Neutral Citation Number: [2012] EWHC 1934 (Admin)

Case No: CO/6526/2011

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT AT LEEDS

Leeds Combined Court Centre,
The Courthouse,
1, Oxford Row,
Leeds LS1 3BG

Date: 25 July 2012

Before :

HHJ ROGER KAYE QC SITTING AS A JUDGE OF THE HIGH COURT

Between :

H.M.THE QUEEN (on the application of STEPHEN MALPASS)	**Claimant**
- and -	
THE COUNTY COUNCIL OF DURHAM	**Defendant**

Charles George QC and Cain Ormondroyd (instructed by **Irwin Mitchell LLP**) for the **Claimant**
George Laurence QC and Ross Crail (instructed by **Durham CC**) for the **Defendant**

Hearing dates: 16, 20 April, 25 July 2012

APPROVED JUDGMENT

I direct pursuant to **CPR PD 39A, para. 6.1, PD 52 para. 5.12**, that no official shorthand note or mechanical recording need be taken of this judgment and that copies of the approved final version as handed down may be treated as authentic.

25 July 2012 Roger Kaye QC

Judge Kaye QC:

Introduction

1. This case concerns an area of land at Consett known as "Belle Vue Playing Fields". It is an area of open land of some 12 acres. The freehold of the vast majority of this land has been vested in the defendant council and its predecessor the Consett Urban District Council ("UDC") since 1936 by virtue of a Conveyance dated 9 May 1936[1] ("the 1936 Conveyance"). The Conveyance recited that the land was "*required by the Council for purposes for which they are authorised by statute to acquire land*". It is not disputed that the land has been laid out for some years for the most part as playing fields but is also used by local inhabitants for informal recreation as well as more organised sports and games.

2. The defendant, as owner of the land in question, proposes to build a new academy on a site contiguous with the playing fields and to fence off a large part of the fields in connection with that proposal.

3. The Claimant is a member of Consett Green Spaces Group ("CGSG"). He lives close to the playing fields. He and other local inhabitants formed an objection to this proposal since it would deprive them of much valued public access to the fields.

4. They lodged an application on 20 November 2009[2] to the defendant as the relevant Commons Registration Authority ("CRA")[3] to register the land ("the

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1 Pp. 216-224 of the hearing bundle (page references are to this bundle). The greater part of the application land was first vested in Consett UDC under the 1936 Conveyance, then in Derwentside DC (following local government reorganisation in 1974) and then in the defendant since April 2009 (following a further reorganisation).

2 See Inspectors 1st Report, para. 1, fn 2 at p. 113.

application land") as a town or village green under section 15 of the Commons Act 2006 ("the 2006 Act"). This section entitles any person to apply to the CRA to register land as a town or village green in any case where certain qualifying conditions are fulfilled. It is common ground between the parties that the relevant conditions in this case were and are those in s 15(2) namely that:

> *"(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*
>
> *(b) they continue to do so at the time of the application."*

5. In accordance with established practice, a non-statutory public inquiry was held under the chair of Mr Edwin Simpson, a barrister much experienced in such matters. He sat from 12-15 July 2010 and heard representations from all sides and evidence in the form of deeds and documents, photographs, plans, statutory declarations, Statements of Objection , witness statements, and oral evidence (not under oath) from persons with houses neighbouring the land. Both sides were represented by counsel experienced in the relevant area of law.

6. The inspector produced a report dated 11 October 2010[4]. He found that although all other pre-conditions for registration of the application land as a town or village green under the 2006 Act had been met, the applicants had not satisfied the conditions under s 15(2)(a) because the playing fields had not been used "*as of right*" but "by right", that is to say had been used with express or implied permission and not as trespassers. This was due, he

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[3] Under the Commons (Registration of Town or Village Greens)(Interim Arrangements) (England) Regulations 2007 (SI 457 of 2007).

[4] Pp 113-172.

concluded, to the fact that the playing fields had been (or perhaps rather must have been) subject to a statutory trust under either s 10 Open Spaces Act 1906 ("the 1906 Act") or under s 164 Public Health Act 1875 ("the 1875 Act") as confirmed, clarified or recorded under a Deed dated 4 February 1964 ("the 1964 Deed").

