensive use of the land by the golfers. On these bases, he recommended that the land should not be registered as a town green.

295. The claimant sought judicial review of this decision. This was refused at first instance, as was his appeal to The Court of Appeal. Court of Appeal found that in order for user to be as of right it had to be not merely *nec vi, nec clam, nec precario* (not by force, nor by stealth nor by permission) but also had to be such as to lead a reasonable landowner to conclude that a right to use the land was being asserted by the local inhabitants.

296. When the claimant's further appeal came to the Supreme Court, the Supreme Court allowed the appeal, rejecting the finding of the Court of Appeal that there was an additional test based on what would have been concluded by a reasonable landlord.

297. SWP asks me to take from this case that public user may coexist with lawful use by the owner of the land.

298. This case, however, does not assist with the issue I am considering here. The issue in *Redcar* was whether the public had been using the land "as of right in lawful sports and pastimes on the land for a period of at least 20 years". As we have already seen from the case of *Barkas CA* (see [279] to [282] above), there is a distinction between (i) user by the public "as of right" (a prerequisite to recognising land as a common) and (ii) user by the public "by right" which arises where a statutory trust is created. *Redcar* shows that user by a significant number of inhabitants of the locality *nec vi, nec clam, nec precario* may meet conditions for the registration of a town or village, even if it takes place alongside other use of the land that is by permission. It is not authority for the proposition that the occasional trespass on the land amounts to use of the land by the public for the purposes of determining whether a statutory trust has arisen.

299. I do not accept what meagre evidence there is of trespassers being on the land as demonstrating that there had been public use of the land for the purposes of bringing a statutory trust into existence.

300. Neither is it relevant to characterising the use of the land as public or private that LB Merton sought benefits for its ratepayers in relation to green fees or preferential consideration for membership. It remains the case that the Golf Club was granted a series of exclusive leases and that anyone lawfully on the land was there as a licensee of the Golf Club and not because the land was being used for public recreation (or in the phrase used by Devlin LJ in *Blake* had been "dedicated" to such use). Such user would not even satisfy the test being applied in *Redcar* since such a use permitted by the leaseholder can hardly be said to be *nec precario*.

301. Similarly, whilst it is true that anglers use part of the Golf Club Land, this was as part of another private club which used the property under licence from the Golf Club, so any anglers occupied as licensees of the Golf Club and not as members of the public exercising a right of public recreation.

302. SWP points out that at all material times up to the grant of the 1986 Lease, the Lake was demised to the Golf Club. Pursuant to a right reserved in clause 3(3) of the 1961 Lease, boating took place on the Lake by members of the public and students.

303. Again, I do not see this as evidence of public use of the Golf Course Land. First, the extent of the Golf Course Land that we are concerned about excludes the Lake (as that was excluded both from the 1986 lease and from the freehold title sold to the Claimant), so any public use of the Lake was not public use of the Golf Course Land within the definition we are now considering. Secondly, clause 3(3) of the 1961 Lease expressly required "the grant of facilities for boating etc" in respect of not more than 10 acres of the Lake adjacent to "that part of the Wimbledon Park Estate which at the date hereof is used by the public". In other words, the Golf Club would grant a licence. Thus, any person using the Lake was doing so as a result of such licence and not in exercise of any public right of leisure.

304. I therefore answer the question posed in the heading to this section: no, the Golf Course Land was not being used for the purposes of public recreation.

C. The effect of the Land Registration Act 1925

305. The Claimant argues that the fact that (in contrast with the facts in *Day*) no statutory trust had yet been created is of prime importance when one considers the effect of the Land Registration Act 1925 ("**LRA 1925**").

306. At the time of the sale in 1993, the Golf Course was registered land. The effect of the registration of the Claimant as proprietor was therefore governed by s.20 LRA 1925, as in force at the relevant time.

307. S.20(1) provided:

> "In the case of a freehold estate registered with an absolute title, a disposition of the registered land or of a legal estate therein, including a lease thereof, for valuable consideration shall, when

> registered, confer on the transferee or grantee an estate in fee simple or the term of years absolute or other legal estate expressed to be created in the land dealt with, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, including (subject to any entry to the contrary in the register) the appropriate rights and interests which would, under the Law of Property Act 1925, have been transferred if the land had not been registered, subject—
>
> (a) to the incumbrances and other entries, if any, appearing on the register and any charge for capital transfer tax subject to which the disposition takes effect under section 73 of this Act; and
>
> (b) unless the contrary is expressed on the register, to the overriding interests, if any, affecting the estate transferred or created,
>
> but free from all other estates and interests whatsoever, including estates and interests of His Majesty, and the disposition shall operate in like manner as if the registered transferor or grantor were (subject to any entry to the contrary in the register) entitled to the registered land in fee simple in possession for his own benefit."

