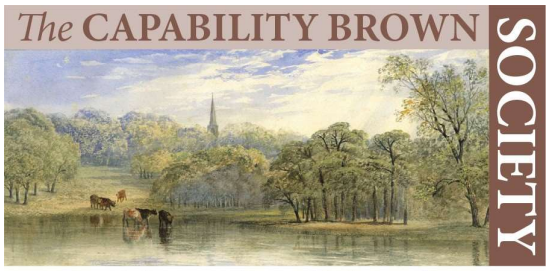

'Capability Brown's Wimbledon Park'
19th Century Water Colour Circa 1870 by an Unknown Artist

London Borough of Merton

(planning.representations@merton.gov.uk)

London Borough of Wandsworth

(planning@wandsworth.gov.uk)

11 September 2023

Dear Local Planning Authorities

Planning Applications, Numbers 2021/3609 & 21/P2900

We write regarding the planning applications to develop the Wimbledon Park Golf Course made by All England Lawn Tennis Ground plc.

This letter sets out further representations in opposition to the granting of planning permission on behalf of The Capability Brown Society.

We write in support of the submissions made by the Wimbledon Park Resident's Association dated 12 April 2023 and 13 August 2023, that the golf course is subject to a statutory trust. We have taken legal advice and gathered further evidence and wish to set out our own position on the various issues which you will need to decide.

We have also reviewed the legal submissions made by the applicant under cover of Rolfe Judd's letter to Callum McCulloch of London Borough of Merton dated 7 July 2023: these allege that the golf course land has never been public open land and has never been held under a statutory trust for public recreation. We wish to respond to points made in the opinions of Mr Jonathan Karas KC dated 23 June 2023 of Mr Russell Harris KC dated 6 July 2023.

We set out our findings and our legal submissions in the annex to this letter. We invite you to reject the applicant's legal submissions and its applications.

Yours faithfully

C. R. Baker.

Chris Baker (Director)

The Capability Brown Society

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PLANNING OBJECTION OF THE CAPABILITY BROWN SOCIETY LIMITED

11 September 2023

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1. EXECUTIVE SUMMARY

Parks are one of the last areas of truly public space in the UK. They offer us space to breathe, exercise and to come together as local communities. They are arguably the most universal of all public services, used by the entire community, from pre-school children to retired adults. In many cases, parks are also part of our local or national heritage. But parks are a discretionary service mostly provided by local government and are therefore vulnerable to cost-cutting. All local authorities must make tough decisions over funding. The temptation for councils to sell park land is significant; not only to generate immediate income, but also to remove a longer-term maintenance liability. This is a huge risk to the public, made more acute by the fact that private commercial development of parks is often irreversible. It is therefore critically important that local authority decision-making around disposal of public parks is held to highest standards. Where the public has rights, those rights should be recognised, respected and (if necessary) enforced.

The historic Wimbledon Park has included a golf course ("**Golf Course**") from the late 1890s through to the end of 2022. The Golf Course passed into public ownership in 1915 and, since 1965, London Borough of Merton ("**LBM**") owned the freehold. The Wimbledon Park Golf Club Limited ("**WPGC**") was one of several golf clubs (generically, the "**Club**") which used the Golf Course during the period.

In 1993, LBM sold the freehold to All England Lawn Tennis Ground plc ("**AELTG**"), subject to WPGC's lease. In 2018, the majority of the members of WPGC agreed to sell the Club to AELTG. At the end of 2022, AELTG finally ended golf on the Course altogether.

Local authorities are legally required to carry out public consultation before selling land forming part of an 'open space' (a statutory term that includes land used for recreational purposes). There are a number of reasons why they must do this. An important reason is that the local authority may owe the public duties as the trustee of the land and accordingly may be restricted from selling the land. Under local government legislation, public trust land can only be sold after a process of public consultation, and it is only after the public has been consulted that the public trust can be removed.

Prior to the 1993 sale of the Golf Course freehold, LBM failed to consult the public as it was legally required to do. Unfortunately, it incorrectly took the view that it did not have to do so, and it failed to consider whether the land it was proposing to sell was public trust land. The Golf Course had in fact been subject to a public trust since 31 March 1965, if not before. Consequently, when LBM sold the land, the public trust remained and was not removed. This means that the Golf Course continues to be land held in trust for the public.

The legal history of the Golf Course from about the end of 1915 to about 1965 is not very clear: whether LBM can clear up any uncertainties will depend on what records from the period it has kept. What is clear, however, is that, if there had not been a public trust before March 1965, there definitely was one from that time.

In the mid-1960s, London local government was reorganised, and the newly created London Borough of Merton came into being. Under secondary legislation coming into force on 31 March 1965, LBM was made – beyond any doubt – the public trustee of the Golf Course. If it had not been before, it was from that time forwards.

The history of the Golf Course thereafter shows how the land was made available to the public. In 1986, LBM granted the Golf Club a new lease (the first since 1961). The lease reserved visitor (non-member) rights to the residents of Merton, as well as reduced green fees, prioritisation for residents' membership over non-residents, and minimum representation for residents in the Golf Club's membership. In our view, when granting the 1986 lease, LBM as freeholder and trustee in effect reserved a right of beneficial occupation of the land to its residents.

Mr Jonathan Karas KC - in an opinion dated 23 June 2023 which we regard and will refer to as a legal submission – given a view to the contrary. His submission should be treated with a great deal of caution, for reasons discussed below. The same goes for Mr Russell Harris KC's concurring opinion dated 6 July 2023, which seems largely dependent on the work Mr Karas has done and stakes out little or no separate territory.

As the Golf Course is still public trust land, AELTG as owner is required to ensure the space remains available for public recreation. This presents two immediate issues (for AELTG, for LBM as the seller of the freehold, and for the local planning authorities). **First**, the public trust requires AELTG's planning application to be rejected. No reasonable planning decision-maker could approve it, because the proposed (predominantly private) tennis development would be utterly inconsistent with the benefits of the public trust and would in effect deprive the residents of Wandsworth and Merton of all or most of those benefits. **Second**, the playing of golf on the Course has permanently ceased, and the land is sitting idle (other than as a temporary car park for the Wimbledon Championships). The land is not being developed and the public have not been allowed since the end of 2022 to access it. This is plainly a breach of AELTG's duty under the trust to make the land available for public recreation.

We recognise that the 1993 sale remains valid. i.e. AELTG is the rightful freehold owner of the land. LBM and AELTG can in theory reverse the sale of the freehold if they decide to do so. The least costly solution for LBM and AELTG to remedy the mistakes of 1993, and what is likely to be the most satisfactory solution from a public perspective, would be for the freehold sale to be reversed.

We ask all concerned to heed the cautionary tale of Shropshire Council's sale of Greenfields Recreation Ground in 2017, in which Shropshire Council made a similar mistake to the one LBM made in 1993. The Shropshire sale was the subject of four years of litigation, at very considerable public expense. Having lost in the Supreme Court, Shropshire Council is currently in negotiations with the developers who bought the site to buy it back. The council leader has indicated there is "quite a lot of public money at stake". As the Supreme Court has now made the legal position very clear, we are confident that the visits to appeal courts that were needed in the Shropshire case will not be needed in this case.

From our perspective, as a society dedicated to the preservation of Capability Brown's heritage, the future use of the Golf Course should not only provide the local community with the benefits to which they are entitled under the public trust but should also preserve the heritage value of this part of a unique, historic Brown landscape. We look forward to working with AELTG, LBM and the local community towards that outcome.

2. LBM'S FAILURE TO DISCHARGE THE STATUTORY PUBLIC TRUST EXISTING OVER THE GOLF COURSE

A. LBM's decision in 1993

1. LBM sold the freehold in the Golf Course (title number: TGL22829) to AELTG on 23 December 1993 for £5,216,000.

2. In an undated (apparently from about March 1993) report to the Leisure Services Committee and the Administration and Land Subcommittee ("**1993 Report"**), LBM had concluded that the Golf Course had never been 'public open space'.[1] The 1993 Report thus recommended (para. 4.4), and LBM decided, not to advertise the 1993 sale.[2]

3. Unfortunately for the residents of Merton and Wandsworth, and for the parties to the sale, this decision was plainly wrong.