7. As noted by the inspector, the investigation and report by the inspector is non-statutory. The inspector can make recommendations but the CRA's task is to decide the matter based on the evidence presented to it[5].

8. The CGSG made further representations to the inspector. Further evidence was adduced. The defendant (as landowner) also made further representations. The inspector produced a second report, dated 15 February 2011[6], adhering to his view.

9. On 11 April 2011 the defendant council resolved on the basis of the two reports from the inspector to refuse registration. The claimant (after a pre-action protocol letter) challenged this decision by his application for judicial review lodged on 8 July 2011.

10. HHJ Behrens initially refused permission on 16 August 2011 but on renewal of the application, on 11 November 2011 HHJ Richardson QC (both sitting as judges of this court) granted permission to proceed on the following limited ground, namely that the decision to refuse registration took:

> "... *into account an immaterial consideration/error of law – in that the Deed* [i.e. that dated 4 February 1964] *was treated as an appropriation*

5 See inspector's 1st Report at para. 3, p. 114 and para. 10, p. 117.
6 Pp 173-180.

and/or it was concluded that no appropriation was required to apply the provisions of the Open Spaces Act 1906".

11. That is the issue before me.

12. Subsequent to the defendant's decision further relevant documents came to light in the defendant's archives. This was possibly as a result of further research by or on behalf of the claimant. These additional documents first emerged as quotes on a sheet inserted in the hearing bundle by or on behalf of the claimant. That then (rightly) led to full and proper copies exhibited to a witness statement of the defendant's litigation manager. The documents exhibited, including some important Minutes of the Consett UDC and of its Allotments, Parks and Open Spaces and Cemeteries Committee, were not before the inspector. No one has taken any point about the late production of this further material.

The Facts

13. The vast majority of the application land in question was together with other land (in all some 44 acres) conveyed to the defendant's predecessors in title, the Consett UDC by the 1936 Conveyance. The remaining small parcels were acquired in 1922 and 1979. The argument before me has however proceeded as regards this greater part acquired in 1936.

14. The 1936 Conveyance, as previously noted, merely recited that the land was "*required by the Council for purposes for which they are authorised by statute to acquire land*". It did not state what those purposes were, or the statute under which the land was acquired. No contemporaneous evidence (such as Council minutes) exists to help fill the lacuna.

15. Between acquisition and the late 1950s there is some evidence that the land was filled in and used as a reclamation site[7]. Mr Charles George QC for the claimant submitted that this was tantamount to evidence that the land had not been used for the purposes of public walks or pleasure grounds as permitted by s 164 of the 1875 Act but I am inclined to think that the submission of Mr George Laurence QC for the defendant council, to the effect that this was merely preparing the land to be levelled and landscaped for use for recreational purposes as permitted under s 164 of the 1875 Act, may be the right answer to this. There is evidence[8] that football was played on the land in the 1950s.

16. Just over a month after the 1936 Conveyance, a small strip of land forming (the inspector found) part of the land conveyed under the 1936 Conveyance was sold off to the North Eastern Electricity Supply Co Ltd for an electricity sub-station. I have not seen this particular Conveyance but there was before the inspector a copy of the consent granted by the Minister of Health under the Local Government Act 1933 to the transaction. Consent was needed since the land was described as vested in the Council "*for purposes of public walks and pleasure grounds*". That, as will be seen, is a reference to the provisions of s 164 of the Public Health Act 1875 (enabling local authorities to acquire land for use as public walks or pleasure grounds).

17. Also before the inspector was a further consent given by the Minister of Health on 21 November 1938 under the Housing Act 1936 to an appropriation of another parcel of land also forming part of the land acquired under the 1936

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7 See inspector's first report, para. 43 (p. 130).
8 See, for example, the witness statement of Mr Green (p. 257-8).

Conveyance, this time for housing. The consent simply described the land as "*vested in* [the] *Council*"[9].

