

# Potential impediments to development of land formerly in public use



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## What this talk will cover

- Summary of the facts
- The decisions of the High Court and Court of Appeal
- The decision of the Supreme Court
- Implications of the Supreme Court's decision

# The facts



## How to Preserve Openness?

- Dr Day first approached solicitors in 2018, in the run up to a *second* planning application for development as housing following an earlier grant.

### Village Green?

- Section 15C(1) of the Commons Act 2006 provides:
  - (1) The right under [section 15\(1\)](#) to apply to register land as a town or village green ceases to apply if an event specified in the first column of the Table set out in the relevant Schedule has occurred in relation to the land (“a trigger event”).
- Schedule 1A to the Commons Act 2006 sets out the first “trigger event” as being:
 

An application for planning permission, or permission in principle, in relation to the land which would be determined under [section 70](#) of the 1990 Act is first publicised in accordance with requirements imposed by a development order by virtue of [section 65\(1\)](#) of that Act

# How to Preserve Openness?

## Waste Land of the Manor?

- Section 193 of the Law of Property Act 1925 confers rights on the public of air and exercise over waste lands. Waste lands include “manorial waste”.
- A subspecies of common land.
- Should be registered on the register of common land.

## Footpaths?

- Easily diverted

## Challenge to Unlawful Disposal?

- Possible, but well out of time.

## Planning

- Raised the status of the land as being public trust land as a planning objection.
- When Council held it was not a material planning consideration, the decision was judicially reviewed

# High Court Claim

- Judicial Review of Decision to Grant Planning Permission for 15 houses
- Aarhus Costs Cap

Before Lang J:

- Volumes of Historic Evidence
- Concluded that the site was purchased in 1925 and held pursuant to statutory trust either under the Public Health Act 1875 or the Open Spaces Act 1906
- Temporary use as allotments as part of the “Dig for Victory” project under war time powers did not affect the analysis
- Nor did the land falling into abeyance in the 1970s and its use as a nursery by the Council in the 1990s

# High Court Claim

## Argument:

- Trusts for recreational enjoyment of land by the public by right are creatures of section 164 of the Public Health Act 1875 and section 10 of the **Open Spaces Act 1906**.
- Land consisting of or forming part of an open space as defined by section 270 of the **LGA 1972** may be freed from trust by virtue of a disposal under section 123(2A) of the **LGA 1972**
- **BUT** requires satisfaction of the preconditions that:
  - notice of an intention to dispose of the land is advertised prior to disposal and
  - objections to disposal are considered.
- So the trust was not discharged
- Shropshire Council's failure to inquire into and ascertain that a public trust and recreational rights pertained over the Site and that the Site was open space was accordingly a public law error (ground 1). As was the failure to take into account material considerations related to open space (ground 2).

# High Court Claim

- Judge allowed the claim on grounds 1 and 2
- But granted no remedy, pursuant to s.31(2A) of the Senior Courts Act 1981. She held that the Respondent should have considered the legal implications of the sale by the Town Council to CSE. However, she considered that, if it had done so, it would have concluded that the right under the statutory trust, insofar as they subsisted, could not be enforced against CSE, by virtue of sections 128(2) and 131(1) of the **LGA 1972**: at §118
- **s.128(2) LGA 1972** provides that the disposition “shall not be invalid” as a result of the non-compliance and that the purchaser “shall not be concerned” to establish whether there has been compliance

# Court of Appeal

Dr Day appealed to the Court of Appeal.

a. Held at **CoA§45** that section 128(2)(b) of the **LGA 1972** expands the circumstances beyond those prescribed by subsection 123(2B) of the **LGA 1972** by which a disponee may take title to land free from statutory trusts;

b. At **CoA§ § 64-65** Public rights of recreation over the Site did not subsist in any form following the disposal to CSE, notwithstanding the failure to comply with the requirements of section 123(2A) of the **LGA 1972**.

c. At **CoA§65** held that public recreational rights under the statutory trust were not material to the decision whether to grant planning permission for the development of the Site.