4. Research undertaken by the Wimbledon Park Residents' Association ('**WPRA**') has confirmed (unsurprising, given the view LBM had taken) that LBM did not advertise publicly prior to the sale in 1993.[3]

B. LBM's power to dispose of open space land

5. S123(1) of the Local Government Act 1972 ("**1972 Act**") states: 'Subject to the following provisions of this section…, a principal council may dispose of land held by them in any manner they wish'.

6. In s123(2A), local authorities have (since 13 November 1980) been prohibited from disposing of 'open space' land unless they advertise the sale sufficiently to allow the public to raise any potential objections.[4] That restriction states:

> *(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.*

7. By s270(1) of the 1972 Act (applying s336(1) of the Town and Country Planning Act 1990 ("**the 1990 Act**")), "open space" means "any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground".

8. S123(2B)(a) of the 1972 Act states:

> *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); …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...*

9. Section 164 of the Public Health Act 1875 ("**the 1875 Act"**) states:

> *Any local authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may*

support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever…

10. Failure to comply with s123(2A) means that s123(2B) cannot be relied on to extinguish any statutory public trust that might exist over the land.

11. As confirmed by R (Day) v Shropshire Council,[5] the effect of the failure to comply with s123(2A) is that a statutory trust over the disposal land under s164, 1875 Act will not be discharged and will survive the transfer of ownership.

C. Discussion

12. LBM misdirected itself in law in deciding it did not have to comply with the advertisement and consultation requirement in s123(2A). This is because LBM's conclusion that the Golf Course was not open space was mistaken. s123(2A) was in fact engaged when LBM sought to dispose of the Golf Course freehold in 1993.

13. S123(2A) is engaged when the land being disposed consists of or forms part of an 'open space'. On this issue, LBM either misdirected itself as to the law, or failed to apply the law properly to the facts.

14. The 1993 Report set out the following analysis and conclusions, so far as relevant for present purposes:

1.3 The land is occupied by Wimbledon Park Golf Club, the club occupied the course and clubhouse and the terms of a lease dated 8th May 1986 for a term of 55 years from 8th May 1996.

1.5 The tenant is required to make available to persons residing within the London Borough of Merton the right to play golf. 75% of members are to be Merton residents or have business interests in Merton. Residents pay 50% green fee and OAPs can play for 25% of the green fee on Mondays and Fridays not public holidays. The tenant is required to give favourable consideration to Merton schools usage for a nominal consideration the club is to encourage coaching by the professional in line with the golf foundation scheme.

2.1 Wimbledon Park Golf course provides a leisure facility in the borough, albeit not directly controlled by this council as it is a private club. The only local resident benefit is the ability to play as a visitor on concessionary rates (see para 1.5).

2.2 The land is not open to the public and never has been, as it has been occupied by the golf club since the Council's purchase of the land in 1915. It is therefore not 'public open space'...[nor] a 'Municipal' public facility…

2.3 Any sale will of course be subject to the existing lease and covenants contained therein.

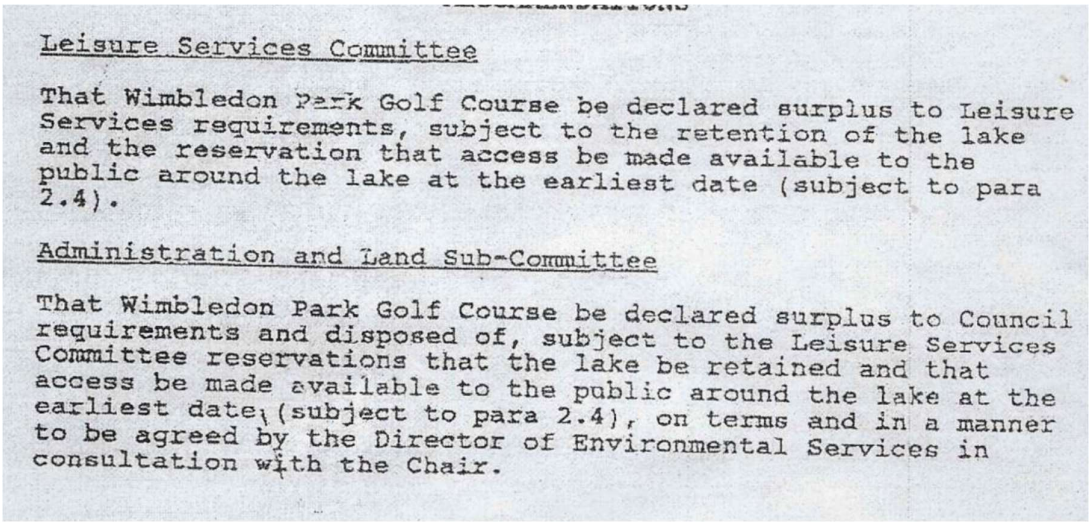
2.4. As mentioned in 2.2 the public have never enjoyed access over any part of the land. It is however suggested that should the land be sold a condition be imposed that when and if the existing lease held by Wimbledon Park Golf Club or the use ceases thus enabling the new freeholder to release the site, an area of land around the lake be dedicated to extend public access from Wimbledon Park thereby giving public access around the complete circumference of the lake.

4.1 The land was acquired under the provisions of the Wimbledon Corporation Act 1914. S123 of the Local Government Act 1972 enables the Council to dispose of any of its land as it chooses…

4.3 It would appear that the Wimbledon Corporation Act has not been expressly repealed...The relationship between the two acts is still under consideration but the conclusion should only affect the mechanics rather than the principle of disposal...

4.4 As the public have no general right to enter upon the land due to the lease of the Golf Club the land is not open space and it is not necessary to advertise the proposal to dispose of it in accordance with the provisions of s123 of the Local Government Act 1972.

15. The Report thus recommended:



Leisure Services Committee

That Wimbledon Park Golf Course be declared surplus to Leisure Services requirements, subject to the retention of the lake and the reservation that access be made available to the public around the lake at the earliest date (subject to para 2.4).

Administration and Land Sub-Committee

That Wimbledon Park Golf Course be declared surplus to Council requirements and disposed of, subject to the Leisure Services Committee reservations that the lake be retained and that access be made available to the public around the lake at the earliest date (subject to para 2.4), on terms and in a manner to be agreed by the Director of Environmental Services in consultation with the Chair.

16. The 1993 Report's summary of the public benefits conferred under the terms of the 1986 lease was broadly accurate (see further explanation at para. 73 below), though there is a significant omission or misunderstanding about priority membership rules. (The lease is a lease dated 8 May 1986 between WPGC and LBM for a 55-year term, registered under title number SGL4611724 ('the **1986 Lease'**)).

17. The main error is in the conclusion at para 4.4 of the 1993 Report, that the land is not open space because "the public have no general right to enter upon the land".

18. LBM appears to have failed to ask itself whether the Golf Course was being 'used for the purposes of public recreation' as s336(1) of the 1990 Act required it to do. That is principally a factual question.[6] Whether the public had a "general right" in relation to, or rights "to enter upon", the Golf Course were not centrally relevant to LBM's decision and suggest that LBM misdirected itself on the law. (There are other indicators. Its statement about the Wimbledon Corporation Act 1914 not having been expressly repealed was undoubtedly wrong: see paras. 125 and 133 below. And the 1993 Report contains no references at all to the 1963-1965 local government legislation which (as will be discussed in detail in section 3 below) is important in the way it applies section 164, 1875 Act to the Golf Course.)

19. It appears from the 1993 Report that the authors of the 1993 Report did not investigate the factual issue, other than to review and refer to the 1986 Lease. They should have sought some legal advice (or more detailed advice, if they had obtained any) about the legal status

of the land before making a recommendation. They should also have obtained information from their tenant, WPGC, about the extent of public use of the Golf Course.

20. Had these inquiries been made, they would have led to the conclusion that the Golf Course was being used for public recreation. Our understanding from discussions with former WPGC members is that WPGC regularly gave golfing access and reduced green fees to local residents and business owners upon proof of Merton residency. WPGC will still have access to the records showing the frequency of resident, non-member use.