18. On 31 March 1949, pursuant to s 163 Local Government Act 1933, consent was again given by the Minister of Health for an appropriation of a further (large) parcel of land this time for the erection of council offices. This parcel was expressed in the consent to be vested in the Council "*for purposes of public walks and pleasure grounds*". This parcel was not part of the application land but was included within that conveyed by the 1936 Conveyance.[10]

19. By 1963 it appears there may have been some desire formally to record the basis on which the land was held. The new evidence adduced in the proceedings (see above) shows minutes of the Allotments, Parks and Open Spaces and Cemeteries Committee which record applications to use the land for a caravan rally[11] and to extend the rugby pavilion[12]. Discussions were held with internal legal advisors about the provision of a "Charter". The minutes record[13]:

> "*It would appear that the Council is adequately covered in so far that the ... Belle Vue Grounds are held as public walks and pleasure grounds and that any variation to this use would require the consent of the Ministry of Housing and Local Government ...*"

20. The upshot is that the Council eventually decided on and executed the Charter or Deed of Dedication as it was sometimes referred to in the minutes in the

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9 Inspector's first report, para. 93 (p. 147).
10 Inspector's first report, para. 94 (p. 147).
11 Page. 92.
12 P. 98.
13 P. 92.

form of the 1964 Deed. This Deed, the Council moreover decided, should be framed and displayed in the Council chamber[14].

21. The deed of 4 February 1964 recited and declared as follows:

> *"WHEREAS there is vested in the Council for its statutory purposes certain lands short particulars of which are set forth in the Schedule hereto*
>
> *AND WHEREAS the Council have been requested to put on record the purposes for which the lands are to be used and the Council have decided so to do by this Deed*
>
> *NOW IT IS DECLARED that the lands and any buildings thereon which are described in the Schedule hereto are held by the Council under its statutory powers for the benefit or interest of the Public as Open Spaces for the recreation of the Public or for Public Walks Parks and Pleasure Grounds or as Public Quarries or for general use of the Public by way of provision of an Omnibus Station and as a Market as the case may be"*

22. The Schedule to the Deed then described five plots of land as follows:

> *"(a) 1,160 Square yards of land situate and known as The Market Square Consett TOGETHER with the Buildings thereon used as an Omnibus Station*
>
> *(b) 10 acres or thereabouts of land situate and known as Sherburn Park Consett aforesaid*
> *TOGETHER with the Buildings thereon*
> *TOGETHER ALSO with an additional 1,200 square yards*
> *TOGETHER ALSO with the Stable Workshop and other Buildings erected thereon in Back Medomsley Road Consett aforesaid*
>
> *(c) 44 acres or thereabouts of land situate and known as Number One Consett aforesaid*
>
> *(d) 2,570 square yards or thereabouts of land in Medomsley Road Consett aforesaid being an addition to the before mentioned lands at Number One*
>
> *(e) Black Dyke Common Quarry*
> *Berry Edge Common Quarry*
> *West Carr House Common Quarry"*

23. There was no issue before the inspector, and it was accepted before me that:

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[14] P. 102.

- the various descriptions of use in the operative parts of the 1964 Deed were to be ascribed to one or more of the five parcels of land described in the Schedule "*as the case may be*". Thus (a) referred to the described use as an Omnibus Station and (e) to the Public Quarries;

- the vast majority of the application land formed part of (c), the 44 acres, acquired under the 1936 Conveyance;

- the remaining small parcels did not specifically form part of either (c) or (d) but possibly were part of (e) (Black Dyke Common Quarry). Nothing of significance however turns on this;

- the references in the 1964 Deed to "*Open Spaces*" and "*Public Walks, Parks and Pleasure Grounds*" reflected the language of s 10 of the 1906 Act (prescribing that land acquired by local authorities under the Act as open space is to be held as such for use by the public for purposes of recreation) and s 164 of the 1875 Act (above).

24. As to evidence of user, the inspector found (indeed the defendant accepted) that the land had been sufficiently used (sufficient that is to satisfy s 15(2) of the 2006 Act) over the period of 20 years preceding the application (and moreover for a long period before the 20 year period) by members of the public for qualifying lawful sports and pastimes and informal recreation of all sorts including walking, cycling, exercising dogs, playing with children, practising for school sports, playing rounders, cricket and tennis, flying kites, having picnics, practising golf, building snowmen, sledging and playing formally organised as well as informal games such as football and rugby. The

land had he also found open and unimpeded access from all directions, and also had football pitches of various sizes laid out on it over the 20 year period (and more) for the playing of the organised games.

