Neutral Citation Number: [2017] EWHC 1947 (Admin)

Case No: CO/2956/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 2017

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN
on the application of

ALEXANDER KEAY MUIR	**Claimant**
- and -	
WANDSWORTH BOROUGH COUNCIL	**Defendant**
SMART PRE-SCHOOLS LIMITED	**Interested Party**

- -
- -

David Matthias QC (instructed under the **Direct Access Scheme**) for the **Claimant**
Ranjit Bhose QC (instructed by **Sharpe Pritchard LLP**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing dates: 23 May and 18 July 2017

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Approved Judgment

Mrs Justice Lang:

1. The Claimant applies for judicial review of the Defendant's decision to grant a long lease of premises known as Neal's Farm Lodge and Cottage ("the premises"), situated on Wandsworth Common ("the Common"), in the London Borough of Wandsworth, to the Interested Party ("IP").

2. The IP is a limited company which intends to operate a private nursery at the premises for up to 62 pre-school children, aged 2 to 5 years.

3. The Defendant ("the Council") is the local authority which, pursuant to statute, holds the freehold of the land on which the Common is situated.

4. I granted permission to apply for judicial review at an oral renewal hearing on 18 October 2016. Holgate J. gave the Claimant permission to rely on an additional ground for judicial review on 25 April 2017.

Facts

5. Neal's Farm is situated in the north western part of the Common, near Dorlcote Road, though there is no direct vehicle access. It comprises Neal's Farm Lodge and Neal's Cottage which are set in small front and rear gardens. For many years, it was used partly as a café for the enjoyment of those using the Common, and also to provide residential accommodation for Common groundsmen, occupied under residential service tenancies. I consider its origin and early history later in my judgment.

6. In 2013/2014, the Council terminated the residential service tenancies, leaving Neal's Farm unoccupied, apart from the ground floor of the Lodge which continued to be occupied by the Skylark Café. In 2014, the Council rejected an offer from the operator of the café to lease the remainder of Neal's Farm as "uncommercial" and a plan to use it as offices for the Leisure and Culture Staff Mutual was abandoned because of the conversion costs.

7. In January 2015, the Council decided to place the premises (comprising the upper floor of the Lodge, the entirety of the Cottage, an outbuilding and the rear garden, totalling 1,905 sq.ft) on the open market to invite expressions of interest for a 10 or 15 year lease excluded from the Landlord and Tenant Act 1954, "subject to the successful applicant carrying out all works and obtaining requisite consents to bring the properties back into commercial use" (email from Mr Peter Tiernan, Principal Valuer, to estate agents, dated 28 January 2015). The email stated any lease could only be granted to a limited company.

8. It is apparent from the email evidence that Mr Tiernan was aware that the premises were subject to significant restrictions on use under the schedule to the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967 ("the Long Act") because they were situated on the Common. The estate agent from Lambert Smith Hampton complained that the advice from the Council's Planning Department "seems to limit all use other than in connection with uses associated with the common, this rules out virtually all commercial uses". Mr Tiernan received advice from the Borough Solicitor to the

effect that use of the premises as a children's nursery was a recreational or educational use consistent with the Long Act.

9. It is also apparent from the email evidence that Mr Tiernan was aware that the grant of a lease would amount to a disposal of open space land which would require a statutory disposal notice in accordance with section 123(2A) of the Local Government Act 1972 ("LGA 1972"), and any objections would have to be considered by the Community Services Overview and Scrutiny Committee.

10. Advertisements were placed in a local newspaper on 17 April and 15 May 2015. The Council sought expressions of interest specifying that "any use must provide a recreational or educational facility servicing the common". Ten expressions of interest were received. Nine were for proposed nursery use.

11. Lambert Smith Hampton sent details of the bids to Mr Tiernan, recommending that the lease be granted to the IP, who was the highest bidder. On 7 July 2015, Mr Tiernan passed this information on in an updating email to Councillor Cook (copied to Mr Andrew Algar, Assistant Director (Property Services) and Mr Tunde Ogbe, Head of Valuation and Asset Management) informing them of Lambert Smith Hampton's recommendation and reminding them that "the use of facilities on common land must be consistent with the 1967 'Long Act'". On 8 July 2015, Mr Algar replied to an email from Mr Ogbe confirming that he could go ahead and make a conditional offer to the IP, before hearing back from Councillor Cook.

12. On 15 July 2015 Lambert Smith Hampton sent a formal recommendation to Mr Tiernan advising that the IP was "an established nursery & nanny provider operating out of Wimbledon Hill" and "[t]he property is ideally placed for the nursery use proposed and therefore this has provided a much higher rent per sq. ft. than any recent D1 comparable evidence in the surrounding area" and, by reference to the schedule of bids attached, "best consideration has been achieved".

13. The Lambert Smith Hampton recommendation was signed by Mr Tiernan, and dated 16 July 2015, in his capacity as Borough Valuer, exercising delegated powers. He annotated the document by hand adding that the delegated power was "1.E(l)" and that "Letting subject to statutory consultation – s.123(2A) LGA 1972 + planning". Someone wrote on the top of the document "Commercially sensitive. Not to be released". The Defendant's evidence was that this document represented the Council's decision to lease the premises to the IP.

14. Mr Tiernan sent the approved recommendation by email to Lambert Smith Hampton stating "Please find approved Recommendation Report for your review and action". It was copied to Mr Ogbe.

15. The tenth expression of interest was from the Claimant who proposed an educational and recreational facility for use by local maintained schools. The Claimant's expression of interest was ruled out on the grounds that it did not provide sufficiently detailed information. The Claimant was notified of this decision by letter dated 9 July 2015. The Claimant complained to Councillor McDermott, who raised the matter with Mr Algar, and then responded to the Claimant. Eventually Mr Ogbe, Head of Valuation and Asset Management, instructed Lambert Smith Hampton to "press ahead with the letting" on 21 July 2015.

16. On 3 and 10 September 2015, the Council published notices in the local newspaper pursuant to the Long Act stating that it intended to grant a 15 year lease of the premises which it identified as "open space" and inviting objections, if any. No objections were received.

17. On 6 September 2015 the Claimant made a Freedom of Information Act 2000 ("FOIA") request which the Council responded to on 8 October 2015. The Claimant subsequently made further FOIA requests.

18. On 9 October 2015, the IP applied for planning permission for a change of use from residential (Use Class C3) to nursery/pre-school, classified as a non- residential institution under Use Class D1, as well as some minor building alterations. The proposed nursery would cater for 62 children aged 2 to 5, from 7.30 am to 6.30 pm on weekdays. About 15 staff would be employed by the nursery.

19. The Claimant asked for a meeting with the Council in November 2015, concerning irregularities in the bidding process, which the Council declined.

20. On 10 January 2016, the Claimant emailed the Council's Borough Solicitor requesting that the IP's planning application be reviewed as the change of use proposed – childcare, not education – was not consistent with the provisions of the Long Act.

21. On 1 February 2016, the Assistant Borough Solicitor replied stating that the proposed nursery use for the premises fell within the scope of Article 7(1)(a)(v) of the Schedule to the Long Act ("indoor facilities for any form of recreation whatsoever"). She added:

> "Whilst it might be argued that part of the work of a nursery is education, it is predominantly recreational; nurseries serve very young children and whatever learning a nursery provides is learned through play – as such this is a recreational use. The legislation does not require uses of facilities to be limited to non-profit organisations."