21. On its chosen approach, LBM ought to have concluded that because the public were permitted under the 1986 Lease to use the Golf Course for recreational purposes, it was at least likely that the public were in fact using the land for those purposes. No reasonable authority could (on the evidence apparently available to the authors of the 1993 Report) have concluded that the land was not being used for public recreation. There was, for example, no legal requirement that the land was being used exclusively for public recreation.

22. Additionally, it appears that LBM failed to consider yet another relevant question. Applying ss 123(2A) and 270(1) of the 1972 Act and s336(1) of the 1990 Act, that question was whether the Golf Course was land consisting or forming part of land laid out as a public garden, or used for the purposes of public recreation. Accordingly, LBM was required to (and apparently did not) consider the relationship between the Golf Course and the wholly public park mentioned in para. 2.4 of the 1993 Report. The Golf Course was used for the purpose of public recreation in the sense that it formed part of an overall park, at least part of which (as the 1993 Report conceded) was public. Even based on the 1993 Report's incorrect view that the public did not have general rights to enter on to the Golf Course, the Golf Course was nevertheless:

    - part of the background and scene enjoyed by visitors to the wholly public park;
    - an "integral part of the whole and…enjoyed as part of the whole"; and (as we will discuss in more detail in section 3 below) "acquired as part of an integral whole": R. (Freeman) v Council of the City of Plymouth and Cornwall County Council.[7]

23. Accordingly, had LBM properly directed itself on the law and made the proper factual inquiries, it ought to have decided that the Golf Course was "*land consisting or forming part of an open space"*.

24. Instead, what in fact happened was:

    - On 31 March 1993, the Leisure Services Committee resolved "That Wimbledon Park Golf Course be declared surplus to Leisure Services requirements, subject to the retention of the lake and the reservation that access be made available to the public around the lake at the earliest date (subject to paragraph 2.4 of the report)."[8]
    - At the same session, a motion that LBM defer consideration of the item, pending public consultation, was defeated.
    - On 6 April 1993, the Administration and Land Sub-committee resolved "that the recommendations in the Report be approved subject to inclusion after the words "earliest date" of the following "and subject to a covenant preventing the use of the land otherwise than for leisure or recreation purposes or as an open space".[9]

- On 27 April 1993, the Policy and Resources Committee resolved "That Wimbledon Park Golf Course be declared surplus to Council requirements and disposed of, subject to the Leisure Services Committee reservations that the lake be retained and that access be made available to the public around the lake at the earliest date (subject to paragraph 2.4 of the report), subject to a covenant preventing the use of the land otherwise than for leisure or recreation purposes or as an open space, and otherwise on terms and in a manner to be agreed by the Director of Environmental Services in consultation with the Chair".[10]

- On 14 July 1993, the Chair of the Policy and Resources Committee (Councilor Colman, who was also Leader of the Council) referred to the Golf Course: "*I am very pleased and proud to place on record our commitment to retaining the open space at the Wimbledon Golf Course regardless of the outcome of our bid to put the freehold out to tender… I am totally committed to ensuring this area remains part of Merton's green space. It is designated as Metropolitan Open Land…Council minutes…will show future Councils and future residents that when we decided to sell this land, we did so ensuring it would be kept as open space*".[11] (emphasis added)

- The language of the Councilor's statement is inconsistent with para. 2.2 of the 1993 Report (quoted above) and should have led to a review of the Leisure Services Committee's decision not to consult the public about the disposal of the freehold. This did not happen.

25. As a result of LBM's failure to identify that the proposed sale was of "*land consisting or forming part of an open space*" caught by section 123(2A) of the 1972 Act (or its reckless disregard of the requirements of that section), it then failed to consider whether the land was held for the purpose of s 164 of the 1875 Act. LBM clearly did not consider this to be a relevant issue at all.

26. However, as we will show in the next section, the Golf Course was subject to a statutory public trust under the 1875 Act at the time of the April 1993 Report, and LBM ought to have reached a decision which reflected that.

27. The existence of a statutory public trust was yet another reason why LBM ought to have determined that the Golf Course was "*land consisting or forming part of an open space*".[12]

28. If LBM had correctly determined that the Golf Course was 'open space', LBM would have realised it was obliged by s123(2A) of the 1972 Act to (i) specify the Golf Course was to be sold, (ii) advertise the proposed sale in two consecutive weeks in a newspaper circulating in the Merton/Wimbledon area, and (iii) consider any objections to the proposed disposal.

29. LBM's failure to consult the public on the plan to dispose of open space was ironic as well as mistaken. When in 1914 its statutory predecessor (the Wimbledon Corporation) sought Parliament's consent to acquire the land which included the Golf Course, it also asked for a power to sell a limited amount of the land in future with the consent of the Local Government Board. The Wimbledon Corporation submitted to Parliament: "…*that provision as to the consent of the Local Government Board is considered by the Corporation to be important because they desire that the ratepayers should have every opportunity in that way of expressing their view before a Local Government Board*

inquiry before any alienation of this land takes place."[13] Eighty years later, the council tax payers of Merton were certainly not given 'every opportunity' to express their view.

30. In Day v Shropshire, the Supreme Court held that the only way to extinguish a statutory public trust was compliance with the prescribed statutory mechanism (i.e., ss123(2A) and 123(2B)).[14] It further held, as a matter of statutory construction, that s123 was designed to ensure the public have ample opportunity to learn of and contest any planned sale of statutory trust land.[15] While there was in fact local debate about and opposition to the proposed disposal,[16] the residents of Merton were not afforded the proper procedure and opportunity for engagement that newspaper advertisement pursuant to s123(2A) would have provided.

31. Nor did LBM consider its duties as a trustee under s164, or the public's rights under s164, before it decided to sell the Golf Course: or at least we have seen no evidence that it did so (and to have done so would have been inconsistent with the conclusions of the 1993 Report). The decision to sell was therefore also legally flawed.

32. As a result of the non-compliance with s.123(2A), s.123(2B) was not triggered, and LBM therefore failed to discharge the statutory public trust of the Golf Course.

33. As the freehold owner of the Golf Course, AELTG is bound by the statutory public trust.

3. STATUTORY PUBLIC TRUST OF THE GOLF COURSE

34. Following a detailed review of the legal history, our conclusion is that the Golf Course has been subject to a statutory public trust under s164 of the 1875 Act since 31 March 1965, if not before.

35. To show why that is the case, we need to set out the legal history of the Golf Course prior to 31 March 1965.

36. Accordingly, in this section of our Planning Objection, we relate the pre-1965 history, so far as our investigations have been able to discover. We then describe the local government reforms in 1963-1965 that either created or continued the statutory public trust (responding, at the same time, to Mr Karas's and Mr Harris's arguments to the contrary). We then show how LBM sought to comply with its obligations under the statutory public trust after 1965, and up to the point of the freehold sale in 1993.

37. Sub-sections A – D provide the factual history: sub-sections E – G then set out the legal analysis. Sub-section H provides some further comments on Mr Harris's and Mr Karas's submissions.

A. The early years of golf and the public acquisition of the Wimbledon Park Estate

38. The Wimbledon Park Estate (the "**Estate**") was formed over several hundred years.[17] In the 18th century, it was owned by the Spencer family. Lancelot "Capability" Brown was commissioned to lay out a park, including a lake, in about 1765.

39. Though the Estate was privately owned, the lake and lakeshore have for centuries been used by locals for angling, walking, and nature study. We understand from local anglers today that angling has been enjoyed around and upon the lake (from boats) since the lake was formed by Capability Brown's design. (This is the lake referred to in Section 2 above)

40. In the 19th century the Estate was acquired by John Augustus Beaumont, a property developer. He sold off various parts of the Estate during his period of ownership.[18] The remainder passed to his heirs.