# The Supreme Court's Decision

## Starting point

*“For many years Parliament has recognised the importance for local communities of having green spaces where people can take exercise, play sport and meet each other in the outdoors. Certainly, the events of recent years blighted by the Covid-19 pandemic with compulsory lock downs and social distancing have confirmed that recreation areas have a vital role to play in the physical and mental well-being of people living in an urban environment.”*

*“Legislation has conferred powers on local councils to acquire and lay out recreation grounds and provide them to residents. Where a local authority uses the powers conferred by the Public Health Act 1875... or the Open Spaces Act 1906... to acquire and provide recreation land or open space to the public, the land is subject to a statutory trust in favour of the public and members of the public have a right to go onto the land for the purpose of recreation.”*

# The Supreme Court's Decision

## The issue

- **s.123(2A) and (2B) of the LGA 1972**
  - Before disposing of land subject to a statutory trust the council must advertise their intention to do so in the local paper for two consecutive weeks & consider any objections
  - If the council complies with that procedure → land is freed from any public trust
- What if they don't comply?
  - **s.128(2)** provides that the disposition “shall not be invalid” as a result of the non-compliance and that the purchaser “shall not be concerned” to establish whether there has been compliance
- **But what happens to the statutory trust?**

# The Supreme Court's Decision

## The nature of the rights created by the statutory trust

- Statutory trusts created by the PHA 1875 and OHA 1906 [34]-[40]
- Restrict the ability of the local authority to use the land subject to the trust for any purpose other than recreation and confer rights on the public to use the land for that purpose: see case law on this at [42]-[49]
- Not analogous to private trusts → no overreaching pursuant to/by analogy with s.2(1) of the LPA 1925 [50]-[52]

# The Supreme Court's Decision

## The nature of the rights created by the statutory trust

- Council argued that the obligations imposed on a local authority by the statutory trust cannot be divorced from the ownership and/or control over the land by that authority because the statute doesn't impose obligations on 3<sup>rd</sup> parties
- Inconsistent w/ CA's conclusion that the statutory trust would not be extinguished if the purchaser had actual notice of the trust and the LA's non-compliance
- **SC held that simple transfer of the land into private ownership is not sufficient to extinguish the statutory trusts [57]**
- If that were the case, there would be hardly any need for s.123(2B) or s.128(2)(b) & the restrictions on sales of statutory trust land would be very easily circumvented
- Rights are analogous with rights in town & village greens and over public highways which clearly survive the transfer of land into private ownership [58]

# The Supreme Court's Decision

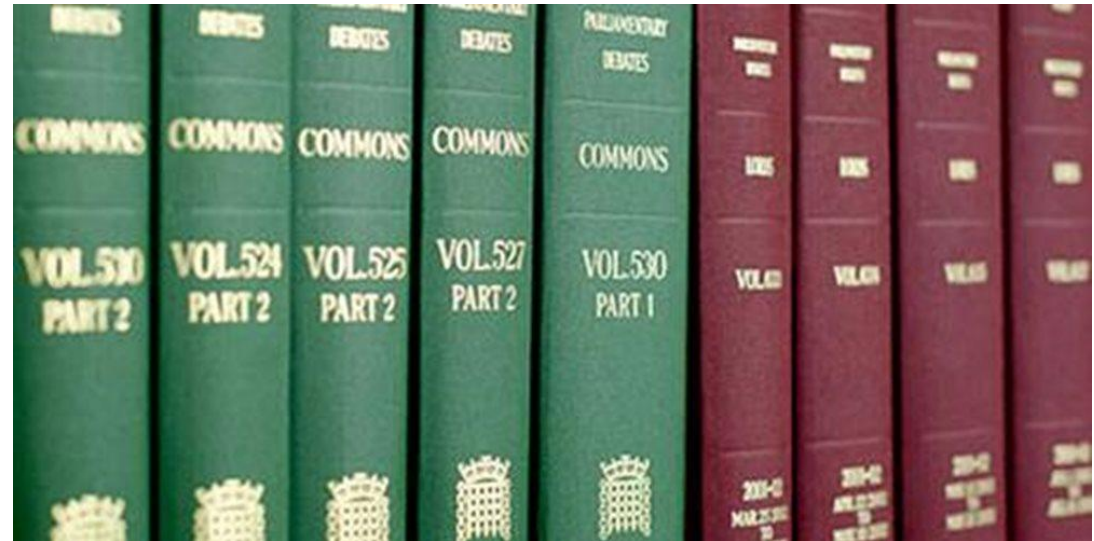
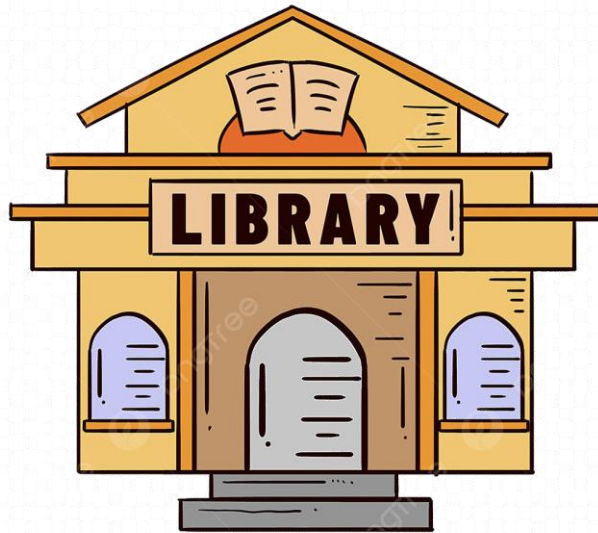
## The nature of the rights created by the statutory trust