308. Thus, the argument runs, the effect of s.20 LRA 1925 was, upon registration, to confer on a purchaser in the position of the Claimant an estate in fee simple subject only to:

    i) incumbrances and other entries appearing on the register and to

    ii) overriding interests.

309. With these two exceptions, the effect of registration of the disposition is the same as it would be if the Claimant were beneficially entitled to the land and so, for example, free of any equitable interests under a (private law) trust.

310. As the statutory trust was not noted on the register, it could only affect the Claimant as purchaser if it was an overriding interest.

311. What is meant by an "overriding interest" is defined first at s.3(xvi):

> ""Overriding interests" means all the encumbrances, interests, rights and powers not entered on the register but subject to which registered dispositions are by this Act to take effect, and in regard to land registered at the commencement of this Act and included the matters which are by any enactment repealed by this Act declared not to be incumbrances".

312. This provision defines "overriding interests" by reference to their effect (that they bind the land being transferred even though they are not noted on the register) rather than identifying what sort of things comprise an overriding interest. For that we need to turn

to s.70(1) LRA 1925 which includes a list of the types of rights and liabilities considered to comprise overriding interests having the effect mentioned in the definition. Of those listed, the most pertinent rights were those listed at s.70(1)(a), to the effect that on registration a proprietor's title was subject to:

> "rights of common, drainage rights, customary rights (until extinguished), **public rights**, profits à prendre, rights of sheepwalk, rights of way, watercourses, rights of water, and other easements not being equitable easements required to be protected by notice on the register".

313. I think it was common ground, and certainly it is my view, that "public rights" would include any public rights under a statutory trust. However, the Claimant argues that public rights can refer only to rights that are in existence at the point that a purchaser or lessee acquires title - and that at the point of the sale of the Golf Course Land, and at the point of the creation of the 1986 Lease, there were no "public rights" and as a result, no overriding interest.

314. The meaning of the phrase "public rights" in the land registration regime was considered by the Court of Appeal in *Overseas Investment Services Ltd v Simcobuild Construction Ltd* (1995) 70 P&CR 322 ("***Simcobuild***").

315. In that case, a local authority acquired a right to bring about a highway maintainable at public expense over land by an agreement with the owner, either allowing the local authority to require the owner to construct and then dedicate the highway, or in default of that by constructing it itself. Before any road was built, the land was sold to the appellant. The first respondent was the owner of land which required access over the subject land. The issue was whether the rights created under the agreement for a future highway were "public rights" within the meaning of s.70.

316. The Court of Appeal held that they were not. At page 327, Peter Gibson LJ (with whom Beldam LJ agreed) identified that the overriding interests listed were "all terms familiar to conveyancers". He then continued (on page 328) to find that this meant (*prima facie*) that the rights mentioned in s.70(1)(a) LRA 1925 (which include "public rights")

> "are present rights, presently exercisable and do not include future rights"

317. He also on the same page agreed with an extract from the textbook authority *Megarry & Wade* that a public right was a:

> "right exercisable by anyone, whether he owns land or not, merely by virtue of the general law."

He held (at page 329) that there was no justification for

> "giving "public rights" an extended meaning so as to embrace rights existing for the benefit of the public when not exercisable by any member of the public".

318. Staughton LJ reached a similar conclusion finding that:

> "it is desirable that overriding interests should be in a narrow rather than a wide class and should be clearly defined. The phrase "public rights" has a clear and limited meaning. It refers to right exercisable by any member of the public. Rights of a public nature, on the other hand, is or may be a vague test and may be much wider".

319. This reading also receives further support from the case of *Whitstable Society v Canterbury City Council* [2017] EWHC 254 (Admin) ("***Whitstable***"). This case was dealing with the definition of "open space" for the purposes of s.123A LGA 1972. Dove J held that the s.123 advertising requirement did not apply to land which had been acquired with the intention to develop it as an open space, but had not been by the time of the sale laid out as a public garden, or used for the purposes of public recreation, or as a disused burial ground.

320. In that case, Canterbury Council had acquired a former outdoor roller skating rink in Whitstable called the Oval Chalet. In order to acquire it, the authority had undertaken to a competing purchaser that it would develop it as an open space, and subsequently continued to intend to do so, but never did. Many years later it contracted to sell the property to a third party intending a commercial development. That decision to contract was the subject of judicial review on a number of bases, including that the authority had failed to advertise the sale in accordance with s.123(2A).