41. There was a golf club on the Estate from the early 1890s. A golf course was laid out by a local professional around 1898. The 'reconstructed' Wimbledon Park Club was formed in 1900 (the previous one having closed in 1898) and was a local affair: local residents subscribed sufficient money to take a 10-year lease and erect a temporary club house.[19] The club survived its early years, and on 25 December 1911 it took a 10-year lease of about 100 acres, representing the majority of the land in the still undeveloped Estate.[20]

42. In early 1914, the local council decided to buy what remained of the Estate, about 155 acres. The decision was approved by the Council (voting by a wide margin) and a poll of the local ratepayers (by a narrow margin).[21] The debates around the acquisition are now of little more than historic interest. It is enough to note that, in an era of rapid development, population growth and movement of less affluent households into the area, the local council wished to preserve the rateable value of existing properties and the 'character' of the area by saving the Estate from further building of cheaper houses.[22] No doubt the motivations of homeowners in the vicinity of the Estate would have been similar. The problem was made acute by the fact that the Golf Course land might become available for purchase as soon as the Club's lease expired.[23]

43. The Wimbledon Corporation Act 1914 (given Royal Assent in August 1914) (the "**1914 Act**") was enacted to authorise the council's purchase of the Estate. The 1914 Act (as far as it concerned the Estate – Part II of the Act) permitted what is referred to in the Act as the Wimbledon Corporation (the "**Corporation**") to buy the Estate.[24] The preamble to the Act refers to 'great public and local advantage' if the Corporation were to acquire the Estate, and to a provisional agreement to purchase the Estate for £65,500.

44. Section 5 granted the Corporation the power to:

> *…purchase by agreement subject to any existing tenancies in the Wimbledon Park estate and any other lands not exceeding twelve acres in extent adjoining any part of the Wimbledon Park Estate or convenient to be held therewith and may enter into and carry into effect any contracts or agreements necessary or proper for the purpose and the Corporation shall hold and may use manage control and dispose of the Wimbledon Park Estate and other lands so acquired by them for the purposes and subject to and in accordance with the powers and provisions set forth in this Act.*

45. This was supplemented by a general power of control and management under section 7. Section 7(2) permitted the Corporation "let for such term not exceeding twenty-one years…any part or parts of the Wimbledon Park Estate and other lands acquired and held in connection therewith for games or for purposes of recreation". Section 7(4) permitted the Corporation to "set apart and appropriate any portion of the Wimbledon Park Estate…for such purposes of public utility instruction or benefit for such periods and on such terms and conditions as they may think fit".

46. Section 8 granted the Corporation powers in relation to golf, including:

- "to hold and use and appropriate for the purposes of a municipal golf course such part of the Wimbledon Park Estate and other lands acquired and held in connection therewith as may be necessary or expedient for that purpose";
- "to permit the use thereof by any club or other body subject to conditions as the Corporation may think fit";
- to make and enforce byelaws with respect to the golf course;
- to "maintain alter regulate manage and use a golf course" with ancillary buildings, officers and servants;
- to charge for the use of the golf course.

47. Section 9 of the 1914 Act permitted the Corporation "*temporarily and from time to time to allow the use of any part or parts of the Wimbledon Park Estate and other lands acquired and held in connection therewith for the purposes of a public walk pleasure ground public park or recreation ground for such period as they may think fit*". (We abbreviate 'public walk pleasure ground public park or recreation ground', which is used numerous times, as "**PWPGPPRG**".)

48. Section 9 went on to state that during "*such period or periods the said part or parts of the Wimbledon Park Estate and other lands so used shall be deemed to be public walks or pleasure grounds within the meaning of the Public Health Acts*".

49. Section 10 of the 1914 Act then required the Corporation to set aside, from about 1919, a minimum amount of the Estate for similar defined purposes:

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

We have referred above to the lake in Wimbledon Park, which explains the words in brackets.

50. Section 11 of the 1914 Act then stated:

> *From and after the date when the Corporation shall have appropriated any portion of the Wimbledon Park Estate and other lands acquired and held in connection therewith for the purpose of a public walk pleasure ground public park or recreation ground the provisions of the Public Health Acts as amended and extended by this Act shall apply thereto as if such portion had been acquired by the Corporation in pursuance of section 164 of the Public Health Act 1875.*

51. The first part of section 164 of the 1875 Act has already been set out at para 9 above. The second part of the section allows local authorities to "make byelaws for the regulation of any such public walk or pleasure ground, and may by such byelaws provide for the removal from such public walk or pleasure ground of any person infringing any such byelaw…"

52. Sections 12 and 13 of the 1914 Act granted the Corporation powers to lease the Estate and to collect ground rents: powers to sell parts of the Estate were also granted though sale had to be approved by the Local Government Board. Section 14 set a maximum of 75 acres of the Estate that could be sold or let on building leases. Section 16 provided that revenues from the Estate were to be applied first "in payment of the expenses properly chargeable to revenue of conducting managing maintaining improving and laying out the Wimbledon Park Estate and other lands and of maintaining a golf course thereon". Finally, section 115(1) permitted the Corporation to borrow up to £70,000 for the purchase of the Wimbledon Park Estate and expenses in connection therewith and specified that the Corporation should pay off the debt within 60 years.

53. By an indenture dated 29 December 1915 ("**1915 Indenture**"), for a consideration of £65,500, the Wimbledon Corporation acquired the Wimbledon Park Estate (which included the Golf Course) from Augusta Sarah Lane (née Beaumont, daughter of John Beaumont).

B. 1915 to the 1960s

54. The period of five years under section 10 of the 1914 Act was extended by executive orders made under the provisions of the Special Acts (Extension of Time) Act 1915, to 31 December 1923.[25] Presumably the section 10 appropriation must have occurred during 1923, but we have not found written records of the act(s) of appropriation. We note Mr Karas is in a similar position, stating that his instructing law firm, CMS Cameron McKenna Nabarro Olswang LLP ("**CMS**"), "have been unable to find all documents which might have been produced and which might be relevant. In particular, research has not yet unearthed: Documents constituting or directly demonstrating the appropriation of parts of the Estate under WCA 1914 sections 10 and 11."[26]

55. 'Appropriating' in this context means changing the use of land from one purpose to another.

56. In 1924, when renewing the lease of the Golf Course, it appears the Corporation sought to reserve to the public a right of way throughout the year "instead of during 8 months of each year as at present".[27] A new lease was granted in December 1924 (Annex 26 to Mr Karas's submission). The lease plan shows the Club House near a boathouse. The boathouse, we understand, was used by anglers who fished in the lake as well from the lakeshore, which they accessed from all parts of the lakeshore (including the Golf Course land).

57. In 1926, the Corporation offered the golf club the freehold of the Golf Course plus some of the rest of Wimbledon Park, but it seems the purchase price could not be raised.[28] The Corporation also in 1926 sold a 12.5-acre area of the Estate called 'Banky Field' for development. The draft 1926 Town Plan (produced as enclosures 27A and 27B to Mr Karas's submission) shows the Golf Course as public land – perhaps because of these developments.

58. In June 1929, the Corporation sought an injunction against Wimbledon Park Golf Club Ltd, to restrain parking of motor vehicles for gain on any part of the Wimbledon Park Estate.[29] This tends to suggest that the Corporation was actively enforcing the restrictions in the lease preventing use of the land "*except for the purposes of golf cricket football tennis hockey lacrosse croquet or bowls or other game or games approved in writing by [the Corporation] or for the grazing of horses cattle or sheep…*".

59. In 1933, Parliament passed another Wimbledon Corporation Act, noteworthy here because, while granting the Corporation a general power to dispose of land, it expressly excluded disposal of the Wimbledon Park Estate (under s38(1)).

60. The account of a member who joined the Club in 1935 indicates that membership at the time was 50% local prior to the Second World War.[30] His account does not record whether and to what extent non-member locals were permitted to use the Course.

61. WPGC was incorporated on 29 December 1948.[31]

62. On 10 April 1961, WPGC took another lease (the "**1961 Lease**") of the Golf Course, which endured until May 1986 (25 years – although it was granted for 38-year term). The 1961 Lease appears as enclosure 51 to Mr Karas's submission.[32]

C. 1963-1986

63. In 1963, London Boroughs were created under the London Government Act 1963 ("**1963 Act**") as part of a general reorganisation of London local government.