25. As to quality of user (i.e. was use by the public "*as of right*"), the inspector found that the grass over the whole of the application land has been regularly cut by the defendant who also put up the posts for the organised pitches and marked the white lines. Hire fees were paid for use of the pitches for adult and junior matches. The user of the organised matches was licensed, almost all at weekends with some junior training during the week. However there was only one sign, in a rather inconspicuous location (on an outside wall of a building used as a changing room) stating among other things that organised events needed the permission of the district council which the inspector did not find sufficient of itself to render user permissive[15]. Moreover, the defendant could not, the inspector advised, rely on communication to users that access to the land was regulated. Deferment to users of the organised pitches on occasions was not inconsistent with user as of right over the remainder of the land[16]. Accordingly he advised that the use of the land by local inhabitants was not subject to any form of implied permission by reason of the defendant or its predecessors exercising control over the land.

26. That left the question whether nevertheless public enjoyment had been exercised by reason of some other right sufficient to render the enjoyment "by right" and not "*as of right*".

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15 See 1st Report, paras. 64-65.

16 See 1st Report, paras. 66-73 and *R (Lewis) v Redcar and Cleveland BC (No. 2)* [2010] 2 AC 70 SC.

27. The answer to this question depended to a large extent on the purposes for which the application land was held by the local authority and on the effect of the 1964 Deed.

28. The inspector drew attention to two passages from the speeches in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 pointing out that where land was held for recreational purposes by a local authority, the public enjoyed such use "by right"[17].

29. First, as Lord Scott explained it:

> *"29. Finally I should refer to section 10 of the Open Spaces Act 1906. Section 10 provides that:*
>
> > *"A local authority who have acquired any estate or interest in or control over any open space ... 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 ... in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose; and*
> >
> > *(b) maintain and keep the open space ... in a good and decent state ..."*
> >
> > *"open space", as defined in section 20, includes "land ... which ... is used for purposes of recreation ..."*
>
> *Section 123(2B)(b) of the Local Government Act 1972 enables open space land held under a 1906 Act trust to be disposed of freed from that trust.*
>
> *"30. It is, I think, accepted that if the respondent council acquired the Sports Arena "under the 1906 Act", the local inhabitants' use of the land for recreation would have been a use under the trust imposed by section 10 of the Act. The use would have been subject to regulation by the council and would not have been a use "as of right" for the purposes of class c of section 22(1) of the Commons Registration Act 1965. But Mr Petchey accepted that Mr Laurence QC was correct in contending that the Sports Arena had not been acquired "under the [1906] Act" and that*

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17 See the inspector's first report, paras. 99-100. He quoted them in reverse order.

section 10 did not, therefore, apply. Here, too, although your Lordships cannot, in view of this concession, conclude that Mr Laurence's contention is wrong, I do not, for myself regard the point as clear. Is it necessary in order for open space land to have been acquired under the Act, for it to be expressly so stated, whether in the deed of transfer or in some council minute? Attorney-General v Poole Corporation [1938] Ch 23 is interesting on this point. The open space land in question had been conveyed to Poole Corporation

> *"in fee simple to the intent that the same may for ever hereafter be preserved and used as an open space or as a pleasure or recreation ground for the public use."*

There was no express reference in the Conveyance to the 1906 Act but the Court of Appeal thought it plain that the Act applied. Indeed counsel on both sides argued the case on the footing that that was so (see Sir Wilfrid Greene MR, at p 30). It seems to me, therefore, that the 1906 Act should not have been set to one side in the present case simply on the ground that in the documents relating to the transfer to the council no express reference to the 1906 Act can be found. It would be, in my view, an arguable proposition that if the current use of land acquired by a local authority were use for the purposes of recreation and if the land had not been purchased for some other inconsistent use and the local authority had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10 would apply (c/f counsel's argument in the Poole Corporation case, at p 27). But your Lordships cannot take the argument to a conclusion in the present case."