321. Dove J at [78] held that the key issue was whether at the time of the disposal the property consisted or formed part of an open space, which was to be answered by reference to the specific language of the section. At [78], he held that the Oval Chalet was not "*open space*" as defined, despite the intention to develop it as an open space. At [81], he specifically considered and rejected a submission that holding land under s.164 for a proposed but not yet developed open space was sufficient to make that land "*open space*", because the wording of the statute was determinative, and that required the land to consist of or form part of an open space *at the time* when the disposal is being undertaken.

322. It is important to note that in *Day* Lady Rose (at [81]) distinguished *Day* case from *Whitstable* on the basis that:

> "although the disputed site had been purchased with the intention of developing it as an open space, the development never took place".

323. If (as we are assuming in this section of the judgment) the Golf Course Land was acquired by LB Merton for the purposes of section 164 PHA 1875, but the land had never been used or developed for the purposes of public leisure, it seems to me that the circumstances of the Golf Course Land are much closer to the considerations in *Whitstable,* than those in *Day* and accordingly that, as in *Whitstable* public rights had not yet been created.

324. Mr Cohen argued that the circumstances of the Golf Course Land were different, based on his view that the public right had arisen as a result of the land being held for the purposes of s.164 PHA 1964, notwithstanding that the public had never been able to exercise such right. He suggested that I should interpret these references to a right being

"exercisable" as meaning that the right must exist (even if not legally or practically exercisable).

325. I accept this argument insofar as it relates to a right that exists but is not practically exercisable (for example a right of passage in navigable waters where a waterway has temporarily been stopped up – see *Rowland v Environment Agency* [2003] Ch 581). However, as I have mentioned I find troubling the concept of a legal right that is not legally enforceable. This argument seems to me to fly in the face of the careful words used by the eminent judges in *Whitstable.* I prefer the Claimant's more straightforward interpretation of that case.

326. Mr Cohen also referred me to *Secretary of State v. Baylis & Bennett* [2000] 80 P&CR 324. In this case Kim Lewison QC (as he then was) distinguished *Simcobuild* on the basis that public rights had been created through the adoption of a highway by the relevant highways authority, before any user of the highway had occurred. Mr Cohen considered that this demonstrated that a public right does not require actual user in order to exist. I do not find this case particularly useful in the present context – it turns on the laws of highways and we are dealing here with a different type of statutory trust that arises in a different way.

327. In summary, I agree with the Claimant's interpretation of *Simcobuild* and that two points emerge from this analysis.

328. A public right is one which arises under the general law, regardless of land ownership. The public's entitlement to use land laid out and made available for public recreation under PHA 1875 s.164 clearly falls within this category, and therefore can constitute an overriding interest. Devlin LJ described the right under s.164 as "the public right of free and unrestricted use". Lady Rose regarded those as analogous to rights in the highway, as did Devlin LJ in *Blake* at page 299.

329. The corollary of this, however, is that such a right to use the land cannot constitute an overriding interest unless it is extant at the date of the relevant transfer. As I have found that an overriding interest would only arise at the point that the statutory trust was in force and not at the earlier point at which LB Merton acquired the land subject to a duty to use it in accordance with s.164 PHA 1875 (assuming that that is indeed what happened), it follows that at both the point that the 1986 Lease was acquired by the Golf Club and the point at which the freehold was acquired by the Claimant, there was no such trust.

330. SWP have raised a number of arguments against this proposition. I have already dealt with and rejected their argument as to the point when the statutory trust arose.

D. The 'very clear words' argument

331. A further argument is based on a comment by Lady Rose in *Day* (at [101]) that:

> "very clear words indeed were needed in order for a power to dispose of land to be effective in extinguishing the public's rights under the statutory trusts created in public walks and pleasure grounds under section 164 of the PHA 1875 or open spaces under section 10 of the OSA 1906."

332. That conclusion of Lady Rose was in part based on a consideration of the House of Lords decision in *Shonleigh Nominees Ltd v Attorney General* [1974] 1 WLR 305. This case is summarised and referred to in *Day* at [96]- [100]. In this case there was an airfield being sold by the Secretary of State. The land had been advertised on the basis that there was planning permission for it to continue to be used for civil aviation. It was alleged that there was a public right of way across the land, which would have interfered with its continued use as a civil airfield, and occasional motor racing track. The alleged right of way had been suspended under the Defence Act 1842 and it was being argued that the Secretary of State sold it using a power in that Act to sell free of all manner of prior rights.

333. Lord Morris agreed that this provision have had that effect and would allow the appeal. Lord Hodson disagreed and would dismiss the appeal on the basis that the wording of the Act was not apt to allow the exclusion of public rights. Viscount Dilhorne (with whom Lord Reid agreed) also considered that the Act could not have included the exclusion of public rights, reasoning in particular on the basis that the broader interpretation was incompatible with the Highways Act 1835 which included an elaborate procedure for permanently stopping up or diverting a highway and also noting that another section allowed compensation for anyone who lost a right, and this compensation provision could not sensibly be intended to have applied to every member of the public. Lord Simon agreed with Viscount Dilhorne and Lord Hodson and added reasons of his own.