64. The Wimbledon Corporation was abolished, and the Wimbledon Park Estate was transferred to the newly created London Borough of Merton via two statutory instruments made under section 84 of the 1963 Act.

65. Article 16(2)(a) of The London Authorities (Property, Etc.) Order 1964 (SI No. 1464) ("**1964 Order**") stated:

> *all property and liabilities vested in or attaching to an authority named in column (1) of Schedule 4 (or of any extension thereof contained in any further order under section 84 of the Act made before 1st April 1965) shall by virtue of this order be transferred to and vest in or attach to the authority specified in respect of such authority in column (2) …*

In schedule 4, line 29, the properties of the 'Corporation of the borough of Mitcham or Wimbledon' were transferred to the 'corporation of the London borough of Merton'.

66. Provision was also made by Parliament for the new local authorities to hold land for purposes under specific statutory powers. Article 32 of the 1964 Order stated:

> *Any land held for the purposes of an enactment specified in columns (1) and (2) of Schedule 5 (or of any extension thereof contained in any further order under section 84 of the Act made before 1st April 1965) and transferred by the Act or this order to any authority shall be held by that authority for the purposes of the enactment specified in respect of such first-mentioned enactment in column (3).*

67. Schedule 5 of the original 1964 Order – entitled "APPROPRIATION OF LAND TO OTHER ENACTMENTS" - made no reference to enactments under which the Wimbledon Corporation was holding land. However, with effect from 31 March 1965, article 44(1)(l) of the London Government Order 1965 (SI No. 654) ("**1965 Order**") amended article 32 of the 1964 Order to extend the list of land covered by schedule 5 of the 1964 Order.

68. Schedule 5, Part II, line 3 of the 1965 Order made the following provision regarding land held by the Wimbledon Corporation:

PART II

Extension of Schedule 5 to London Authorities (Property etc.) Order 1964

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

69. The 1914 Act was mostly repealed at around this time, along with other local London Acts. We explain the details of the repeal in sub-section F. below.

70. Statutory powers for the management of open spaces owned by London councils were updated and put on a uniform footing in 1967. Provision was made for golf courses: Greater London Parks and Open Spaces Order 1967, art. 7(1)(a)(ii).[33] Local authority powers to provide recreational facilities including for golf, and premises for recreational clubs and societies, were codified in 1976.[34]

71. Though golf continued to be played on the Course, the Club declined due to the war and the subsequent years of austerity: by the beginning of the 1970s, there was no waiting list, and the Club was advertising for members.[35]

D. <u>From 1986</u>

72. By the 1980s, however, the Club had recovered and, on 8 May 1986, the Club succeeded in negotiating a new 55-year lease grant from LBM, despite fierce opposition from the WPRA and the Wimbledon Park Users' Committee. [36] We do not know why the 1961 Lease was determined 13 years before the end of its term. It appears LBM failed

to advertise the proposed grant of the 1986 Lease in accordance with s.123(2A) of the 1972 Act.[37]

73. As LBM would identify in the 1993 Report, covenant 2(20) of and schedule 2 to the 1986 Lease imposed on the Golf Club conditions regarding membership and access to the course by the public. Covenant 2(20) required the Club to make available to Merton residents rights to play golf in accordance with Schedule 2. Schedule 2 imposed the following obligations:

    - The Club would (subject to availability and suitability) be composed of at least 75% of members living or having business interests within the London Borough of Merton.
    - Rate payers within Merton were to be given priority over other applicants (all other things be equal).
    - Residents of Merton who wished to use the Course as visitors "may do so" provided they (i) supplied evidence of their residence, and (ii) paid a concessionary green fee of 50% of the normal visitor's fee (25% if they were a pensioner attending on a designated 'special weekday').
    - The Club was authorised to grant handicaps under certain conditions.
    - The Club was required to give favourable consideration to local schools wishing to use the Course, for nominal consideration, and to provide any available coaching facilities to local schools.

74. Schedule 2 appears to be a departure from what had come before. Neither the 1961 Lease nor the other lease of the Golf Course in the period between 1914 and 1986 that we have seen (from 1925 – enclosure 32 to Mr Karas's submission) had any provisions which compare to or foreshadow Schedule 2 of the 1986 Lease. In another departure, LBM retained its right to possession of the lake, whereas under the previous leases we have seen, the lake had been let to the Golf Club.

75. As described at paras. 14 - 23 above, LBM decided in a series of Committee votes in March – April 1993 to dispose of the freehold of the Golf Course. In doing so, as we have said, they failed to comply with s123 of the 1972 Act.

76. We have not been able to determine precisely why LBM's Administration and Land Sub-committee sought to prevent "the use of the land otherwise than for leisure or recreation purposes or as an open space". WPRA have previously submitted, "this was a very controversial sale and the local community tried very hard to stop it. The Wimbledon Park Residents' Association and the Wimbledon Society led the movement, and, through their efforts, various undertakings were made in public and in the press by both the Leader of the Council at that time and the Chairman of [LBM] that they recognised that the land should remain open land and free of any future building".[38]

77. In the deed of transfer dated 23 December 1993, AELTG undertook (Sch. 3, para 1) "not to use the Property otherwise than for leisure of recreational purposes or as an open space".

78. We also note that in condition 4 of the agreement for the sale of the Golf Course, of the same date, between LBM and AELTG, it was declared that "The Seller sells pursuant to its powers under Section 123 of the [1972 Act] and the Buyer [i.e. AELTG] will raise no requisitions in relation to these matters."

79. Returning to the history of public use of the lake and the lakeshore (touched on at paras. 39, and 56 above), The Wimbledon Club (the sports club that has owned land within Wimbledon Park since the mid-19th century) continued to allow access to and from the lakeshore for anglers. The general public also regularly entered on to the Golf Course land, usually by passers-by who wanted to look at the lake. The Wimbledon Club's (privately owned) access road from Church Road to the lake is only shut on Christmas Day each year.

E. Discussion Part 1 – Pre-1963

80. The three primary legal instruments which gave rise to and/or continued a statutory trust of the Golf Course are the 1914 Act, the 1915 Indenture, and the extended 1964 Order. There may also have been legal acts between 1915 and 1965 which created such a trust, but these are not currently available to us.

81. Taking matters in chronological order, the starting point is the 1914 Act. Section 5 allowed the existing provisional agreement to purchase the Estate to be carried into legal effect. It also required the Corporation to hold and allowed it to "use manage control and dispose of" the Estate "for the purposes and subject to and in accordance with the powers and provisions set forth in this Act", including sections 8 - 11.

82. Section 8 of the 1914 Act allowed (but did not require) the Corporation to hold and manage a 'municipal golf course' on the Estate. The Golf Course already existed in 1914 and was subject to a lease to a private club with several years left to run.

83. There can be little doubt that Parliament thought that a municipal golf course could serve as a PWPGPPRG and thus that the existing golf course was capable of being used or appropriated under section 10.[39] A municipal golf course falls within the 'recreation ground' part because golf is obviously a recreational activity.[40] 'Pleasure ground' is not a term defined in the 1875 Act, nor in subsequent national legislation. The common thread amongst the cases on section 164 (and the wider body of authority) is that land will be considered a pleasure ground if its purpose is recreation.[41]

84. Now, the legislature did not say in 1914 (nor, as far as our research has been able to determine, at any time before 1965) that the Corporation was or would in future be required to hold or use or appropriate any golf course as a PWPGPPRG. In 1914, Parliament left that up to the Corporation (and if necessary the then sitting tenant of the Golf Course) to determine in future.

85. That is or appears to be the effect of sections 9 and 10 of the 1914 Act: s9 permitting temporary use of land for the purpose of a PWPGPPRG; s10 requiring a minimum area of the Estate to be appropriated as a PWPGPPRG within a certain period (five years). The discussion of the Wimbledon Corporation Bill in legislative committee makes clear that five years was chosen because it was anticipated that the then existing golf club lease would have expired by 1919.[42]

86. Section 11 of the 1914 Act then provides that any land appropriated for the purpose of a PWPGPPRG would be deemed to have been acquired pursuant to section 164 of the 1875 Act.[43]

87. It is settled law in the present day that s164 gives rise to a statutory public trust: and the idea that once acquired under s164 the local authority was no longer free to change the use of the land would have been known to Parliament in 1914.[44] In section 164, Parliament was principally concerned with the provision of new open space for public recreation.