22. On 16 February 2016 the planning officer's report was published. The report recommended that the application be approved subject to conditions. The report acknowledged that the site was "controlled" by the Long Act but asserted that "[t]his legislation and the processes to be followed under it, is not material to the determination of this application in the Council's role as local planning authority. Any reference to it is only provided for information purposes."

23. There were numerous objections to the application from local residents, the Wandsworth Society and the Wandsworth Common Management Advisory Committee.

24. At the hearing of the Planning Applications Committee on 24 February 2016, the Borough Solicitor advised the Committee that the restrictions in the Long Act were not a planning consideration and the application for planning permission had to be considered on its merits. Planning permission was granted as follows:

> "Change of use from residential (C3) to nursery and preschool (Class D1) catering for up to 62 children (0-5 years old)…."

25. The conditions attached to the grant of planning permission included:

    i) Condition 2: the number of children enrolled at the nursery shall not exceed 62.

    ii) Condition 4: the premises shall not be open to customers other than between the hours of 0800 and 1800, excluding weekends and bank holidays, and at no other times.

    iii) Condition 7: the premises shall be used for a nursery/preschool and for no other purpose (including any other purpose in Class D1….).

26. On 5 April 2016, an objector filed a claim for judicial review of the grant of planning permission. That claim was eventually dismissed on 13 June 2016.

27. The Claimant filed this claim for judicial review on 24 May 2016. The Council has decided not to grant the lease to the IP whilst the challenge to the lawfulness of its decision to let the premises is ongoing.

28. The draft lease is for a term of fifteen years. The Council will insert clauses to reflect the planning conditions set out above, and to limit use by reference to the Long Act. It will also require the IP to accept local authority funded children who otherwise meet its admission criteria.

History of Neal's Farm and regulation of the Common

29. The Common was referred to in the Doomsday Book as the common land of the Manor of Battersea and Wandsworth. It was referred to on Rocque's Map of 1741 as Wandsworth Common. Although owned by the lord of the manor (Earl Spencer), local land owners had ancient rights of common over the Common, typically to graze animals and gather wood etc. The rights of common were registered under the Commons Registration Act 1965.

30. According to the *'Survey of London*', Volume 49 Battersea, in the 1820's the Common comprised about 400 acres, over twice its current size. In the 19th century, the freeholder (Earl Spencer) permitted encroachments on the Common, for road and rail construction, and for buildings for public or charitable purposes, such as Wandsworth Prison (10 acres, 1847), St James Industrial Schools (20 acres, 1847) and the Royal Victoria Patriotic Asylum ("the Asylum") for the maintenance and education of orphans (55 acres, 1857). From perusal of historic maps, and from the account given in the *Survey*, it appears that the site on which Neal's Farm Lodge and Cottage are now situated was included within the 55 acres sold to the Asylum.

31. Pursuant to the Wandsworth Common Act 1871 ("the 1871 Act"), the freehold interest in the Common which was owned by the local landowner, Earl Spencer, was transferred to "a body of Conservators" who were tasked with the duty to maintain the Common.

32. By section 33 of the 1871 Act:

> "The Conservators shall at all times keep the Common open uninclosed and unbuilt on except as regards such parts thereof as are at the passing of this Act inclosed or built on and except as otherwise in this Act or in the Agreement Scheduled thereto expressed and shall by all lawful means prevent resist and abate all encroachments and attempted encroachments on the Common and protect the Common and preserve it as an open space and resist all proceedings tending to the inclosure or appropriation for any purpose of any part thereof."

33. By section 34 of the 1871 Act:

> "It shall not be lawful for the Conservators except as in this Act or the Agreement Scheduled thereto expressed to sell lease grant or in any manner dispose of any part of the Common."

34. Over time, the freehold of the Common was transferred, pursuant to statutory powers:

i) in 1887, to the Metropolitan Board of Works;

ii) in 1898, to the London County Council ("LCC");

iii) in 1965, to the Greater London Council;

iv) on 1 April 1971, to Wandsworth Borough Council, pursuant to the London Authorities (Parks and Open Spaces) Order 1971.

35. It is common ground between the parties that, upon each of these transfers, the new freeholder was vested with the duties and powers originally conferred upon the Conservators by the 1871 Act.

36. The 'Plan of the Common referred to in Act of 1871' shows that the Neal's Farm site and the buildings thereon were outside the boundary of the Common at that time (having been sold to the Asylum), and so they were not subject to the 1871 Act when first enacted. The Asylum and its 'Market Gardens' (which were on the site of Neal's Farm) were marked on the Plan, adjacent to the Common.

37. The *Survey* sheds some light on the history of Neal's Farm, at p.252:

> "Chief among the reasons for the conservators' eventual demise was the development of the neighbouring 'between the commons' area east of Bolingbroke Grove and the break-up of the five houses that formerly edged the common there. With an influx of new residents faced with steeply rising rates, even the modest amount devoted to the common was a bone of contention. The conservators themselves appeared aloof and increasingly ineffectual. Matters came to a head over the former farm attached to the Patriotic Asylum. In 1885 this and twenty acres of surrounding ground were let on lease to George Neal who laid out a roadway to it from Trinity Road. The

> Wandsworth Common Protection Association – seemingly a disaffected rump of the former Preservation Society – claimed that if the land was no longer required for the asylum's purposes, it should revert to the common, and blamed the conservators for failing to stop Neal.
>
> A deputation of ratepayers from Battersea and Wandsworth petitioned the MBW [Metropolitan Board of Works] to take over control and management of the common. The conservators agreed, and in 1887 the common passed to the care of the Board." [Footnotes excluded]

38. According to a document produced by the Wandsworth Common Protection Association, dated 1887, the farm and twenty acres of land had been used as a market garden for the Asylum, and it was intended that the new tenant would continue that use. In 1886, the Royal Commissioners leased 19.5 acres of this land for a term of 21 years at a yearly rental of £150 to Mr Neal.

39. The 1896 Ordnance Survey map shows buildings on the site of Neal's Farm in the same location as the current Lodge and Cottage, called "The Farm".

40. The London County Council map of the Common, dated 1904, shows the Asylum, and it also shows two fields referred to as Neal's Farm with buildings to the south east. The footprint of the buildings on this map is consistent with the current day Neal's Farm Lodge and Cottage.

41. The *Survey* describes how in 1913 Neal's Farm once again became part of the Common:

> "In 1911 Neal's Farm was put up for sale. The LCC Parks Department was keen to buy the land and take it back into the common to provide much-needed playing fields. In 1913 the Council took possession of the 'Wandsworth Common extension' and drew up plans for laying out the ground, including forming a bowling green, and adapting the existing buildings for use as dressing rooms, refreshment rooms, tenements for the staff, conveniences and a bothy. The work was postponed during the First World War, when the ground was used for staff accommodation for the third London General Hospital, which had taken over the Royal Victoria Patriotic Asylum." [Footnotes excluded]

42. In 1913, London County Council purchased Neal's Farm and surrounding land, amounting to just over 20 acres, from the Royal Patriotic Fund Corporation. It became the 'Wandsworth Common extension' but it was not open to the public until 1924 because the land was used as a hospital camp during World War 1.

43. The conveyance referred to "…building situate in the south east corner …. known as the 'Farm'". There was an entry for 'The Farm' on the accompanying plan, which was consistent with the location and footprint of the current buildings at Neal's Farm. The conveyance was:

> "To hold unto and to the use of the Council and their assigns in fee simple for the purposes of the Open Spaces Act 1906 subject to the provisions for exchange of lands contained in the London County Council (General Powers) Act 1905 and to be at all times hereafter used as an open space or public walk or pleasure grounds as defined by the Act of 1906 and for no other purpose whatsoever and to be at all times subject to the provisions of the said Act of 1906."