334. Whilst this case was principally based on the wording of the Defence Act 1842, it does support, if any support is needed, Lady Rose's dictum that "very clear words indeed" are needed to extinguish a public right.

335. My answer to that point is firstly that , if the statutory trust is not yet in existence, then no public right has been extinguished. There may be a question whether the public authority involved has acted in accordance with its duties, but that is a separate question.

336. Secondly it seems to me that the words of LRA 1925 are very clear words indeed. Unless a right is an overriding interest or an incumbrance noted on the title, a purchaser of registered land takes free of it. I see no lack of clarity.

337. Mr Cohen suggested that the lack of clarity arose in s.20 LRA 1925 where it was stated (in summary) that a purchaser acquiring a freehold estate registered with absolute title (or a legal estate therein) for valuable consideration would acquire the land):

> "… subject –
>
> (a) to the incumbrances and other entries, if any, appearing on the register; and
>
> (b) unless the contrary is expressed on the register, to the overriding interests, if any, affecting the estate transferred or created,
>
> but free of all other estates and interests whatsoever…

338. Mr Cohen, by way of an alternative argument to his main argument that there were public rights over the Golf Course Land amounting to overriding interests, suggested that it was these last words that were not sufficiently clear in that they did not specifically deal with public rights and therefore did not pass the "very clear words" test applicable where public rights are concerned.

339. The consequence of Mr Cohen's argument must be that there can be four different categories of rights:

i) incumbrances and other entries (within paragraph 20(1)(a)) that are registered on the title - purchaser takes subject to these matters;

ii) overriding interests - the purchaser takes subject also to these;

iii) "other estates and interests" (meaning other than matters within the first two categories) that are not public rights - purchaser takes the land free of these;

iv) "other estates and interests" (again meaning other than matters within the first two categories) that are public rights and so fall out of the scope of the effect of the final part of s.20 because that provision is not sufficiently clear, with the result that the purchaser takes subject to these also.

340. The problem with this analysis is that it fails the test in logic of the excluded middle. The categories of overriding interests expressly include public rights and so this categorisation only works if there can be something that is not a public right so as to give rise to an overriding interest, but is still a public right for the purposes of the "very clear words" test.

341. I therefore reject this interpretation in favour of the much simpler interpretation that if there is a public right affecting the land there will be an overriding interest. If there is no public right (and no entry on the register) then the words at the end of s.20 apply. Those words can never fall foul of the "very clear words" test because they will only apply to rights that are not public rights.

342. I would add, that even if this fourth category could exist, it would only apply to public rights and as I have found above at the relevant points the public have no interest in the Golf Course Land.

E. The effect of any inconsistency of LRA 1925 with LGA 1972

343. SWP has advanced a further argument as to why LRA 1925 cannot be relied upon. This is that LRA 1925 is inconsistent with LGA 1972 and so must be considered to have been repealed or modified by it.

344. SWP argues that there is a consistent line of authority to the effect that the LRA 1925 will yield to any later statute which is inconsistent with it. The inconsistency in question can be implied. For these propositions I was referred to *Miller v. Minister of Mines* [1963] A.C. ("***Miller***") and *British American Cattle Co. v. Caribe Farm Industries Ltd* [1998] 1 WLR 1529 ("***Caribe Farm***").

345. *Miller* was a Privy Council case dealing with the relationship between two statutes applicable in New Zealand: the Mining Act, 1926 ("**MA 1926**") and the Land Transfer

Act, 1952 ("**LTA 1952**"). Lord Guest delivered the judgment of the Privy Council. He found that MA 1926 on its terms, had an extended operation beyond that of earlier Mining Acts in New Zealand, which dealt only with gold, so that it applied to metals and minerals other than gold. He held further that licences granted under MA 1926 created rights that were not registered rights under LTA 1952, and so were not subject to a provision in LTA 1952 (similar to that in LRA 1925 in the United Kingdom) that a purchaser of registered land took free of interests that were registrable but had not been registered. Lord Guest explained that:

> "It is not necessary in their Lordships' opinion that there should be a direct provision overriding the provisions of the Land Transfer Act. It is sufficient if this is a proper implication from the term of the relative statute."

346. He found that MA 1926 provided its own separate and independent code for the registration of mining licences and that it could not have been the intention of the legislature that this would have been overridden by LTA 1952.

347. This, then, was not a case where the later Act superseded the earlier Act. It was a case where the later (1952) Act had to be construed in the light of a clear legislative intention within the earlier (1926) Act, and also an example of the courts being hesitant to allow a provision drafted in general terms to override more specifically targeted legislation (as we have seen also in *Blake*).