30. Second, Lord Walker said this:

"*86. The City Council as a local authority is in relation to this land in a different position from a private landowner, however benevolent, who happens to own the site of a traditional village green. The land is held by the City Council, and was held by its predecessors, for public law purposes. A local resident who takes a walk in a park owned by a local authority might indignantly reject any suggestion that he was a trespasser unless he obtained the local authority's consent to enter. He might say that it was the community's park, and that the local authority as its legal owner was (in a loose sense) in the position of a trustee with a duty to let him in. (Indeed that is how Finnemore J put the position in Hall v Beckenham Corporation [1949] 1 KB 716, 728, which was concerned with a claim in nuisance against a local authority, the owner of a public park, in which members of the public flew noisy model aircraft). So the notion of an implied statutory licence has its attractions.*

"*87. After that approach had been suggested there was a further hearing of this appeal in order to consider the effect of various statutory provisions which were not referred to at the first hearing, including in particular section 10 of the Open Spaces Act 1906, sections 122 and 123 of the Local Government Act 1972 and section 19 of the Local Government (Miscellaneous Provisions) Act 1976. 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, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation."

31. As to the 1964 Deed, in his reports the inspector conducted a careful and detailed analysis of its provisions, terms and effect and events leading up to it. His conclusions and reasoning (drawing from both his reports) was largely as follows:

- that the application land consisted almost entirely of land which was the subject-matter of the 1936 Conveyance and that paragraph (c) of the Schedule to the 1964 Deed related to such land;

- that although there was circumstantial evidence (e.g. the use of the land, the ministerial consents especially that given in 1936 recording that the land conveyed for the electricity supply station was included in the land conveyed by the 1936 Conveyance and was held by the local authority "*for purposes of public walks and pleasure grounds*", and the 1964 Deed itself) supporting the proposition that the application land was held and acquired for public recreation, nevertheless it did not follow that the whole of the application land was held from acquisition for the purpose of public walks or pleasure grounds but it was possible. Crucially, he was not however able to reach a conclusion on the balance of probabilities as to what purpose the land was held for prior to the 1964 Deed[18];

[18] See for example, para. 8 of his second report (p. 175).

- That surrounding evidence was circumstantially entirely consistent with acquisition under either s 10 of the Open Spaces Act 1906 or s 164 of the Public Health Act 1875;

- relying on the above dicta of Lord Walker and Lord Scott in *R (Beresford) v Sunderland City Council* (above) and other case law and after a detailed study of a plethora of local government legislation dealing with local authority holding of land for various public uses, he concluded that,

  a) although the 1964 Deed was "*not the most straightforward document to interpret*" where land had been appropriated "*for the purpose of public recreation*" this was enough to render use "by right" rather than "*as of right*" (and so entitle the CRA to refuse registration) [my emphasis][19];

  b) whether the land was acquired under s 10 of the Open Spaces Act 1906 or s 164 of the Public Health Act 1875 it did not matter; both were sufficient to render use of the application land as "by right" (since the recognised effect of both species of legislation was to require the local authority to hold the land on an implied statutory trust to allow the public to use and have access to the land for public recreation);

  c) for open space land to have been acquired under the 1906 Act it may not be necessary for it to be expressly so stated in the conveyance or transfer;

[19] See first Report, paras. 112-113, 116, 117.

d) where land was held under either the 1906 Act or the 1875 Act it was possible to effect an informal appropriation of land for purposes which were not inconsistent with the terms of the original acquisition and which appropriation accordingly did not need to comply with the mechanisms of ss 122(2A) and (2B) and 123(2A) and (2B) of the Local Government Act 1972 which applied where the authority wished to appropriate land it already held for public purposes for an entirely different inconsistent purpose and freed the land, on fulfilment of the statutory requirements, from the statutory trusts arising under s 10 or s 164 as the case might be;

- The motivation, he thought, behind the 1964 Deed was to make the position clear[20]. Looking at the background, context and language of the 1964 Deed the inspector concluded that the purpose and effect of the 1964 Deed was either

  a) to record, clarify or confirm the position then known or assumed, namely that the application land was held under either the 1906 Act or the 1875 Act or

  b) to declare and effect just such an informal appropriation of land for purposes which were not inconsistent with the terms of the original acquisition or the then use of the land and accordingly did not need to comply with the formal statutory mechanisms of ss 122(2B) and 123(2B) of the Local Government Act 1972;

20 Second report, paras. 11, 15 (pp. 176, 178).

- in short, by this Deed the local authority was recording, clarifying, confirming or declaring that it held almost all the application land for the benefit of the public as open spaces for the recreation of the public or for public walks, parks and pleasure grounds under s 10 of the 1906 Act and s 164 of the 1875 Act; accordingly the public had not used the application land in the relevant period prior to the application for registration "*as of right*" but "by right" under the statutory trust of a public nature affecting the application land[21];

- for these reasons he recommended registration should be refused.