44. The Land Register includes a restriction on any registration made other than in accordance with the Open Spaces Act 1906 ("OSA 1906") or some other Act, except under an order of the Registrar.

45. Section 39 of the 1871 Act provided that the Conservators may from time to time purchase by agreement any land having been part of the Common and any such land when vested in the Conservators shall be deemed part of the Common for the purposes of that Act. It was common ground that the 20 acres of land purchased in 1913 by the LCC was thereby held under the 1871 Act, together with the rest of the Common.

46. It has not been possible to discover the date at which the current buildings at Neal's Farm were constructed. They were described as "Edwardian" in the Council's Planning Officer's report, a description which was probably based on their architectural style, rather than the actual date of construction, which is unknown. The early part of the twentieth century seems to be the likely date, judging from the footprint on the ordnance survey maps and the architectural style.

47. Section 10 of the OSA 1906 provides that:

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

48. Section 123(1) LGA 1972 gives a principal council power to dispose of land held by them in any manner they wish. Subsections (2A) and (2B) provide:

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

> (2B) Where by virtue of subsection (2A) above a council dispose of land which is held –
>
> (a) for the purpose of section 164 of the Public Health Act 1875 (pleasure grounds); or
>
> (b) in accordance with section 10 of the Open Spaces Act 1906 (duty of local authority to maintain open spaces and burial grounds),
>
> the land shall by virtue of the disposal be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164 or, as the case may be, the said section 10.]"

49. Section 87(3) of the Local Government Act 1963 ("LGA 1963") gave the Minister power to amend, revoke, repeal or extend any Greater London statutory provision by order, for the purpose of securing uniformity. It provided:

> "(3) For the purpose of securing uniformity in the law applicable with respect to any matter in different parts of the relevant area, or in the relevant area or any part thereof and other parts of England and Wales, any appropriate Minister may, after consultation with such of the appropriate councils as appear to the Minister to be interested, by provisional order made after 1st April 1965 amend, repeal or revoke any Greater London statutory provision and extend it, with or without modifications, to a part of the relevant area to which it did not previously extend; and any such order may include such incidental, consequential, transitional or supplementary provision as may appear to the Minister to be necessary or proper for the purposes of the order or in consequence of any provisions thereof."

50. Article 32 and Schedule 5 to the London Authorities (Property Etc.) Order 1964 ("the 1964 Order"), made under the LGA 1963 stipulated that the Common was to be held for the purposes of the OSA 1906.

51. The Local Law (Greater London Council and Inner London Boroughs) Order 1965, made under the LGA 1963, repealed much of the 1871 Act which had become redundant upon transfer of the Common from the original Conservators to a succession of public bodies. However, certain sections that were fundamental to the protection and preservation of the Common, regardless of the body in which ownership of the Common was vested from time to time, were not repealed and remain in force today (sections 1, 33 to 37, 44 and 71).

52. On an unknown date between 1965 and 1967, following consultation with the London local authorities, the Minister of Housing and Local Government made the Greater London Provisional Order For Securing Uniformity In The Law Applicable With Respect To Parks And Open Space, pursuant to section 87(3) LGA 1963.

53. The Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parts and Open Spaces) Act 1967 ("the Long Act") confirmed the terms of the Greater London Provisional Order, enacting it as the Schedule to the Long Act. Article 1 of the Order provides that it may be cited as the Greater London Parks and Open Spaces Order 1967 ("the 1967 Order").

54. The term "open space" is defined in Article 6 of the 1967 Order to include:

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

55. Article 7 of the 1967 Order empowers local authorities to provide facilities for public recreation in any open space in Greater London. It provides as follows:

> "**7 Facilities for public recreation**
>
> (1) A local authority may in any open space -
>
> (a) provide and maintain—
>
> (i) swimming baths and bathing places whether open air or indoor;
>
> (ii) golf courses and grounds, tracks, lawns, courts greens and such other open air facilities as the local authority think fit for any form of recreation whatsoever (being facilities which the local authority are not otherwise specifically authorised to provide under this or any other enactment);
>
> (iii) gymnasia;
>
> (iv) rifle ranges;
>
> (v) indoor facilities for any form of recreation whatsoever;
>
> (vi) centres and other facilities (whether indoor or open air) for the use of clubs, societies or organisations whose objects or activities are wholly or mainly of a recreational, social or educational character;
>
> (b) provide amusement fairs and entertainments including bands of music, concerts, dramatic performances, cinematograph exhibitions and pageants;
>
> (bb) without prejudice to the generality of the powers in the last foregoing sub-paragraph, provide exhibitions and trade fairs for the purpose of promoting education, the conservation of the environment, recreation, industry, commerce, crafts or the arts;

> (c) provide and maintain in time of frost facilities for skating and flood any part of the open space in order to provide ice for skating;
>
> (d) provide meals and refreshments of all kinds to sell to the public;
>
> (e) provide and maintain swings, platforms, screens, chairs, seats, lockers, towels, costumes and any apparatus, appliances, equipment or conveniences necessary or desirable for persons resorting to the open space;
>
> (f) erect and maintain for or in connection with any purpose relating to the open space such buildings or structures as they consider necessary or desirable including (without prejudice to the generality of this paragraph) buildings for the accommodation of keepers and other persons employed in connection with the open space; and
>
> (g) set apart or enclose in connection with any of the matters referred to in this article any part of the open space and preclude any person from entering that part so set apart or enclosed other than a person to whom access is permitted by the local authority or (where the right of so setting apart or enclosing is granted to any person by the local authority under the powers of this Part of this order) by such person;"

56. Article 8 of the 1967 Order empowers local authorities to grant licences to third parties to provide facilities for public recreation and to let land and buildings on open space for public recreation. It provides as follows:

> "**8 Licences to provide facilities and letting of land and buildings for public recreation**
>
> (1) A local authority may, subject to such terms and conditions as to payment or otherwise as they may consider desirable, grant to any person the right of exercising any of the powers conferred upon the local authority by article 7 and let to any person, for any of the purposes mentioned in that article, any building or structure erected or maintained, and any part of an open space set apart or enclosed, pursuant thereto.
>
> (2) ...
>
> **9 Restriction of public rights**
>
> A local authority may enclose during such periods and subject to such conditions as they may deem necessary or expedient any part of any open space—

(a) for the purposes of or in connection with the cultivation or preservation of vegetation in the interests of public amenity; or

(b) in the interests of the safety of the public;

and may preclude any person from entering any part so enclosed.

10 Charges in respect of user of open spaces

A local authority may—

(a) make such reasonable charges as they think fit for—

(i) the use or enjoyment of anything provided by them under sub-paragraphs (a) to (e) of paragraph (1) of article 7; or

(ii) the use of any building or structure erected or maintained by them under sub-paragraph (f) of the said paragraph (1); or

(iii) admission to, or the use of, any part of any open space set apart or enclosed by them under su-paragraph (g) of that paragraph; and

(b) authorise any person to whom any right is granted or any building or structure is let under article 8 to make reasonable charges in respect of the purposes for which the local authority themselves may make charges under sub-paragraph (a) of this article:

Provided that no charge for admission to any reading room provided under this Part of this order shall be made on more than twelve days in any one year or on more than four consecutive days."

57. Article 11 of the 1967 Order provides, so far as is material:

"**11 Exercise of powers under articles 7 to 10**

(1) Subject to the provisions of this article and of article 12, the powers conferred on the local authority by articles 7 to 10 maybe exercised notwithstanding the provisions of any enactment or any scheme made under, or confirmed by, an enactment…..