88. When the 1875 Act was enacted a local authority had no general power to appropriate land which it had acquired for one statutory purpose to another purpose: a general power to appropriate to another purpose with the approval of the Minister was first granted to local government by section 163(1) of the Local Government Act 1933.[45] Thus, in 1914, if the Corporation had purchased or appropriated the Estate or any parts of it "as public walks or pleasure grounds" (the s164 language), they could not lawfully have used it for any other purpose.

89. The concern of the draftsmen of the 1914 Act therefore seems to have been to ensure that if (as was anticipated) parts of the Estate were initially purchased or appropriated other than for the purpose of a PWPGPPRG, the Corporation would subsequently be able to convert the land to that purpose. The draftsman seems to have included s11 to make clear that the effects of s164 of the 1875 Act (which the courts had already addressed) would apply to any parts of the Estate that the Corporation might choose in future to convert to the purpose of a PWPGPPRG.

90. Moving on in time, in December 1915 the Wimbledon Corporation then used its new statutory powers including under section 5 of the 1914 Act to purchase the Estate and to hold it. The 1915 Indenture provided:

> *AND WHEREAS by the Wimbledon Corporation Act 1914 the Corporation was empowered to purchase…the Wimbledon Park Estate…subject to any existing tenancies…and to use manage control and dispose of the same premises for the purposes and subject to and in accordance with the powers and provisions set forth in that Act AND WHEREAS pursuant to the powers conferred on it by the said Act the Corporation has agreed with the Vendor for the purchase of [the Wimbledon Park Estate] in fee simple...*
>
> *NOW THIS INDENTURE WITNESSETH as follows that is to say:-*
>
> *1. In pursuance of the said agreement... The Vendor...hereby... grant convey... the Wimbledon Park Estate...TO HOLD the said premises unto and to the use of the Corporation its successor and assigns for ever for all the purposes authorised by the said Wimbledon Corporation Act 1914 and (subject to the covenants hereinafter contained and with the sanction of the Local Government Board) for any other purpose for which the Corporation shall for the time being be authorised to acquire land*.

91. The 1915 Indenture thus effected a transfer of the Golf Course land to be held unto and to the use of the Corporation for <u>all</u> the purposes authorised by the 1914 Act. The expansive word 'all' suggests that the Corporation may have thereby appropriated the Golf Course as a PWPGPPRG. However, that could presumably only be achievable if the Golf Course was already being used as a PWPGPPRG with the consent of the tenant, or if the Corporation had agreed in advance with the tenant to convert the Golf Course to a PWPGPPRG upon acquiring the freehold interest. While either of those things is possible, there is no evidence we have seen that they in fact happened (and the extension of time for compliance with s10 of the 1914 Act suggests inferentially that they did not).

92. At very least, it can certainly be said that the 1915 Indenture <u>enabled</u> the creation of a s164, 1875 Act trust of the Golf Course, provided that the purchased land comprising the Golf Course was in fact appropriated for the purpose of a PWPGPPRG within the meaning of section 11 of the 1914 Act.

93. The next question is whether the Corporation did in fact appropriate the Golf Course for the purpose of a PWPGPPRG. As appropriation by a local authority can only be carried out under statutory powers, it must be a conscious decision or an implicit step in a conscious decision.[46]

94. The available evidence suggests it is likely that the Golf Course was appropriated for that purpose. In particular:

- Against the legal background above, and as it had statutory powers in relation to golf (as provided by section 8 of the 1914 Act), it seems intuitively likely that the Corporation will have appropriated the Golf Course for the purpose of a PWPGPPRG at some point.

- This is because Parliament had acted in 1914 to preserve the Estate from development, and there had been raised a large sum of public money to take the Estate into public ownership. About 2/3rds of the area of the Estate at that time was laid out as a golf course and was let to a golf club on a relatively short lease. While Parliament chose not to be prescriptive about the future of golf or the Golf Course, it seems unlikely in the circumstances that the Corporation simply chose to manage the golf course as a landlord to a purely or predominantly private tenant.

- Such an approach would make the 1915 acquisition look much more like a real estate investment than a purchase for the benefit of the public. While the Corporation, in seeking Parliament's consent to the 1914 Act, did not commit to any particular plan for the Golf Course, they did state that they had "*already…given every assurance that we are not likely to be niggardly in the amount [of land] which will be devoted to public purposes because as you see in spite of our having had natural possession of the common we have laid out other recreation grounds on a liberal scale…*"[47] Likewise, the Wimbledon Corporation told the surveyor who provided the official valuation of the Estate prior to its acquisition with public funds that they "*intend[ed] to devote the greater part of this property to the use of the public*" (emphasis added).[48]

- By limiting the minimum size of the s10 appropriation to 20 acres not including the lake, Parliament left the Corporation in a position where it would not have to appropriate any part of the Golf Course as a PWPGPPRG. Excluding about 20 acres covered by the lake (as required under section 10), there were in 1914 about 35 acres of potentially appropriable non-golf land. However, that reduced to about 22.5 acres after the sale of Banky Field in 1926. Neither our own investigations, nor the factual materials that Mr Karas has exhibited to his submission, have uncovered any positive evidence that the Corporation made the decision to appropriate the bare statutory minimum of land as a PWPGPPRG. Given the public controversies around both the acquisition of the Estate and the sale of Banky Fields, one would expect evidence of such a decision to exist and one would hope it had been preserved.[49]

F. Discussion Part 2 – Interpretation of 1963-1965 legislation

i. Introduction

95. Moving forward in time, the Golf Course – as part of land (the Estate) held under 1914 Act section 5 powers – was transferred to LBM via the amended 1964 Order.

96. The effect of art 32 & Schedule 5 1964 Order and Schedule 5 Part II 1965 Order is that land held under by a transferring authority under a column 2 enactment will be held by the receiving authority under the corresponding enactment in column 3.

97. In our view (which is also the view WPRA took in April 2023), these provisions either continued or created a public trust under s164, 1875 Act in respect of land held by the Wimbledon Corporation under section 5 of the 1914 Act.

98. AELTG reject those views based mainly, it appears, on the arguments made by Mr Karas. His argument, in essence, is that (a) the relevant provisions imposed a trust only on land which was held under section 5 and which had already been appropriated under section 10 of the 1914 Act,[50] and (b) that the Golf Course had not in fact been appropriated under section 10.

99. In our view, the first part of Mr Karas's argument is wrong because he has misinterpreted the relevant provisions: and therefore, the second part of his argument is irrelevant or much less important than he suggests. To show why that is so, we need first to set out some principles of statutory interpretation.

ii. Principles of Statutory Interpretation

100. The guiding mission of statutory interpretation is to determine the objective intention of the legislator as expressed in the language of the legislation, read in its context.[51] "Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered": R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department.[52] The interpreter (usually a court) therefore has to consider the language of the legislation together with all the relevant interpretive factors and, in the light of those, reach a view as to how the legislator intended the enactment in question to apply to the situation before it.

101. The extent to which the meaning of the statutory language will be influenced by any or all of the relevant interpretive factors is a matter of judgment, aided so far as is appropriate by the presumptions and principles of construction which the courts have laid down.[53]

102. However:

- Words or phrases should be given their 'natural', 'ordinary' or 'plain' meaning in the general context of the legislation in question (including its purpose), unless the context, or the consequence of such a construction, indicates otherwise.[54]

- The courts have strongly emphasized the primacy of the natural, ordinary or plain meaning of the text in the enactment at hand: "No amount of purposive interpretation can…entitle the court to disregard the plain and unambiguous terms of the legislation…The only principle of statutory interpretation which might enable the plain meaning of legislation to be circumvented is that it can be given a strained interpretation where that is necessary to avoid absurd or perverse consequences": Shahid v Scottish Ministers.[55]

- The language of the statute will always be central to the task of construction and will provide the best starting point: it is never merely one item to be considered: Williams v Central Bank of Nigeria.[56] On the other hand, the natural meaning of the words "is seldom, if ever, the only factor to take into account": David T

Morrison & Co Ltd v ICL Plastics Ltd.[57] It is necessary to consider the legislation's context (including any admissible external aids to construction) and apparent purpose, along with any applicable presumptions as to parliamentary intention.