32. Following the inspector's first report, both sides took the opportunity of making further representations leading to the second report in February 2011. Following this second report (in which the inspector maintained his view), the defendant's Head of Legal and Democratic Services recommended to the Highways Committee (the relevant council committee) that his advice and recommendations be followed resulting in the CRA refusing the application for the reasons set out in the report (of the Head of Legal and Democratic Services), in turn based on the inspector's reports.

The New Evidence

33. As previously mentioned new evidence[22] was adduced comprising further Minutes of meetings of the Consett UDC's Allotments, Parks and Open Spaces and Cemeteries Committee between September 1963 and February

21 See paras 118, 125 of the first report.
22 See pp. 79-108.

1964, especially those of 10 September and 10 December 1963. Two matters are relied on, particularly by the defendant in this new evidence:

- First, they show responsibility for the application land being administered and managed by and under the relevant committee dealing with parks and open spaces (the Allotments, Parks and Open Spaces and Cemeteries Committee of Consett UDC – this evidence at least appears to have been before the inspector[23]);
- Second, the 1963/64 minutes themselves described the Belle Vue Grounds as "*held as public walks and pleasure grounds*" (see above).

The Submissions of Mr George QC

34. I was much assisted by Mr Charles George QC on behalf of the claimant who guided me through a complex web and plethora of local government legislation and law.

35. His principal submissions, in outline, may be summarised as follows:

- The defendant's decision was based ultimately on the inspector's reports and recommendations;
- Those recommendations (for refusal) were legally flawed and accordingly vitiated the defendant's decision;
- The court should not substitute its own decision or its own reasons for that of the decision maker.

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23 See second report, para. 9 (p. 176).

36. In *R (Beresford) v Sunderland City Council* (above), Lord Scott, Mr George pointed out, advanced the following proposition (at the end of the passage cited above):

> "*It would be, in my view, an arguable proposition that if the current use of land acquired by a local authority were use for the purposes of recreation and if the land had not been purchased for some other inconsistent use and the local authority had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10* [of the Open Spaces Act 1906] *would apply*"

37. Mr George argued that this "*arguable proposition*" (which, no doubt for shorthand reasons, was referred to as "the Scott test") was central to the inspector's reasoning, conclusions and recommendations but it was supported by no other of their Lordships, and, it seems, was propounded without the benefit of argument.

38. It was central, submitted Mr George, because the Scott test founded support for the inspector's proposition that where land was not held by a local authority for a purpose inconsistent with that proposed, it needed no formal appropriation process to achieve that purpose. Thus, since the 1964 Deed was (as a matter of logic) incapable of confirming something which the inspector had not found established on the balance of probabilities (namely that the land was acquired or used for the purposes of the 1875 Act or 1906 Act even if "*in practice*" [24] it was being held for a not inconsistent purpose) it can only have been intended to declare that the application land was henceforth held for the public for recreational purposes.

39. That was legally flawed because:

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24 Para. 11 of the inspector's second report.

- Local authorities are creatures of statute and their powers to acquire, hold and use land are governed as such by statute. None of the relevant statutory framework refers to "inconsistent" use, still less "non inconsistent" use;

- The 1964 Deed assumed its importance precisely because it was unclear on what basis the application land was held before the Deed as the inspector duly noted; thus the Deed could not have "confirmed" anything and insofar as it sought to do so, was irrelevant and of no legal effect. Local authorities had no power to make a determination that land was to be used for a particular purpose and the 1964 Deed did not even appear to do so.