*“I would therefore reject the argument that the answer to the present case is simply that as soon as the land comes into private ownership, the trust must be extinguished. There is no support for such a conclusion in the authorities and the cases on village or town greens and public highways suggest that analogous rights can co-exist with private rights.”*

# The Supreme Court's Decision

## Construction of the statutory provisions

*“Like the Court of Appeal, I consider that the answer to this appeal lies in the proper construction of the statutory provisions. With that in mind, I turn to consider the evolution of the local authority’s powers in respect of their land in general and recreation grounds or open spaces in particular.”*



# The Supreme Court's Decision

## Construction of the statutory provisions

### Local Government Act 1933

- ss.163-165: power to LAs to let or sell land or appropriate it for another purpose
- In most cases ministerial consent/approval required
  - Exception: lease for a term not exceeding 7 years
- Could only sell land (w/ consent of Minister) if no longer required for the purpose for which it was acquired or was being used
- s.179(d): nothing in those provisions authorised a disposal *“in breach of any trust”*

# The Supreme Court's Decision

## Construction of the statutory provisions

### Town and Country Planning Act 1959

- s.26: removed the requirement for ministerial consent for some sales
  - But not for disposals of “open spaces” – s.26(2)(a)
- “Open spaces” = “any land laid out as a public garden or used for the purpose of public recreation, or land being a disused burial ground” – s.57(3), importing the definitions from earlier statutes
- s.29: provided that where consent was required and not obtained:
  - The disposal was not invalid by reason of the lack of consent; and
  - The disponee “shall not be concerned to see or inquiry whether any such consent has been given”

# The Supreme Court's Decision

## Construction of the statutory provisions

### *Blake v Hendon Corporation* [1962] 1 QB 283

- Question: was the LA in occupation of land subject to a statutory trust for rating purposes unless and until it had done something to “dedicate” the land to the public?
- Answer: No
  - Nothing over and above acquiring the land under s.164 of the PHA 1875 required
  - The power to let the land conferred by the LGA 1933 was subordinate / supplementary to the main power in s.164 of the PHA 1875 & could only be used if compatible w/ the full use of the park by the public

# The Supreme Court's Decision

## Construction of the statutory provisions

### *Laverstoke Property Co Ltd v Peterborough Corpn* [1972] 1 WLR 1400

- Land acquired by Peterborough under the OSA 1906 but no longer required for that purpose
- Sold subject to a special condition that P obtain the necessary ministerial approvals/consents and release the land from the obligations of the OSA 1906
- P did not satisfy the special condition; purchaser built offices on the land
- P argued that it could sell the land pursuant to s.165 of the LGA 1933 and that the requirement for consent had been removed by s.26(a) of the TCPA 1959
- Court said no: s.179(d) of the LGA 1933 made clear that s.165 did not authorise a disposal in breach of trust and s.10 of the OSA 1906 expressly created a trust