348. *Caribe Farm* was another Privy Council case. Lord Browne-Wilkinson delivered the judgment of the court. The case concerned title to land in Belize which, under the Law of Property Ordinance 1954 ("**LPO 1954**") and the General Registry Ordinance 1954 ("**GRO 1954**") operated land registration according to the Torrens system. Lord Browne-Wilkinson explained (on page 1533) that:

> "Although the details of the Torrens system vary from jurisdiction to jurisdiction it is the common aim of all systems to ensure that someone dealing with the registered proprietor of title to the land in good faith and for value will obtain an absolute and indefeasible title, whether or not the title of the registered proprietor from whom he acquires was liable to be defeated by title paramount or some other cause"

349. The effect of LPO 1954 and GRO 1954 was that, to bring about an effective transfer of legal title of registered land, the transferor had to produce his certificate of title and execute the memorandum of transfer in a prescribed form. A conveyance that did not conform with these requirements would nevertheless create an equitable title over the land in question.

350. In the case before the Privy Council, the original proprietor of land, Mr Brotman, made a purported conveyance of land to a Mr Zent, who later transferred the land to the claimant, BACC. Neither transfer complied with the statutory requirements and so were ineffective to transfer the legal title, but under GRO 1954 transferred an equitable interest which carried with it a right to demand the holder of the legal title transfer the legal title to the holder of the equitable title.

351. Mr Brotman died and his personal representative was registered as the legal owner of the land. That personal representative transferred the registered title to the defendant, Caribe Ltd, which was duly registered as the legal owner, but, as that company was an alien, under the Aliens Landholding Ordinance 1973 ("**ALO 1973**") that registration was invalid in the absence of a licence from the Minister. Caribe Ltd argued that the provision of ALO 1973 could not operate as LPO 1954 conferred on the registered holder an "absolute and indefeasible" right.

352. Lord Browne-Wilkinson found in favour of the claimant. Whilst under the Torrens system it was necessary to keep to a minimum the number of matters which may defeat the title of the registered proprietor, he considered that it was well established that there are certain exceptions and that

> "One of these is where a later statute is inconsistent with the provisions of the Act conferring absolute and indefeasible title on the registered proprietor."

353. He cited *Miller* in support of this proposition, although, as we have seen, in *Miller* it was the earlier (but more specifically targeted) Act that took precedence. He additionally cited in support of this principle the decision of the High Court of Australia in *Travinto Nominees Pty. Ltd. v. Vlattas* (1973) 129 C.L.R. 1 ("***Travinto***") in which Gibbs J. said, at p. 35:

> "Although the Real Property Act is of the greatest importance in relation to land titles it is not a fundamental or organic law to which other statutes are subordinate. The question is simply whether the provisions of the later enactment ... override [it]."

354. What I take from these cases is that an earlier Act that is incompatible with the later Act may well need to be considered to have been cut down in its operation by the later Act (as was the case in *Caribe Farm* and *Travinto)*. However, it may also be the case that the apparent wide words in a later Act may need to give way to the provisions in an earlier, more specifically focused, Act (as was the case in *Miller)*. In either case, the court is looking to discern, as best it can, the intentions of the legislature.

F. The application of the LGA 1972 provisions

355. SWP argues that s.123(2A) and (2B) LGA 1972 provide a comprehensive mechanism for freeing land of a public trust pursuant to s.164 PHA 1875 on disposal so that if the two are in conflict LGA 1972 should be followed.

356. It is necessary then to consider whether there is a conflict.

357. The wording of s.123(2A) and (2B) LGA 1972 are set out at [245] above. These sections are engaged in relation to a disposal of "any land consisting of or forming part of an open space". It is therefore necessary to consider whether the Golf Course Land comprised, or formed part of, an open space at the relevant time.

(i) Was the Golf Course Land an "open space"?

358. When in 1993 LB Merton sold the Golf Course Land, although the sale was extensively publicised and the subject of much local opposition, the sale was not advertised formally in accordance with the requirements of s.123(2A) LGA 1972. The Claimant points out that this was because the Administration and Land Sub-Committee of the Leisure Services Committee of LB Merton expressly considered whether the Golf Course Land was "public open space" and concluded that it was not and that therefore there was no need. The conclusion appeared to be based on the proposition that the public had no general right to enter the land owing to the lease of the Golf Club.

359. In fact, use by the public is not the only way that land may fall within the definition of "open space" within LGA 1972 s.123(2A).