(2) Subject to the provisions of article 9 as relates to the enclosure of any part of an open space in the interests of public safety, the powers of articles 7, 8 and 10 shall not be exercised in respect of any open space in such a manner

> that members of the public are by reason only of the exercise of such powers unable to obtain access without charge to some part of such open space.
>
> (3) No power conferred upon a local authority under articles 7 to 10 shall be exercised with respect to any open space in such manner as to be at variance with any trust for the time being affecting such open space (not being a trust existing by virtue of section 10 of the Open Spaces Act 1906) without an order…."

58. Article 12 restricts the use of common land. It provides:

> "**12 Restriction on exercise of powers under articles 7 and 8 in relation to commons**
>
> (1) In the exercise of powers conferred by articles 7 and 8 the local authority shall not, without the consent of the Minister …, erect, or permit to be erected any building or other structure on, or enclose permanently, or permit to be enclosed permanently, any part of a common.
>
> (2) Nothing in this article shall be deemed to require the consent of the Minister to—
>
> (a) the maintaining or re-electing by, or with the permission of, a local authority of any building or other structure erected on a common before the date of operation of this order; or
>
> (b) the continuing by, or with the permission of, a local authority of any permanent enclosure of part of a common made before that date;
>
> and any such building or structure, or permanent enclosure, shall be deemed to have been lawfully erected or made (as the case may be).
>
> [(2A) Sections 39 and 40 of the Commons Act 2006 apply in relation to an application for consent under paragraph (1) as they apply in relation to an application for consent under section 38(1) of the Act.
>
> (2B) Section 41 of the Act applies in relation to the carrying out of works in contravention of paragraph (1) as it applies to works carried out in contravention of section 38(1) of the Act (and as if references to consent under that provision were to consent under paragraph (1)).]
>
> (3) …"

59. Additionally, the power to provide exhibitions and trade fairs, conferred by Article 7(1)(bb), is not exercisable on a common: see proviso (vii) to Article 7.

60. Section 5 of the Metropolitan Commons Act 1866, as amended by the 2006 Act, prohibits enclosure of a metropolitan common which is under the control and management of a London Borough Council. However, if ministerial consent was given under Article 12 of the 1967 Order, enclosure would be lawful.

61. Section 193 of the Law of Property Act 1925 ("LPA 1925") provides:

> "Members of the public shall …. have rights of access for air and exercise to any land which is a metropolitan common within the meaning of the Metropolitan Commons Acts, 1866 – 1898, or manorial waste, or a common, which is wholly or partly situated within an area which immediately before 1st April 1974 was a borough or urban district, and to any land which at the commencement of this Act is subject to rights of common and to which this section may from time to time be applied in manner hereinafter provided:
>
> Provided that –
>
> (a) such rights of access shall be subject to any Act, scheme, or provisional order for the regulation of the land, and to any byelaw, regulation or order made thereunder or under any other statutory authority; and
>
> (b) the Minister shall, on the application of any person entitled as lord of the manor or otherwise to the soil of the land, or entitled to any commonable rights affecting the land, impose such limitations on and conditions as to the exercise of the rights of access or as to the extent of the land to be affected as, in the opinion of the Minister, are necessary or desirable for preventing any estate, right or interest of a profitable or beneficial nature in, over, or affecting the land from being injuriously affected, for conserving flora, fauna or geological or physiographical features of the land,] or for protecting any object of historical interest and, where any such limitations or conditions are so imposed, the rights of access shall be subject thereto; and
>
> (c) such rights of access shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle, or to camp or light any fire thereon; and
>
> (d) the rights of access shall cease to apply—
>
> (i) to any land over which the commonable rights are extinguished under any statutory provision;
>
> (ii) to any land over which the commonable rights are otherwise extinguished if the council of the county [county borough][or metropolitan district] . . . in which the land is situated by resolution assent to its exclusion

> from the operation of this section, and the resolution is approved by the Minister."

62. In my view, section 193 LPA 1925 applies to the Common, either because it is a metropolitan common or an urban common (see *Gadsen on Commons and Greens* by Cousins and Honey, 2nd ed., 2012, paragraphs 9-04 – 9-05).

63. It appears that the rights of common were not extinguished over the 20 acres around Neal's Farm when the land was sold to the Asylum by Earl Spencer in 1857. The conveyance provided that the land would be free from rights of common only "so far as …Earl Spencer could …legally enclose or approve the same but not otherwise". However, when the scheme for the registration of rights of common was introduced by the Commons Registration Act 1965, rights of common were registered over the 20 acres around Neal's Farm. In my judgment, this indicates that the ancient common law rights of common were not extinguished during the period when the 20 acres around Neal's Farm ceased to be part of the Common. If they had been extinguished, they would not have been registered under the Commons Registration Act 1965.

64. According to *Gadsen*, at 4-11, mere non-use of rights of common is generally insufficient to raise the presumption of abandonment. However, abandonment accompanied by permanent alteration of the dominant tenement e.g. by construction of a building preventing the exercise of rights of common can result in extinguishment. On that basis, the rights of common could have been extinguished in respect of the footprint of the Neal's Farm buildings (though not its gardens). However, if that were the case, it ought to be apparent from the Commons Register and plan. They make no distinction between the buildings and the land surrounding them. Therefore on the balance of probabilities, I consider that the rights of common subsist.

Ground 1

65. The Council submitted that it had power to lease the premises to the IP under Article 7(1)(a) of the 1967 Order, either as an indoor facility for recreation under sub-paragraph (v), or as a centre or other facility for an organisation whose objects or activities are of a recreational or educational character, under sub-paragraph (vi). The Council further submitted that the exercise of these powers was consistent with its obligations under the OSA 1906, and did not contravene section 193 LPA 1925.

66. The Claimant submitted that the Council did not have power to grant the lease to the IP because the provision of childcare at a private nursery run by a private company, which had exclusive use of the premises and could restrict entry to members of the public, fell outside the scope of the 1967 Order as it was not a facility for public recreation and use. It was a commercial transaction, intended to further the IP's business interests and to benefit the Council by generating a profit from renting out the premises.

67. The Claimant had to accept that Article 11 of the 1967 Order provided that the powers conferred on the local authority by Articles 7 to 10 "may be exercised notwithstanding the provisions of any enactment" which meant that the prohibition on letting in section 34 of the 1871 Act could be overridden, as well as the rights granted

by the OSA 1906 and section 193 LPA 1925, insofar as the Order so permitted. Moreover, section 193(a) LPA 1925 expressly provided that the rights of access which it conferred were subject to any provision made for the regulation of the land and section 123 LGA 1972 permitted the disposal of land held under the OSA 1906.

68. However, the Claimant submitted that since this legislation, in particular the OSA 1906, remained in force, it was the starting point for a consideration of the Council's duties and powers, and also ought to be taken into account when identifying the purpose and scope of the 1967 Order, and interpreting its provisions. I agree with the Claimant's submission.

Open Spaces Act 1906

69. By virtue of section 10 OSA 1906, the Council holds and administers the Common in trust "to allow, and with a view to, the enjoyment thereof by the public as an open space". The Council is the trustee and the inhabitants of Wandsworth are the beneficiaries of the trust. In *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, Lord Walker said, obiter, at [47]:

> "….where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature…."

70. The effect of a statutory trust of this nature was considered in a series of rating cases which turned upon earlier legislation governing parks and open spaces held by local authorities.