- The reasoning that the 1964 Deed amounted in substance to an informal process of appropriation of the application land to public use was plainly based on the Scott test, i.e. that no formal process was required;

- It was insufficient merely to state that the land was "*in practice*" held for a purpose which was not inconsistent with the new, informally appropriated, purpose. To be a valid appropriation to the stated use, the local authority must have concluded that the land subject to the appropriation was "not required" for its existing purposes (see Local Government Act 1933, ss 163, 165). No such conclusion is recorded in the 1964 Deed or elsewhere nor does the 1964 Deed declare it was appropriating the land to a different purpose. Moreover, to take effect as an appropriation from one use to another the formal statutory

mechanisms of the Local Government Act 1933 needed to be complied with and ministerial approval (at that time) was needed. It was apparent none of the formalities had been observed. All this is unsurprising given the inspector was relying on and treating the 1964 Deed as an informal process.

- Thus, it was argued the 1964 Deed was simply of no legal effect at all. That being so, and it being unclear for what purpose the application land was held by the defendant council the only legitimate conclusion was that the CRA had erred in law in refusing the application (since the applicants must thereby have established their user was "*as of right*" not "by right" and so within s 15 of the 2006 Act).

- Accordingly the court should quash the refusal decision of the CRA, order the defendant to register the application land under the 2006 Act or else, at worst, the matter should be remitted for a fresh consideration.

The Submissions of Mr Laurence QC

40. Mr George Laurence QC for the defendant does not seek to support or uphold the Scott test, at least at this level. Instead his principal submissions were as follows:

- That even if the court came to the conclusion the decision to refuse registration was due to some error of law, being a decision of an authority and not of a court or tribunal, this court cannot substitute its own decision but only remit the matter: see s 31 (5) and (5A) Senior

Courts Act 1981 as amended by the Tribunals Courts and Enforcement Act 2007.

- That the totality of the evidence, together with the new evidence strongly suggests the application land was acquired under the 1875 Act and was lawfully used for public purposes sufficient to prevent the acquisition of the right to registration under the 2006 Act:

  a) The new evidence is entirely consistent with the "*circumstantial*" evidence noted by the inspector that it was possible (even if not probable) that the application land had been acquired under the 1875 Act and was being lawfully used for the purposes of public recreation;

  b) the 1936 ministerial consent (recording the land was held "*for purposes of public walks and pleasure grounds*") must have been given under s 165 Local Government Act 1933 (repealed in 1974) then requiring ministerial consent for the disposal of land no longer required for the purpose for which it was acquired or was being used.

  c) Accordingly, since the land being disposed under that consent (the electricity sub-station) had been part of the land conveyed by the 1936 Conveyance that was a very strong pointer towards the whole of the land thereby conveyed (including most of the application land) having been acquired under s 164 of the 1875 Act.

d) The 1949 ministerial consent for the appropriation of land for council offices was necessary also but under s 163 of the Local Government Act 1933 requiring ministerial approval where land held by a local authority was appropriated from one use to another, different, use (see above).

e) Having regard to that and all the surrounding evidence (including the new evidence) and absent any evidence to the contrary it ought to be inferred and can be safely inferred that the application land (being part of for the most part that conveyed by the 1936 Conveyance) was also acquired under the 1875 Act. There is no evidence, for example, suggesting that part of the 1936 Conveyance land was acquired under one statute and part under another.

f) All this is entirely consistent with the new evidence (the Council minutes) as showing that the defendant's predecessors, having consulted the lawyers, were advised the land was held (in substance) under the 1875 Act and therefore needed ministerial consent if there was to be any "*variation*" of that use.

g) On that basis the 1964 Deed can be readily understood. It was merely a reflection or confirmation of what everyone knew or understood at the time. It is not a case of appropriation at all. It did not, as the inspector suggested, need a fresh dedication or appropriation. It merely confirmed the status quo.

h) A local authority had power to dedicate its land for the use of public recreation: *R v Doncaster MBC(ex p Braim)* (1986) 57 P&CR 1 (though he conceded in view of the doubts expressed by McCullough J in that case whether "*dedication*" was the right word).

i) On that basis the decision should not be quashed and there would be no point in remitting the matter for further consideration: the result would still be the same: refusal of registration.

- Alternatively, if the 1964 Deed operated as an appropriation:

a) It was tantamount to a record of a decision by the local authority to hold the land on the statutory trust for public recreation;

b) If the land was not held for an inconsistent purpose already there would be no requirement for the statutory formalities attendant on freeing the land from the statutory trusts for public recreation;

c) In any event it is now, after over 40 years since the Deed far too late to mount an *ultra vires* challenge to the Deed;

d) Accordingly there was no error of law in saying that the 1964 Deed subjected the application land to the statutory trusts, whether or not that entailed an appropriation. Such a proposition does not depend on the Scott test.