360. *"Open space"* is defined in LGA 1972 s.270 (as amended). It adopts the meaning in s.336(1) Town and Country Planning Act 1990, which is:

> *""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."*

361. Thus, there are three ways that land may be considered to be open space for these purposes:

i) if it is laid out as a public garden;

ii) if it is used for the purposes of public recreation;

iii) or if it is a disused burial ground.

362. There is no question of the land having been a disused burial ground, and so the question is whether it is used for the purposes of public recreation or whether it was laid out as a public garden.

363. I have already considered whether the land was being used for the purposes of public recreation when considering whether a statutory trust has come into being. I have reached the clear conclusion that it was not.

364. The Claimant argues that the Golf Course Land was not laid out as a public garden. It was laid out as a private golf course. I agree.

365. It follows from these findings that the Golf Course Land was not itself an open space.

(ii) Was the land "part of" an open space?

366. SWP argues that even if the Golf Course Land itself was not an open space, it formed "part of an open space" and so was anyway caught by ss.123(2)(A) LGA 1972.

367. To define what is meant by "forms part of" SWP refers to *R (Freeman) v Council of the City of Plymouth and Cornwall County Council 1987* 19 HLR 328.("***Freeman****").*

368. This was a case when the tenant of a lodge sitting in a country park that was owned (as was the Lodge) by two local authorities, sought to exercise a right to buy that house

There was no doubt that the Country Park itself was used as for the benefit of the public. One of the issues under consideration in that case was whether an intermediate lease of that property (that had been granted, it seems, with a view to taking the property outside the then applicable "right to buy" legislation) fell foul of predecessor legislation to LGA 1972 which similarly required advertisement where the land:

> "consists of or forms part of an open space (not being land which consists of or forms part of the common or of a fuel or field garden allotments)".

369. "Open space" had the same meaning that we are considering:

> "any land laid out as a public garden, or used for the purpose of public recreation or land being a disused burial ground".

370. Neill LJ gave the leading judgment on behalf of the Court of Appeal. On the question of whether the Lodge formed part of an open space, he found as follows:

> "In my judgment, the Lodge forms part of the Mount Edgcumbe Country Park: it was acquired as part of an integral whole and lies within the perimeter of the Park. Furthermore, though Lord Irvine expressed reservations about the architectural merits of the Lodge, I am satisfied that the Lodge and the surrounding trees can properly be regarded as being used for public recreation although there is no public access to the Lodge."

371. His reasoning then seemed to be based on three considerations:

i) that the Lodge was acquired with the Country Park as part of an integral whole;

ii) that the Lodge lay within the perimeter of the Country Park; and

iii) that the Lodge and the surrounding trees can properly be regarded as being used for public recreation, even though the public had no access on the basis that the property as a whole (in particular its trees) added to the visual amenity of the Country Park.

372. In my view, the third of these considerations applies in the case of the Golf Course Land. Looking across the Lake from the Park at a landscaped golf course may be considered to add to the visual amenity of the Park. I doubt, however, whether this consideration by itself would be sufficient to deem the Golf Course Land to form part of a larger open space.

373. The second consideration does not apply. The Golf Course Land is adjacent to the remainder of the Wimbledon Park Estate, it is not within the perimeter of the Park area of the Estate.

374. Whether the first consideration applies is arguable. Certainly, it may be said that the Wimbledon Park Estate was originally acquired by Wimbledon Corporation as part of a single transaction. Arguably whether it was acquired by LB Merton as part of an "integral whole" depends on whether it is accepted that LB Merton acquired the Golf Course Land subject to s.164 PHA 1875 - if only the Park element of the Wimbledon

Park Estate was so acquired, then there is a strong argument that the two parcels of land cannot be regarded as an integral whole. However, in this section of this judgment I am working on the assumption that the whole of the Wimbledon Park Estate was acquired by LB Merton on the basis that it would be used for the purposes of PHA 1875. On that assumption, I consider that the first consideration does apply.

375. On the basis that two out of the three considerations that caused Neill LJ to consider that the Lodge in *Freeman* formed part of the open space comprised in the Country Park may be considered to apply to the Golf Course Land, there is a case to answer that it may be considered to form part of an "open space".

376. There is, however, a powerful counterargument that the Golf Course Land cannot be considered part of a larger open space.

377. The second consideration in *Freeman*, which does not apply here, may be considered to have been of prime importance in that case. In *Freeman* the Lodge was surrounded by the Country Park and formed a minor part of the entirety of land that undoubtedly was being used as an open space. By contrast, the Golf Course Land is not contained within open space – it is adjacent to open space. Further, unlike the Lodge in *Freeman,* the Golf Course Land is larger than the open space that it is being said to form part of if the Lake is taken out of account, and of a comparable size even if the Lake is included as part of the open space. It makes no more sense to conclude that the Golf Course Land is part of the Park that it would do to conclude that the Park is part of the Golf Course Land.