103. It is generally presumed that the legislator has used legislative language 'correctly and exactly, and not loosely and inexactly', with a heavy burden on those who would contend otherwise.[58]

104. One important aspect of the context in which legislative words must be construed is the purpose of the legislation, upon which the meaning of the words used may depend: "…the statutory purpose and the general scheme by which it is to be put into effect are of central importance. They represent the context in which individual words are to be understood": Bloomsbury Intl Ltd v Sea Fish Industry Authority.[59]

105. Legislation may have more than one purpose, or its purpose may be to strike a balance between important competing interests. In such a case, it may not be possible or appropriate for a Court to determine whether or to what extent one policy aim ought to trump another in giving effect to the legislation. In Macris v Financial Conduct Authority, Lord Neuberger put it this way: "Because there are powerful policy arguments pointing in opposite directions, it seems to me that it is justified, indeed requisite, to have particular regard to the wording of the relevant statutory provision."[60]

106. It is the Court's task to find the appropriate balance between literal and purposive interpretations. Laws LJ observed of the purposive approach that "…there is a price to be paid in the coin of legal certainty, and in a debasement, however marginal, of the constitutional truth that it is the legislature's will, found from the words of the Act, and not the executive's will, found from the promoter's intentions, that drives the meaning of statute law".[61] The Supreme Court has stated that "…a departure from a literal construction is justified where it is necessary to enable the provision to have the effect which Parliament must have intended": Littlewoods Ltd v Revenue and Customs Comrs.[62]

107. There is a presumption that Parliament intends to act reasonably or does not intend an absurd result:

> *"The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature…the courts give a wide meaning to absurdity in this context, "using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief". The width of the concept is acceptable, since the presumption against absurdity does not apply mechanistically but rather…"[t]he strength of the presumption…depends on the degree to which a particular construction produces an unreasonable result"…the courts have to be careful to ensure that they do not rely on the presumption against absurdity in order to substitute their view of what is reasonable for the policy chosen by the legislature, which may be reasonable in its own estimation"*
>
> R (PACCAR Inc) v Competition Appeal Tribunal[63]

108. Where, having regard to all relevant context, the statutory language leaves no room for a reasonable interpretation, the question to be asked is whether the consequences of the application of the clear statutory words are so absurd that one can see that

Parliament must have made a drafting mistake, which the courts may then be able to correct.[64]

109. The most authoritative statement of the 'corrective' power of interpretation was given in Inco Europe Ltd v First Choice Distribution:

> *It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words...This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation…*[65]

110. This rule applies to secondary as well as primary legislation.[66]

iii. The competing arguments on interpretation

111. The starting point is that Estate – as the 1915 Indenture makes clear - had been acquired and held under section 5 of the 1914 Act. Applying the plain or ordinary meaning of the words "section 5" in Schedule 5 Part II of the 1965 Order, LBM was required to be hold the Estate as if it had been acquired by LBM under section 164 of the Public Health Act 1875.

112. As a part of the Estate, the Golf Course was acquired and held under the same mechanism, and was thus subject to an existing or new section 164 trust.

113. In view of the pre-1965 factual evidence referred to above (para. 94), it is likely in our view that there was thus in effect a continuation of a statutory trust of the Golf Course.

114. But in any event, Schedule 5 Part II of the 1965 Order provided for land held under section 5 of the 1914 Act to be held for the purposes of section 164 of the 1875 Act. Importantly, there was no requirement in the amended 1964 Order that the land must have been appropriated for the purpose of or held as a PWPGPPRG in accordance with sections 9, 10 or 11 of the 1914 Act. Instead, the relevant provisions required only that the land to be held under s164 by LBM should have been held under the most general power in Part II of the 1914 Act, i.e., s5. In effect, this ensured that the whole of the Estate in local government ownership be held as a public walk or pleasure ground under s164, whether or not it had been so held before the transfer date.

115. Mr Karas agrees with this on the basis of what he calls a literal interpretation: "If one views the [1914 Act] in isolation…until 31.03.1965 the Property [i.e. Golf Course land] can be described as "held" under section 5 of the [1914 Act] subject to the provisions of that Act…".[67] Similarly: "…[i]n the absence of other material, it can be said that, read

literally, the 1964 Order as amended by the 1965 Order resulted in the Property being held under section 164 of the Public Health Act 1875 because it was "held" under the [1914 Act] s.5 when the Orders took effect".[68]

116. However, Mr Karas goes on to reject the literal interpretation, instead arguing that "on its true construction, the land described in the amended Schedule to the 1964 Order as held under s.5, and made subject to s.164, is to be identified as the land (1) which was indeed held under s.5 but (2) which had also already been appropriated under [1914 Act] s.10 and deemed under s.11 to be land to which s.164 applied (until that latter section was repealed)" (emphasis added).[69]

117. Mr Karas's reasons for that interpretation concern mainly the statutory purpose of the relevant provisions and what he considers to be "extremely surprising" consequences of the literal interpretation. We will address those arguments in the following sub-sections.

iv. Purpose

118. We disagree with Mr Karas insofar as he suggests that the words "section 5" in Schedule 5 Part II should be interpreted to give effect to a primary purpose of:

- "ensur[ing] the transfer to the new local authorities the duties, functions and property of the previous authorities which were to be superseded";[70] or
- preserving "the status quo…as far as possible."[71]

119. We find no support for those views in the Report of the Royal Commission or the Government White Paper which preceded the 1963 Act.[72]

120. In our view, the purpose of schedule 5 to the 1964 Order, and of the amending/extending Schedule 5 Part II of the 1965 Order, was to update and simplify the multitude of powers conferred by 19th- and early-20th century local legislation, under which recreational grounds and open spaces had been being held by London local government bodies. These lands were often, pre-1964/5, still being held under local Acts, which may have imposed constraints which were outdated, or which would become outdated at the point at which the authorities to which these Acts referred were abolished. [73]

121. One finds a reference to this purpose in section 87(3) of the 1963 Act, which talked about "the purpose of securing uniformity in the law applicable with respect to any matter in different parts of the relevant area [Greater London], or in the relevant area or any part thereof and other parts of England and Wales".

122. The purpose and effect of article 32 (1964 Order) and schedule(s) 5 (1964 and 1965 Orders) was therefore to appropriate the relevant recreational grounds and open spaces so that going forwards they would be held under and for the purposes of national legislation. [74]

123. We therefore regard Schedule 5 of the 1964 Order and Schedule 5 Part II of the 1965 Order as part of a complex law reform project. Regarded in that way, there can be no assumption that the purpose was to preserve the status quo or merely to reproduce the effect of the old local Acts.

124. The 'law reform project', as we have called it, was scheduled to complete on 1 April 1965, when (under s3(1) of the 1963 Act) most of the existing London boroughs, councils and corporations would cease to exist. This date is referred to many times in the 1963 Act, including in sections 84 and 87. It is also referred to in art 32 of the 1964

Order, which contemplates extensions of Schedule 5 "contained in any further order…made before 1st April 1965". As we have already said, Schedule 5 Part II of the 1965 Order, which extended Schedule 5 of the 1964 Order, came into force on 31 March 1965, the day before.

125. As to complexity:

- We note that the relevant Schedules refer to 41 old local Acts – 35 in the 1964 Order, 6 in the 1965 Order.
- On 1 April 1965, seven "Local Law" Orders came into force which repealed and modified parts of the local Acts under which local government in the new Greater London Area had been conducted. [75] The Local Law (South West London Boroughs) Order 1965 repealed most of the 1914 Act: we will comment on the parts of the 1914 Act saved below.