71. In *The Churchwardens and Overseers of Lambeth Parish v London County Council* [1897] AC 625, Lord Halsbury held that the Council did not occupy Brockwell Park, they were "merely custodians and trustees for the public" and "there is no possibility of beneficial occupation to the county council; they are incapable by law of using it for any profitable purpose; they must allow the public the free and unrestricted use of it". The mansion house and refreshment rooms remained part of the park and the same principles applied to them.

72. In *Mayor of Liverpool v Assessment Committee of West Derby Union* [1908] 2 KB 647, which concerned Stanley Park, Sir Gorrell Barnes, President, described Liverpool Corporation as "not occupiers, but mere custodians or guardians of the property for the public, who are themselves the occupiers" (at 663). Farwell LJ said (at 669):

> "The by-laws …. are for the good management of the park as dedicated to the public. I can find nothing to warrant the suggestion that the corporation are to be allowed to use the park on those days for their own profit. The object appears to me to be to enlarge the public benefit intended to flow from its use as a park by allowing the park to be utilised during the seven days for some charitable or public purposes for which a small charge may be made, or possibly to enable the corporation themselves

> to recoup the expense to which they may be put by holding some show there which may be of general public interest. I very much doubt whether on the true construction of these by-laws the corporation are entitled to use the park for the purpose of making a profit for themselves…."

73. These authorities were applied by the Court of Appeal in *Burnell v Downham Market Urban District Council* [1952] 2 QB 55, which concerned the local authority's liability to rates in respect of seven acres of land which it held under the OSA 1906. The Master of the Rolls held that the land was held on a statutory trust, imposing on the local authority the duty of allowing it to be used by the public for the purposes of recreation (at 65), and the case was indistinguishable from the *Brockwell Park* case. However, he qualified Lord Halsbury's reference to "free and unrestricted use" by the public, saying (at 66):

> "It is not suggested that "free and unrestricted use" by the public means that the public, that is any member of the community who chooses to do so, must be free to go upon the land at any time of the day or night. A right for a local authority, or for any other body charged with the duty of holding and managing an open space or park for the public use, to close such a place at night, for example, must clearly be ancillary to, if not indeed essential for, good regulation. The terms of the Open Spaces Act 1906, themselves indicate that a right of closure as such is not inconsistent with dedication for public recreation. In the Brockwell Park case itself there were certain portions of the land from which the public was necessarily excluded – those portions occupied by a keeper's lodge, the bandstand, and refreshment building. But those exclusions were manifestations of the duty and exercise of management, and their total area compared with the whole park was of course negligible."

74. The Master of the Rolls added (at 67-68) that allowing local tennis, cricket and football club occasional exclusive use of the facilities, at which times members of the public would be charged for entry, was consistent with the duty to provide for recreation for the public and ancillary to the management of the open space.

Making a profit

75. In the light of the observations in the *Brockwell Park* and *Liverpool* cases to the effect that the local authority, as trustee, could not lawfully make a profit from land held under the OSA 1906, the Council conceded that it could not properly use any rent paid by the IP for its general purposes; it could only be used for the purpose of improving or maintaining the Common. In its written evidence and skeleton argument in these proceedings, the Council had stated it intended to use only 30% of any rent received from the IP for the purpose of improving and maintaining the Common, but it withdrew that statement during the hearing. Of course, I accept the Council's point that the cost of maintaining the Common far exceeds the amount of rent payable under the proposed lease.

Occupation of Neal's Farm by groundsmen

76. *Burnell* and the *Brockwell Park* case confirmed that the statutory trust applies equally to buildings in the open space. Typically, they are occupied for purposes ancillary to the management of the open space and the provision of facilities to the public, which justifies any necessary limitations on access by the public. The *Survey* indicated that when, in 1913, the LCC purchased the 20 acres of land including Neal's Farm, it planned to adapt the existing buildings for use as refreshment rooms, tenements for the staff, conveniences, and dressing rooms. The Lodge is still used as a café and for many years the Cottage and Lodge were occupied by Common groundsmen, under residential service tenancies, until privatisation of the parks service.

77. Express provision is now made for these uses under the terms of the 1967 Order. Under Article 7, the Council is authorised to:

> "(d) provide meals and refreshments of all kinds to sell to the public; and
>
> (f) erect and maintain for or in connection with any purpose relating to the open space such buildings or structures as they consider necessary or desirable including (without prejudice to the generality of this paragraph) buildings for the accommodation of keepers and other persons employed in connection with the open space;

78. The Council relied upon the fact that the public had never enjoyed access to these premises because they were occupied by the groundsmen. However, as the case law demonstrates, such occupation was ancillary to the management of the Common, and so the necessary restriction on public access was consistent with the statutory trust, as well as expressly authorised by Article 7 of the 1967 Order. The premises remained subject to the statutory trust, and so even though the premises were no longer needed for the groundsmen, the Council could not treat them as surplus property which it could dispose of as it saw fit. As the Council recognised, the premises could only be used in accordance with the legislation which governed the Common as a whole.

Facilities for public recreation

79. The Claimant rightly emphasised the importance of the references to the interests of the public in the 1967 Order, which reflected the legal position, namely, that the Council holds the Common on trust for the public as beneficiaries. For example, the proviso in paragraph (vi) of Article 7 states the local authority must satisfy itself when providing indoor facilities that it has not unfairly restricted the space available to the public for recreation in the open air.

80. The Claimant submitted that the powers conferred under Article 7 to 9 of the 1967 Order had to be construed in the light of the headings to those Articles. Article 7 is headed "Facilities for public recreation". Article 8 is headed "Licences to provide facilities and letting of land for public recreation". Article 9 is headed "Restriction of public rights".

81. In *R v Montilla* [2004] UKHL 50, [2004] 1 WLR 3141, Lord Hope giving the opinion of the Committee, held that headings were as much part of the context of an Act of Parliament as Explanatory Notes, which were an admissible aid to construction (at [34] – [37]). The Claimant also referred to the case of *Inglis v Robertson* [1898] AC 616, in which Lord Watson held that headings in the Factors Act 1889 "were not …. mere marginal notes, … the sections in the group to which they belong must be read in connection with them and interpreted by the light of them".

82. Applying these principles, I consider that the headings indicate that the overall purpose and scope of Articles 7 and 8 of the 1967 Order is to enable the Council to provide and maintain recreational facilities for the public i.e. "public recreation". Such an interpretation is consistent with the statutory trust created by section 10 OSA 1906, under which the Council is the trustee and custodian of the Common and holds it for the enjoyment and use of the inhabitants of Wandsworth, who are the beneficiaries of the trust.

83. The Council submitted that Article 7 of the 1967 Order confers wide powers *inter alia* to provide and maintain facilities for recreation (such as golf or swimming), to which public access is restricted, by payment of an admission fee, and by standard terms and conditions, such as limited opening hours. Access may also be restricted by general conditions of entry e.g. children would be excluded from rifle ranges. When providing facilities for public recreation under Article 7(1), it may set apart or enclose any part of the open space and preclude persons from entering other than a person to whom access is permitted (sub-paragraph (g)). Article 8 empowers the Council to grant to any person the right to exercise its powers under Article 7 on its behalf, and let to any person any building, structure or part of an open space for such purpose. Article 10 permits the Council, and any person exercising the powers of the Council, to make reasonable charges to members of the public.

84. In oral submissions Mr Bhose QC said that these wide powers would permit it, for example, to let out part of the Common to a private operator, to run a sports club or golf course, which would restrict access to members only. In those circumstances, how could there be any objection to letting out the premises to a private nursery provider which would offer services to local children? He pointed out in his skeleton argument that the Neal's Farm premises comprised only 0.04% of the total area of the Common (69.43 hectares).