378. For these reasons, I consider it wrong to consider the Golf Course Land, which is not itself "open space" is to be part of the adjacent "open space" which is the Park (whether or not taken with the Lake).

(iii) Is there anyway a conflict between LRA 1925 and LGA 1972?

379. Having concluded that the Golf Course Land is neither an open space nor part of an open space, it follows that the provisions in LGA 1972 requiring advertisement did not apply, and therefore there is no need to consider how these might have affected the analysis concerning the application of LRA 1925.

380. If a statutory trust had arisen, this would have been regarded as giving rise to a public right and an overriding interest under LRA 1925. If the procedure for advertisement and considering representations from the public in ss.123(2)(A) and (B) LGA 1972 had been followed I think it is clear that the later Act would have modified the application of LRA 1925 so as to allow the land to be transferred free of the overriding interest. This clearly follows from the principles I have outlined above derived from *Miller* and *Caribe Farm*.

381. It does not, however, follow that a failure to comply with the procedure in LGA 1972 creates a public right and an overriding interest if one was not already recognised under LRA 1925.

382. If, contrary to what I have found, the Golf Course Land can be considered to be open space or part of an open space so that the requirements for advertising in LGA 1972 apply, then this will have arisen in two possible scenarios.

383. The first scenario is that the Golf Course Land (contrary to what I have found) is open space and a statutory trust has arisen over it. Under this scenario the statutory trust would comprise a "public right" and therefore an overriding interest for the purposes of LRA 1925 and so the Claimant would take the land subject to this overriding interest. The position would not be affected by LGA 1972 since the saving provision in s.123(2)(B) LGA 1972 would not apply as there has been no advertisement.

384. The second scenario is that the Golf Course Land is open space or part of open space (contrary to what I have found) but (as I have found) a statutory trust has not arisen over it. Under this scenario, there is no "public right" and therefore no overriding interest for the purposes of LRA 1925.

385. SWP's argument is that in this second scenario, because the procedure in LGA 1972 provides a comprehensive mechanism for freeing land from a public trust, and has not been engaged because of the failure to advertise, then the Claimant must take the Golf Course Land subject to a public trust. This cannot be correct. The provisions in LGA 1972 provide a mechanism for freeing land from the public trust. They do not provide a mechanism for bringing a public trust into being where one does not already exist.

386. If (as I have found not to be the case) the Golf Course Land is an open space or part of an open space then whether or not a statutory trust had arisen there is an argument that LB Merton would have been in breach of a duty to comply with LGA 1972 s.123(2A). However, that is a matter for LB Merton. The Claimant (and the Golf Club) still obtained good title as a result of s.128(2) LGA 1972.

387. The Claimant does not need to rely on LGA 1972 s.123(2B) to take the land free of a statutory trust because at the time that it took the land (and at the time that the Golf Club took the 1986 Lease) the land was not impressed with a statutory trust.

9. THE GOOD FAITH ISSUE

388. The Claimant has asked the court to consider two further issues:

i) whether the Claimant was a purchaser in good faith of the freehold in 1993 without notice or knowledge of the statutory trust, and similarly

ii) whether the Golf Club was a purchaser in good faith without notice of the 1986 Lease.

389. SWP has asked the court not to consider these matters on various grounds.

390. The ground first discussed in argument was based on the unfairness that the Claimant had waived privilege over three documents within the conveyancing file of its solicitors in relation to the purchase, Linklaters, but had maintained privilege over the remainder of the file (comprising some 170 documents). SWP's solicitors had been given an opportunity to review the remainder of the file for the purposes of deciding whether there were other closely linked documents so that the Claimant should be regarded as making a wider collateral waiver of privilege material. Even so, SWP argued that it did not know whether there were other documents that might be relevant to these issues over which privilege was not been waived.

391. It seemed to me at the hearing that the inspection that had been made would have been sufficient for that purpose, but nevertheless, after consultation with counsel on both sides, it was agreed that the solicitors to SWP would be given a further opportunity to inspect the file for this purpose. They were availed of that opportunity and found no further documents. I therefore do not consider this objection to be material. Neither do I find it surprising, in response to another complaint made by SWP, that the Linklaters' file is not complete more than 30 years later.

392. However, there are a series of other objections that SWP has raised that do need to be considered.

393. The first is that these matters are irrelevant to the declaratory relief sought by the Claimant. Linked to this is SWP's complaint that, whilst the Claimant has "reserved its position to argue in the Supreme Court that *Day* should not be followed", it has never explained on what basis it will do so. In the absence of a pleaded case as to how these matters are relevant, SWP has no clue as to what issues to address in evidence or submissions. Neither SWP nor the Court should be asked to address or make factual findings in a vacuum.