# The Supreme Court's Decision

## Construction of the statutory provisions

### The LGA 1972 as originally enacted

- Repealed the LGA 1933 and provided new powers for LAs to acquire, appropriate and dispose of land
- s.123(3) allowed for the disposal of “public trust land” subject to conditions:
  - Total land disposed of has to be less than 250 square yards
  - 2 weeks’ advertisement in local newspaper required before disposal
- If those conditions were met, then the land would *“by virtue of the disposal, be freed from any trust arising solely by reason of its being public trust land”*
  - Wording first appeared when clause considered by the HL in Committee

# The Supreme Court's Decision

## Construction of the statutory provisions

### The LGA 1972 as originally enacted

*“The intention behind the amendment was said by the Earl of Gowrie when moving the amendment to be “to put beyond doubt that where public walks or pleasure grounds or public open space is appropriated or disposed of, to the very limited extent allowed under the Bill, the land is freed from any public trust so that it can be used for the purpose for which it is appropriated or disposed of”: see Hansard (HL Debates), 18 September 1972, col 798—799.”*

# The Supreme Court's Decision

## Construction of the statutory provisions

### The LGA 1972 as originally enacted

- s.128(2) – same form as it is now; based on s.29(1) of the TCPA
- s.128(3) – disapplied ss.26 & 29 of the TCPA 1959 to avoid overlap with the powers granted to LAs by the 1972 Act
- s.131(1)(a) – replaced s.179(d) of the TCPA 1959 but with a carve out for statutory trusts:

*“Nothing in the foregoing provisions of this Part of this Act or in Part VIII below – (a) shall authorise the disposal of any land by a local authority in breach of any trust, covenant or agreement which is binding upon them, **excluding any trust arising solely by reason of the land being held as public walks or pleasure grounds or in accordance with section 10 of the Open Spaces Act 1906**”*

# The Supreme Court's Decision

## Construction of the statutory provisions

### The LGA 1972 as amended [by the Local Government, Planning and Land Act 1980]

*“(2A) A principal council may not dispose under subsection (1) above of any land consisting or 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 purposes 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.”*

# The Supreme Court's Decision

## Conclusions

- s.128(2) does not operate to extinguish the rights enjoyed by the public under statutory trusts unless the bespoke procedure set out in s.123(2A) and (2B) has been complied with
- Because:
  - General powers conferred on LAs to buy, appropriate, lease and sell land have always been subject to special conditions or restrictions
  - Statutory trust land has generally been treated as different from other land & wide powers applicable to disposals treated as not overriding the public's rights under the statutory trust
    - Consistent line in the case law to this effect [93]-[100]

# The Supreme Court's Decision

## Conclusions

- Parliament would have been in no doubt that “very clear words indeed” were needed in order for a power to dispose of land to be effective in extinguishing the public’s rights under statutory trusts [101]
- Clear words were used in s.123(3): “*freed from any trust...*”
- The generally applicable provision in s.128(2)(b) cannot override the provisions of s.123(3)
- It is not a “cure all” and “*a purchaser would be wrong to think that buying land which appears to be an open space from a local authority is bound to be trouble-free because of section 128(2)*”
- Nor does s.131(1)(a) assist the authority [112]

# The Supreme Court's Decision

## Conclusions

*“I therefore respectfully differ from the analysis both of Lang J and of the Court of Appeal. Section 128(2)(b) in my judgment neither extinguishes the public rights under the statutory trust as the Court of Appeal held nor has the effect that the rights, in so far as they subsist, cannot be enforced against CSE the purchaser, as Lang J held.”*