85. In my judgment, the Council has underestimated the constraints on its powers to develop the Common. The first constraint on developing a sports club or golf course on the Common would be the restrictions on enclosure of common land. Section 5 of the Metropolitan Commons Act 1866, as amended by the 2006 Act, prohibits enclosure of a metropolitan common which is under the control and management of a London Borough Council. Mr Bhose provided a copy of this Act to me at the commencement of his submissions on the second day of the hearing, as it was clearly relevant. This prohibition is qualified by Article 12 of the 1967 Order which prohibits the Council from erecting buildings on the Common, or permanently enclosing any part of the Common, without obtaining the consent of the Minister. Although rights of common are vested in individual property owners, not the public at large, section 193 LPA 1925 confers "rights of access for air and exercise" upon members of the public, subject only to the limitations set out in paragraphs (a) to (d).

86. The position is different in respect of Neal's Farm. I have addressed at paragraphs 61 and 62 above the question whether or not rights of common continue to exist over Neal's Farm, and concluded that they do. The Council rightly submitted that, as the buildings at Neal's Farm premises pre-dated the 1967 Order, ministerial consent for the buildings would not be required, by virtue of Article 12(2). The same may apply to the enclosure of the land to create the front and rear gardens at Neal's Farm, if (as seems likely) that occurred before the 1967 Order. Moreover, the object of section 193 LPA 1925 is to grant the public rights of access to "land" for the purposes of "air and exercise", and so by implication, it would not extend to buildings built on common land, unless they were in some way ancillary to the right of access to the land.

87. The second constraint on the development of a sports club or golf course on the Common would be the public rights of access and use. Since the Common is held on trust for the use of the public, and because Article 7 of the 1967 Order is intended to provide "Facilities for public recreation", the sports club or golf course would have to be open to all members of the public who wished to enter, upon payment of a "reasonable charge" and subject to standard terms and conditions of entry. Therefore, the operators would not have the power to exclude or restrict access by members of the public, for example, by means of a membership scheme with high annual fees and a long waiting list, or by screening prospective members for suitability.

88. The Council's proposal to let the premises at Neal's Farm to a private company (the IP) to operate a private fee-paying nursery presents even greater difficulties, since members of the public would not have a right of access to the premises, and it would not provide them with any facilities. The IP would control access to the premises, which would usually be limited to its staff and up to 62 enrolled children in any one term, and visits by parents. Facilities would only be provided for the cohort of children enrolled in the nursery, not for children generally.

89. In argument, Mr Bhose QC conceded that the Council would not have power under the 1967 Order to let out premises on the Common to a private provider to run a fee-paying private preparatory school, which local children could attend, because it would not be a facility for public use and the public would not have access to the premises.

90. Mr Bhose QC sought to distinguish the proposed letting to the IP on the grounds that it will be a term of the lease that children aged 2 to 4, who are eligible for child care hours funded by the local authority, will be admitted in accordance with the IP's admission criteria, and will not be charged a top-up fee. All children aged 3 and 4 are entitled to 15 hours of local authority funded childcare for 38 weeks of the year[1]. Children aged 2 are eligible for funded childcare if their parents are on benefits. This will assist the Council in the discharge of its obligations to secure local authority funded child care under section 7 of the Childcare Act 2006. In practice, although all Council-run nurseries admit children who are local authority funded, some private nurseries choose not to do so, because they can charge higher rates to privately funded children.

[1] From September 2017, local authority funded childcare will increase to 30 hours per week for 3 and 4 year old children, but only where each parent's earnings exceeds the minimum threshold (16 hours at minimum wage rates) and is below £100,000.

91. However, there is no guarantee that any child who is local authority funded will be admitted to the nursery as it operates a first come/first serve policy and does not reserve places for children who are local authority funded. The IP's admission criteria are:

> "We arrange our waiting list in first to come first to be served order. In addition, our policy may take into account:
>
> - the length of time on the waiting list in accordance to the first to come first to be served;
> - whether any siblings already attend the setting; and
> - the capacity of the setting to meet the individual needs of the child; and
> - the number of places in each class and the total number of places granted by the planning permission and Ofsted registration."

92. Moreover, local authority funded hours will only represent a small proportion of the nursery's total opening hours. The nursery will be open for 10 hours per day, and 50 hours per week. The local authority funded hours are limited to 15 hours per week per child. As the IP caters for working parents, it is likely that the nursery will be open for more than 38 weeks per year, which is the limit for local authority funding.

93. In my view, the fact that the nursery may admit children who are local authority funded for 15 hours per week, does not overcome the problem that this facility will only be provided to a cohort of up to 62 children, not to the public. The grant of a lease to the IP for 15 years will prevent any public use of the premises for a significant period of time. In my judgment, this restriction on public access and use is contrary to the statutory trust arising under section 10 OSA 1906, under which the Common is held on trust for the use and enjoyment of all the local inhabitants. Article 11 of the 1967 Order, which allows the exercise of powers under Articles 7 to 10 notwithstanding the provisions of the OSA 1906, does not avail the Council because the restrictions on access and use would also be contrary to the intended purpose and scope of Articles 7 and 8, which is to provide facilities for "public recreation". The nursery does not provide facilities for public recreation.

Article 7(1)(a)(v): indoor facilities for any form of recreation whatsoever

94. The Claimant also submitted that the proposed nursery use fell outside the meaning of the term recreation as used in the heading to Article 7 of the 1967 Order, and in sub-paragraphs (v) and (vi) of paragraph (1)(a) of Article 7.

95. The term recreation is not defined in the Order, save for the limited purposes of Article 13 (Competitions and Prizes) where it is defined as "any activity for which a local authority have power to provide facilities in an open space".

96. Section 19 of the Local Government (Miscellaneous Provisions) Act 1976 confers power on a local authority to provide "recreational facilities" and the non-exhaustive

list of such facilities is a useful guide to the meaning of recreational facilities in a local authority context:

> "19 Recreational facilities.
>
> (1) A local authority may provide, inside or outside its area, such recreational facilities as it thinks fit and, without prejudice to the generality of the powers conferred by the preceding provisions of this subsection, those powers include in particular powers to provide—
>
> (a) indoor facilities consisting of sports centres, swimming pools, skating rinks, tennis, squash and badminton courts, bowling centres, dance studios and riding schools;
>
> (b) outdoor facilities consisting of pitches for team games, athletics grounds, swimming pools, tennis courts, cycle tracks, golf courses, bowling greens, riding schools, camp sites and facilities for gliding;
>
> (c) facilities for boating and water ski-ing on inland and coastal waters and for fishing in such waters;
>
> (d) premises for the use of clubs or societies having athletic, social or recreational objects;
>
> (e) staff, including instructors, in connection with any such facilities or premises as are mentioned in the preceding paragraphs and in connection with any other recreational facilities provided by the authority;
>
> (f) such facilities in connection with any other recreational facilities as the authority considers it appropriate to provide including, without prejudice to the generality of the preceding provisions of this paragraph, facilities by way of parking spaces and places at which food, drink and tobacco may be bought from the authority or another person;
>
> and it is hereby declared that the powers conferred by this subsection to provide facilities include powers to provide buildings, equipment, supplies and assistance of any kind."