394. I would not take this point too far, as it is clear enough that the Claimant would wish to raise this point for the purpose of an argument that the Claimant holds the Golf Course Land free of s.164 PHA 1875. Even so, it is correct that it is difficult to see how the fact (if it can be shown) that the Claimant was a good-faith purchaser would be relevant given the Claimant's apparent acceptance that if a public trust had arisen that would be an overriding interest.

395. SWP points out that there are many cases warning courts not to stray beyond pleaded cases and in particular cites *Satyam Enterprises Ltd v (1) Burton (2) JVB Seven Properties Limited* [2021] EWCA Civ 287 at [35].

396. SWP argues further that it is not a representative defendant for the purposes of these issues as defined by paragraph 2.1 of my order of 10 June 2025, which is in the following terms:

> "Pursuant to CPR 19.8(1)(b), the First Defendant be appointed to represent all those persons in whose interests it is or would be to argue that (by reference to the definitions in the Particulars of Claim) LB Merton held the freehold reversion to the Golf Course for the purposes of s.164 of the Public Health Act 1875 prior to the Transfer and/or that after the Transfer the Claimant has held the freehold reversion to the Golf Course for the purposes of s.164."

397. This last argument, I consider to be a weak one since this paragraph does not define or limit the issues that SWP can deal with: it merely identifies what class of persons SWP may represent.

398. Nevertheless, I do see considerable force in the other arguments.

399. The Claimant acknowledges that resolution of this factual dispute is not directly relevant to the legal analysis on the two issues on which relief is sought. However, it

argues that its acquisition in good faith was pleaded as part of the background against which the Court will have to exercise its discretion whether to grant declaratory relief on those issues. Further, it points out that it was clear within its pleadings that it has reserved its position to argue in the Supreme Court that the decision in *Day* reads s.128(2) LGA 1972 too narrowly, having been reached without the Court's attention having been drawn to analogous provisions in other contexts. Further, SWP has put the Claimant to proof on this issue and this was an issue for disclosure.

400. Despite these arguments, I consider that I should resist the Claimant's invitation to deal with these points. Given that I have found in favour of the Claimant in relation to both of the points on which it has sought a declaration, it is difficult to see what would be gained by looking into these questions. Despite the points the Claimant has made, the state of knowledge of the Claimant, and in particular the state of knowledge of the Golf Club (which was not a party), were not front and centre in argument. Should they become a matter for evidence, I consider that it is likely that better evidence could emerge than was before me, particularly if the basis on which they have become relevant was better understood.

10. CONCLUSION

401. This matter is one of considerable importance both for the Claimant and for SWP and those which it represents. Accordingly, the legal teams on both sides have dealt with this matter assiduously and have argued the many different issues that arise, both in relation to the facts and the law, in great detail and, I think it would be fair to say, leaving no stone unturned. I have tried in this judgment to deal with all of the disputed issues raised with the same degree of detail and rigour, hence the length of this judgment.

402. It is easy within this mass of detail to lose sight of the basic principles on which the decision should rest. At the risk of over-simplification I consider the principal issues to have been these:

i) since it was first acquired and throughout the time it was held by Wimbledon Corporation or LB Merton the Golf Course Land was used as a private golf club and not for the purposes of public recreation;

ii) it was never appropriated or dedicated to the use of public recreation;

iii) it was not the intended or actual effect of the 1960s legislation reorganising local government in London to change the basis on which it was held so as to cause the Golf Course Land to be held for the purpose of public recreation under PHA 1875;

iv) neither did the Golf Course Land ever become "open space" or part of "open space" for the purposes of LGA 1972;

v) as the land never became held by LB Merton for the purposes of s. 164 PHA 1975, it never became the subject of a statutory trust and therefore the 1986 Lease and the 1993 transfer of the freehold were each made free of such trust;

vi) even if the above proposition is wrong, it is clear that the land was never used or laid out for public recreation, so that even if LB Merton did hold the land for the purposes of s.164 a statutory trust had not yet come into being;

vii) with no statutory trust in being at the time both of the acquisition of the 1986 Lease by the Golf Club and of the freehold by the Claimant, there were no public rights over the land, and therefore no overriding interests for the purposes of LRA 1925, and therefore the registration of these interests in the land in favour of the Golf Club (originally) and the Claimant provided a clean title unencumbered by any statutory trust.

403. The overall outcome of these considerations seems to me to be a reasonable outcome. In essence I have found that land that had never been appropriated or designated for the purposes of public enjoyment could be sold without imposing onto the purchaser a public trust where one had never before existed.

404. Finally, in accordance with the request of both parties represented in these proceedings, I make no order for costs.