- The so-called Scott test was not central to the inspector's reasoning and in any event the new evidence shows the land was held under the 1875 Act. Hence the Scott test (or Lord Scott's arguable proposition) can safely be put on one side.

Discussion

41. For present purposes it is common ground that

- Despite the absence of some clear and unequivocal evidence spelling out under what authority the application land was acquired or held, it was and is proper to assume the acquisition and holding was lawful provided the use to which the land is put is permitted by some appropriate enabling legislation (see, for example, *Attorney-General v Poole Corporation* [1938] Ch 23 cited above by Lord Scott);

- In the absence of some formal or lawful appropriation, once acquired for one purpose, the local authority cannot (absent some temporary use or not inconsistent use) use the land for some other purpose;

- if the application land had indeed been held for the purposes of s 10 of the Open Spaces Act 1906 or under s 164 of the Public Health Act 1875, then the land was held on statutory trusts for public recreation resulting in the public's use of the land being by right and not "as of right" and in those circumstances the CRA would have been correct in refusing registration;

- the 1936 Conveyance did not adequately state under what power or authority the relevant land was acquired or held;

- leaving aside the 1964 Deed, there is no evidence of any express appropriation of the land for recreational purposes under either the 1906 or 1875 Acts, or for that matter any other Act.

42. Although Mr Laurence helpfully described the case as "*straightforward*" and Mr George equally helpfully described it as "*very very simple*", despite the patience and helpfulness of both counsel I confess to finding this neither straightforward nor simple largely because whilst I found Mr George's legal submissions and reasoning compelling in that, taken step by step, the inspector's reasoning based as it was on the Scott test or proposition leading him to the conclusion that the 1964 Deed could amount to an informal, but lawful, recognition or appropriation of the land for public purposes was legally flawed, I equally found Mr Laurence's submissions on the evidence, particularly the effect of the 1963/64 minutes, also quite compelling.

43. Mr Laurence disavowed reliance on the Scott test. He also sought to persuade me that the inspector's reasoning did not depend upon it. I accept that there are passages in the inspector's report which appear to suggest he did not place exclusive reliance on this proposition but in the key part of his report justifying the informal appropriation by the 1964 Deed it is, as it seems to me, inescapable that he was at the very least heavily influenced by this proposition which Lord Scott himself (see the longer quoted passage) expressly left open.

44. That being so, in my judgment the decision of the CRA, based as it ultimately was, on the reasoning and recommendations of the inspector, must be viewed as flawed sufficient to justify quashing the decision for the reasons advanced by Mr George (which is why I have set them out fully above). Equally I am

not persuaded by Mr Laurence's alternative argument based on informal appropriation. This depended on a finding that the land was not acquired or held for an inconsistent purpose, something the inspector seems to have assumed ("*in practice*") rather than found as a fact (or in law). Reliance on *Doncaster* does not assist for there the assumption that the local authority could dedicate the land to public use was a concession made by both sides and was not fully argued (see p. 8 of the report).

45. The inspector did not have the advantage of the 1963/64 minutes before him. As I have said above I found this evidence for my part, quite compelling. Had the inspector had those minutes before him he might just, having regard to that and all the other evidence, have moved from findings of possibility (that the land had been acquired under s 164 of the 1875 Act) to findings of probability (that it had). On that basis he might then have gone on to recommend refusal because the land in question was and had always been held for the purposes of s 164 of the 1875 Act. Despite that, I accept Mr Laurence's submission that I can not or ought not to substitute my own decision and order the defendant to allow (or for that matter to refuse) the registration under the 2006 Act. That would, in my view, be to usurp the function of both the inspector and the CRA.

Conclusion

46. Accordingly, however unsatisfactory the result may be to all, it seems to me that I should remit the matter to the defendant to consider how, in light of this judgment, and in light of the further evidence, it wishes to proceed in considering the matter afresh.

47. Finally I repeat my appreciation of the assistance I have had from counsel and only regret, owing to pressure of other cases, the matter has taken as long as it has. I am grateful for everyone's patience.