97. I also found it helpful to consider previous interpretations of 'recreational use' for the purpose of the law of commons and greens. These have included:

i) sports and pastimes - *Fitch v Rawling* (1795) 2 H. Bl. 393, at 398;

ii) horse riding - *Mounsey v Ismay* 159 E.R. 621 (1865) 3 Hurl. & C. 486;

iii) erecting a maypole - *Hall v Nottingham* (1875) 1 Ex. D. 1;

iv) practicing archery - *New Windsor Corporation v Mellor* [1975] Ch. 380, at 393;

v) fishing, bathing and walking over a defined area - *R v Doncaster MBC ex parte Braim* (1989) 57 P&CR 1;

vi) Walking, cycling and horse-riding - *Forestry Commission v SSCLG* [2015] EWHC 1848 (Admin), at [28].

98. In *Attorney-General v Cooma Municipal Council* [1962] NSWR 663, the Supreme Court of New South Wales held that the construction of an information centre in a park was for the purpose of recreation, which included recreation of the mind, such as libraries and art galleries. It was not limited to physical or sporting activities. Jacobs J. said:

> "The word "recreation" is a very wide word. The definition of it in the *Oxford Dictionary* is: "The action of recreating oneself or another, or the fact of being recreated by some pleasant occupation, pastime or amusement."

99. All these illustrations of recreational activities are consistent with the dictionary definition of recreation which is a means of refreshing or enlivening the mind or spirits by some pleasant occupation, pastime or amusement. The word originates from the Latin verb *recreare* meaning to refresh, restore, make anew, revive, invigorate.

100. The Council submitted that the term "recreation" had a broad meaning and the breadth of meaning was reinforced in sub-paragraph (v) by the addition of the words "any form of recreation whatsoever". I accept this submission.

101. The Council also submitted that children's play was a form of recreation, and that in the IP's nursery the children would be provided with opportunities for designed and structured play, as part of their learning.

102. I agree with the Claimant's submission that the IP will primarily be providing a child care facility, within which it will provide pre-school education and play for the children, as well as rest, exercise and meals. The IP originally applied for planning permission to operate from 7.30 am to 6.30 pm but because of objections from local residents, planning permission was only granted from 8.00 am to 6.00 pm. These hours are far in excess of the hours which pre-school children would ordinarily spend in a setting which was for educational purposes (a nursery school, sometimes attached to a primary school, where pre-school children often attend mornings or afternoons only, or at most a school day from 9 am to 3.00 pm), or in a setting which was mainly for socialising and play with other children, such as a play group or One O'clock club, lasting a few hours at most. The IP's hours of operation demonstrate that it is intended to provide childcare for working parents, allowing them to drop off and collect their child at the beginning and end of the working day.

103. Both parties accepted that One O'clock clubs, which are a well-established facility of London parks, are recreational, providing any parents or carers of pre-school children with a safe space in which to socialise, play, and participate in activities, with the

assistance of staff. They are usually Council-run, free of charge and operate from 1 pm to 3.30 pm.

104. Applying the Council's own broad guidance, which I have set out in the footnote 2 below,[2] the IP's facility is a combined nursery school and day nursery. I accept the Claimant's submission that provision of child care in a nursery setting does not come within the meaning of the term recreation. None of the illustrations from the legislation or case law suggest that it does. The fact that children will play in the course of their day at the nursery does not mean that the nursery can be properly described as a facility for recreation. That is not its main purpose. As Mr Matthias QC pointed out, children play wherever they are, including at home, but this does not make a domestic home an indoor facility for recreation.

Article 7(1)(a)(vi): centres and other facilities for the use of clubs, societies or organisations whose objects or activities are wholly or mainly of a recreational, social or educational character.

105. Mr Bhose QC submitted that, under Article 7(1)(a)(vi) of the 1967 Order, the Council was empowered to provide and maintain centres and other facilities, whether indoor or outdoor, for the use of a organisation such as the IP. By Article 8(1) the Council was empowered to let the premises to the IP. By Article 10(1)(b), the Council was empowered to authorise the IP to make reasonable charges in respect of the purposes for which it may itself make charges, namely, to charge parents for use of the nursery.

106. In my judgment, this analysis misconstrued the Council's powers. Under Article 7(1)(a)(vi):

> "(1) A local authority may in any open space
>
> (a) provide and maintain -
>
> (vi) centres and other facilities ….. for the use of clubs, societies, or organisations ….."

Thus, the Council could provide and maintain such centres and facilities itself, and make a reasonable charge to a club, society or organisation for such use, pursuant to Article 10(a). Or, pursuant to Article 8, it could grant to "any other person" the right to exercise its powers, in this instance, to provide and maintain such centres and facilities under sub-paragraph (vi) for use by a club, society or organisation. If it did so, it could authorise that person to make reasonable charges to the club, society or organisation for such use, under Article 10(b), in respect of the purposes for which the

[2] The Council's website states: "**Nurseries in Wandsworth. Day nurseries** Day nurseries provide childcare for children from under one-year-old to the age of 5. They are registered with Ofsted to provide childcare. They are usually open from 8 am to 6 pm, all year round. **Private nursery schools** A nursery or school that is run by a private sector provider. They provide education for children aged from two and a half to five. They are registered with Ofsted to provide childcare. Private nursery schools are usually open part-time. **Independent schools** Independent schools provide education for children aged from three to 11 in Wandsworth. They have to be registered with the Department of Education. Schools are usually open part-time. **Pre-school playgroup**. Pre-school playgroups provide places for small groups of children aged from two and a half to five, to learn and play. They are run by the voluntary sector on a not-for-profit basis. Playgroups are usually open part-time.

Council could make charges under Article 10(a). Essentially, that person would stand in the shoes of the Council.

107. However, this is not what the Council has done in this case. It has proposed to let the premises to the IP for its sole use, instead of letting the premises to the IP so that it could stand in the shoes of the Council and "provide and maintain …. centres and other facilities … for the use of clubs, societies or organisations". The Council has power to charge the clubs, societies or organisations for the use of the centre or facilities, and so the IP could stand in the shoes of the Council and make the same charge. However, the IP is proposing to make a different charge – it is proposing to charge individual parents for its nursery services.

108. The Claimant submitted that, on a proper interpretation, sub-paragraph (vi) was intended to provide centres and facilities for non-profit making groups which shared a common interest, not limited companies who were operating a profit-making business. I accept the Claimant's submission that, in construing the words "clubs, societies or organisations" the *eiusdem generis* principle of construction should be applied "whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character": *Bennion on Statutory Interpretation,* 6th ed., at section 379. *Bennion* states the principle is presumed to apply unless there is some contrary indication, citing *Tillmanns & Co. v SS Knutsford Ltd* [1908] 2 KB 395 The word "organisation" has a very wide meaning, whereas "club" and "society" have a specific and, in this context, similar meaning. I do not consider that the absence of the word "other" before "organisation" indicates that the draftsman did not intend the *eiusdem generis* principle to apply. I agree that the identifiable class is not-for-profit groups which share a common interest, of a recreational, social or educational character. It excludes a commercial organisation such as the IP. However, I do not consider that the class necessarily excludes a limited company, as not-for-profit groups may be incorporated.

109. For these reasons, Ground 1 succeeds. The decision to grant the lease to the IP was not a lawful exercise of the Council's powers under the 1967 Order.

Ground 2

110. The Claimant's second ground was that Mr Tiernan acted unlawfully in deciding to grant the lease to the IP on 16 July 2015 because he did not have authority to do so under the Council's Constitution. Any such decision had to be made either by the full Council or the Executive. It could not be delegated to an officer.

111. I accept the Defendant's submission that the decision was taken by Mr Tiernan in accordance with the delegated authority conferred by the Council's Constitution.