*“It would not be appropriate to comment on where that leaves the rights and obligations of Shrewsbury TC, CSE and the residents of the Greenfields area or whether and how the terms of section 128(2) can be brought to bear in future discussions between CSE and Shrewsbury TC as vendor of the disputed land, should CSE wish to unwind that sale. It is enough for the purposes of this appeal to conclude that the continued existence of the statutory trust binding the land would clearly have been an important consideration for Shropshire Council when considering CSEs planning application.”*

# The Supreme Court's Decision

## Conclusions

- Appeal allowed
- Grant of PP quashed
- Impossible to say that it is highly likely that the outcome of the planning application would not have been substantially different if the mistake had not been made

*“If, as a result of this appeal, other local authorities and parish councils ... take stock of how they acquired and now hold the pleasure grounds, public walks and open spaces that they make available to the public to enjoy then that, in my judgment, would be all to the good.”*

# Reflections on Supreme Court

- “It is enough for the purposes of this appeal to conclude that the continued existence of the statutory trust binding the land would clearly have been an important consideration for Shropshire Council when considering CSE’s planning application.”
- The Supreme Court did not overrule cases in other contexts to the effect that matters contained in separate legislative schemes need not be considered for planning purposes.
- See for example *R v Solihull Borough Council, Ex parte Berkswell Parish Council* (1999) 77 P. & C.R. 312.
- *British Railways Board v. the Secretary of State for the Environment* [1993] 3 P.L.R. 125 in which the House of Lords held that there is no absolute rule that the existence of difficulties for the developer in meeting conditions imposed, even if apparently insuperable, must automatically lead to a refusal of permission.

# Reflections on Supreme Court

Section 131 LGA 1972 provides (as relevant):

(1) Nothing in the foregoing provisions of this Part of this Act or in Part VIII below—

(b) shall affect, or empower a local authority to act otherwise than in accordance with, any provision contained in, or in any instrument made under, any of the enactments specified in subsection (2) below and relating to any dealing in land by a local authority or the application of capital money arising from any such dealing.

(2) The enactments referred to in subsection (1)(b) above are— ...

(k) any local Act (including an Act confirming a provisional order).

Can statutory trusts be discharged by section 123(2B) of the LGA 1972 where land is held under a local act?

# Reflections on Supreme Court

Other statutory restrictions on disposal of open space need to be carefully addressed.

For Example: Green Belt (London and Home Counties) Act 1938

The 1938 Act established the first mechanism for the creation and protection of Green Belt around London by providing for local authority acquisition of land; an ability for private landowners to declare land as green belt, and for the use of covenants. Once acquired under the 1938 Act Green Belt land was thereafter protected against development without ministerial consent (s.10) and protected against disposal without ministerial consent (s.5), but use for recreation, agriculture and camping was permitted (s.27).

# Reflections on Supreme Court

What Happens to the Proceeds of Sale of Land disposed of in breach of trust?

Upon sale of the public trust land, does the Council owe to the beneficiaries of the statutory trust (the inhabitants of its area?) a fiduciary duty as regards the proceeds of the sale to be reinvested in the remaining statutory trust land?

# Wider Consequences of Sale in Breach of Trust

On 16<sup>th</sup> April 2020 a Public Interest Report regarding Governance weaknesses in relation to the Town Council's Annual Governance and Accountability Return for the year ending 31<sup>st</sup> March 2020 was sent to the Secretary of State by the appointed auditors under Schedule 7 of the **Local Audit and Accountability Act 2014** stating Shrewsbury Town Council:

“...must put robust procedures in place to ensure that an oversight such as this (the disposal of the site) is not permitted to recur. Where there should be any future sale of land STC must be able to demonstrate that it has taken sufficient steps to establish the legal status of that land and act in accordance with all relevant legislation prior to sale...”

Shrewsbury Town Council “unreservedly apologises to the residents of Greenfields”.

# Final Reflection on Supreme Court

- *Lady Rose SCJ held*

“If, as a result of this appeal, other local authorities and parish councils decide to follow that advice and take stock of how they acquired and now hold the pleasure grounds, public walks and open spaces that they make available to the public to enjoy then that, in my judgment, would be all to the good”

# Land Use Conference 2023

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