112. The statutory scheme for the governance of the Council is set out in Part 1A of the Local Government Act 2000 ("LGA 2000"). The Council operated executive arrangements, as specified in section 9B(1)(a) LGA 2000 which take the form of a leader and cabinet executive, as specified in section 9C(3) LGA 2000.

113. Section 9D LGA 2000 determines which functions are the responsibility of the executive. Essentially, it provides that all decisions are ones for the executive unless

there is some specific provision by virtue of which they are rendered non-executive decisions. Such non-executive functions remain the preserve of its full council, exercisable as in the past by the full council itself, or delegated to a committee or officer.

114. Section 9E LGA 2000 makes general provision for the discharge of executive functions, which include *inter alia* delegation of executive functions to officers of the local authority.

115. The Secretary of State has made the Local Authorities (Functions and Responsibilities) (England) Regulations) 2000 ("the Functions Regulations") which make provision for non-executive and executive functions and responsibilities.

116. The Council had adopted a Constitution, as required by section 9P LGA 2000. It included the scheme of delegations to officers.

117. Article 7 of the Constitution related to the Executive. Article 7.01 recorded that the Cabinet (referred to therein as "the Executive"), consisted of the Leader of the Council and up to 9 Cabinet members. Article 7.06 was consistent with section 9E LGA 2000 and provided that:

> "7.06 **The Executive's Responsibilities**
>
> The Executive's responsibilities are by law vested in the Leader of the Council who may choose to delegate them in any manner allowed by law, namely to the Executive to determine collectively, to individual Members of the Executive, to a committee of the Executive comprising solely Cabinet members, or to a Council officer. At each Annual Meeting, the Leader will confirm how he intends the Executive's powers to be exercised over the ensuing Municipal Year, although he may alter these arrangements at any time. The Leader will notify any such changes by reporting to a meeting of the Council.
>
> Where, in this Constitution, there is reference to Executive powers, duties, functions and responsibilities, these are subject to the delegations approved and notified by the Leader.
>
> The responsibilities of the Executive are set out in Part 3 of this Constitution.
>
> Those Executive responsibilities which are delegated to officers are set out in Part 3 of this Constitution."

118. Part 3 of the Constitution contained 7 appendices. Appendix F was described on the contents page as "Delegations to officers". The version of Appendix F in force at the material time was titled "Scheme of Delegations to the Chief Executive, All Directors and certain Heads of Service and Proper Officer Functions – March 2015".

119. Paragraph 1 of the introduction to the Scheme of Delegations provided as follows:

> "Exercise of Delegated Authority by other officers

> 1. On 28th September 1994 the Council's Policy and Finance Committee agreed that the delegation of authority to a chief officer includes the exercise of that authority on his behalf by one of his subordinates under his supervision and as a consequence chief officers are entitled to authorise their junior staff to act on their behalf."

120. Section 5 of the Scheme of Delegations was concerned with delegations to the "Director of Finance" and included two further sub-sections, the second of which was titled "5(B) Assistant Director (Property Services)". This included the following:

> "The Assistant Director of Finance (Property Services) is authorised to exercise the following powers and duties of the Council, under the direction of the Director of Finance:-
>
> 1.E To approve and conclude on the best terms reasonable obtainable for the Council:-
>
> …
>
> (1) the letting of investment property and of parts of operational properties which are surplus to current operational requirements and parts of operational properties which are to be let for the use by a Council contractor;"

121. The reference to sub-paragraph "(1)" was a typographical error and should be a reference to sub-paragraph "(l)", coming between sub-paragraphs "(k)" and "(m)". The delegation was a longstanding one, resulting from a resolution of the then Property Committee on 28 June 1994 (as recorded at the end of paragraph 1.E).

122. The power in "1.E.(l)" was concerned with three forms of letting. The first was the letting of "investment property", the second with the letting of parts of "operational properties" which were surplus to current operational requirements, and the third with letting of parts of "operational properties" which were to be let for use by a Council contractor.

123. The distinction between "investment property" and "operational property" was intended to reflect the long-standing distinctions drawn between the two in local authority accounting (see the Code of Practice on Local Authority Accounting 2016-17, section 4.4.2). An "investment property" simply meant a property solely used to earn rentals or for capital appreciation or both, in distinction to an operational property which was one used by the authority itself for the provision of services or goods or for administrative purposes. Although the phrase "investment property" did not entirely accurately reflect the status of the premises, for the reasons set out in Ground 1, I do not consider that this categorisation was capable of invalidating the delegation.

124. By operation of these provisions, the letting of the premises was delegated to the Assistant Director of Finance, who was further authorised to delegate the matter to "his subordinates under his supervision". As at July 2015 the Assistant Director of Finance (Property Services) was Andrew Algar. His immediate subordinate officer

was Tunde Ogbe, Head of Valuation and Asset Management, with Mr Ogbe's immediate subordinate officer being Mr Tiernan, the Principal Valuer.

125. As appeared from the form completed by Mr Tiernan on 16 July 2015, he was acting under delegated power "1.E (l)". Furthermore, he was acting under Mr Algar's direct supervision and with his express agreement, as confirmed by the email dated 8 July 2015 from Mr Algar. Mr Algar was aware of, and agreed to, the letting. I conclude therefore that Mr Tiernan had due authority to make the decision.

126. Pursuant to the requirements of the Functions Regulations, the Constitution provided as follows:

> "FUNCTIONS WHICH THE COUNCIL HAS DECIDED ARE TO BE THE SOLE RESPONSIBILITY OF THE EXECUTIVE"
>
> …….
>
> **Schedule 2 to the Functions and Responsibilities Regulations …**
>
> **Para 1 – Local Act Functions**"
>
> 2. Management and maintenance of Wandsworth Common. Wandsworth Common Act 1871. Ss 1,4, 33-37, 44 and 71."

127. The Claimant relied on this part of the Constitution in support of his submission that only the Executive could take the decision to grant the lease. However, the 1871 Act did not confer any power on the Council to grant the lease. The Council's power of disposal arose solely under the Long Act, being a public Act, and the power to grant leases of investment/operational properties under any such public Act had been delegated to officers.

128. The Claimant also submitted that the decision did not comply with the mandatory requirements for the recording of the decision in the Local Authorities (Executive Arrangements)(Meetings and Access to Information (England) Regulations 2012 ("the 2012 Regulations"). Regulation 13(4) of the 2012 Regulations requires the officer to produce a written statement which records the decision taken, including the date; the reasons for the decision; and details of any alternative options considered and rejected; and a record of any conflict of interest on the part of any executive member consulted.

129. I accept the Defendant's submission that the form signed by Mr Tiernan, dated 16 July 2015, fulfilled these requirements. It recorded his decision, namely, to approve the agent's recommendation to grant a lease to the IP. It recorded the reasons for the letting of the premises and the choice of the IP, in preference to the other bidders, as the IP offered "best consideration". No conflicts of interest arose. The form was annotated with the words "commercially sensitive not to be released" because of the details of the rent etc. contained therein. By regulation 20(2) of the 2012 Regulations, public inspection pursuant to regulation 14 was not required if, in the opinion of the

proper officer, the document either contained or might contain confidential information.

130. Finally, even if there was any failure to comply with the 2012 Regulations which I have missed, it was a minor procedural failure. I would refuse relief under section 31(2A)(a) Senior Courts Act 1981, as it would be highly likely that the outcome would not have been substantially different if the conduct complained of had not occurred.

131. For the reasons set out above, Ground 2 does not succeed.

Conclusion

132. The Claimant's claim succeeds on Ground 1 only.