126. The Minister of Housing and Local Government's self-evident general purpose (in enacting and extending Schedule 5 of the 1964 Order, and in enacting the Local Law Order repeals) was, as we have said above, to update and simplify a multitude of powers concerning recreational grounds and open spaces, to secure uniformity in the law across London or between London councils and councils outside London. The main tool used was to reduce the number of pieces of applicable legislation, and (in all but three cases, one of which is the Estate and the 1914 Act) apply the Open Spaces Act 1906. If there was a more specific scheme or logic, the Minister has not clearly or expressly indicated what it was.[76]

127. On that basis, the legislative purpose does not compel the interpretation that Mr Karas has argued for. On contrary, the Minister should be presumed to have intended to change the substance of the old Acts. Had preserving the status quo as far as possible been his intent, he would have devised a different legislative scheme – one which re-enacted and consolidated the old Acts which were in fact repealed by the Local Law Orders. "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life": R (Quintavalle) v Secretary of State for Health.[77] And, as Mr Karas accepts, in the case of the 1914 Act itself, "a complete replication of the status quo" was not achieved.[78]

v. Other Context

128. We agree with Mr Karas that, in interpreting Schedule 5 Part II of the 1965 Order, it is appropriate to refer to the sections of the 1963 Act under which the 1964 and 1965 Orders were made, i.e. the primary legislation which authorised the Minister to make the relevant secondary legislation. However, we do not agree with his reading or interpretation of those sections.

129. Section 84(1)(a) and (2)(a) together provide that the Minister may make "such incidental, consequential, transitional or supplementary provision as may appear to him…to be necessary or proper for the general or any particular purposes of this Act or in consequence of any of the provisions thereof or for giving full effect thereto" and that "such order may in particular include provision…with respect to the transfer and management or custody of property (whether real or personal)".

130. Likewise, section 87(2) provided that an order made under section 84 may "make such modifications of any Greater London statutory provision in its application to any part of [Greater London] as appears…to be expedient" (para (c)) and "extend any such provision,

with or without further modifications, to a part of the relevant area to which it did not previously extend" (para (d)). Under section 84(8)(a) and (9), "Greater London statutory provision" includes the 1914 Act.[79]

131. As Mr Karas implicitly accepts, these provisions, individually or collectively, are or may be wide enough to include even an appropriation of land to s.164 or open space purposes which had never previously been appropriated or laid out for those or similar purposes.[80]

132. As part of the context against which the relevant provisions are to be interpreted, it is appropriate also to refer to other drafting choices made in Schedule 5 1964 Order. In the second column is a reference to "The London Parks and Works Act 1887 save in so far as it relates to Victoria Park and Westminster Bridge" (emphasis added). In other words, the draftsmen have in this case excluded land by name. In the case of "The London Council (General Powers) Act 1890, Section 8 and Parts I to IV of Schedule A" the draftsmen have excluded land or buildings by type: "…save in so far as they relate to the provision of a public museum or museums". The draftsmen of the 1965 Order did not do either of these things in the case of the 1914 Act, e.g. by saying "save in so far as it relates to…", for example, "the Wimbledon Park Golf Course" or "any golf course".

133. Finally, there is the part-repeal, part-saving on 1 April 1965 of the 1914 Act. Under the Local Law (South West London Boroughs) Order 1965 (art. 6(1) and Schedule 4, Part I), most of the 1914 Act was repealed – but, among other provisions, section 8 of the 1914 Act (the provision concerning a municipal golf course) was preserved. One should therefore presume that the draftsmen of Schedule 5 Part II of the 1965 Order and the Minister had golf in mind when dealing with the Estate. The preservation of the section 8 powers to operate a municipal golf course is also entirely consistent with the continuation or imposition of a statutory trust over the Golf Course.

vi. "Contemporaneous factual matters"

134. Mr Karas's arguments raise a question as to whether it is legitimate to refer to "contemporaneous factual matters" as an aid to interpreting the relevant provisions, e.g. in order to 'deduce' "the identity of the land which the draftsman described as "held" for the purposes of section 5 of the [1914 Act]".[81] It appears that purely private matters are in his view at least potentially admissible aids to construction: e.g. the " "land "terrier" kept by the Wimbledon Corporation in 1965", and "communications which presumably took place between the Corporation and the Ministry for Housing and Local Government".[82]

135. We disagree with Mr Karas's view. As a matter of principle, the only material which should be referred to as an external aid is that which is in the public domain and "of clear potential relevance to the issue of interpretation of a legislative instrument": Bogdanic v Secretary of State for the Home Department.[83] These limitations reflect important constitutional principles. It is the legislation alone which represents the law, which the court is required to interpret: and the law must be accessible to those expected to comply with it.

136. In the case of an Order made in 1965, it would be extremely difficult to recreate what materials would at the time have been accessible to the public: and it would be idle to speculate what one should require the reasonable reader of the 1965 Order to have reviewed to be able to understand what a reference to 'held under section 5 of the 1914 Act' meant.

137. At a practical level (and as Mr Karas concedes), one simply does not know what information was practically available to the Local Government Ministry draftsmen, nor

is it possible or permissible to speculate about the extent of their review of that information prior to drafting the Orders. The draftsmen should be presumed to have read and understood the whole of each local Act "specified in columns (1) and (2) of Schedule 5", but these are *legal* not factual matters.

vii. 1961 Lease

138. Mr Karas argues that the Wimbledon Corporation "did not "hold" [within the meaning of art. 32, 1964 Order] the [Golf Course] while the lease endured. Rather, while the [1961 Lease] endured and the Golf Club was entitled to possession, the Property was "held" by the Golf Club".[84] He argues that if "the intention was to change the status of the [Golf Course], one would have expected clear provision to be made for how this change was intended to affect third party rights" under the 1961 Lease.[85] He also argues that the Orders do not provide "for how the provisions of s.164 were intended to interact with the extant lease entitling the lessee Golf Club to use the Property as a private golf course".[86]

139. Mr Karas accepts that the Wimbledon Corporation was the freeholder: the first of his three points therefore amounts to a suggestion that the relevant provisions are talking about the 'holding' of an interest in possession (such as WPGC's interest under the 1961 Lease) and that a reversionary interest (such as Wimbledon Corporation's reversion) is irrelevant. This is a bizarre suggestion, without any support at all in the 1963 Act or the 1964 or 1965 Orders.

140. The second and third of Mr Karas's three points overlook art 35(a) of the 1964 Order, which provides that (subject to certain articles of the Order which are irrelevant here) the provision made by (among others) article 32 *"is without prejudice to…any agreement…as to the use of any property transferred by the Act or this order"*. The effect in this case is that the 1961 Lease was to take precedence over the appropriation of demised land previously held under the 1914 Act, not vice versa.[87]

141. Mr Karas also overlooks the principle that the actual knowledge of the Minister or his legal team (even if there were evidence of that, which there isn't) cannot inform the interpretation of the relevant provisions. As a practical matter, the Local Government Ministry was arranging the transfer of land held by 47 local government entities listed in Schedule 4 of the 1964 Order and had to consider the powers under 41 local Acts listed in Schedule 5 as extended: it is therefore unlikely that the Ministry would have concerned itself with private agreements, particularly when it would have been expecting to enact a provision like art. 35(a) which would make such inquiries unnecessary.

viii. Financial consequences

142. Mr Karas refers to the absence of evidence that consideration was given to the financial consequences of having to maintain the Golf Course (a "very substantial area") for recreational purposes, where (on his case) it had not been used for those purposes before.[88]

143. We doubt that an absence of such evidence could be relevant to the interpretation of the relevant provisions. However, the more important point is that there are no financial consequences which require the presumption against absurdity (as described in the PACAAR case) to be applied. The Minister enacted art 35(a) of the 1964 Order, by which it was put beyond doubt that LBM would continue to enjoy the income from any existing leases of land previously held under section 5 of the 1914 Act. Objectively, the Minister must have known that for any land held under section 5 which was not already being used by agreement, LBM would be bearing upkeep costs anyway.[89] And the future costs of discharging obligations under s164 of the 1875 Act in respect of the Golf Course are

not (as we will show in sub-section G below) inevitably so great that it must be unlikely that the Minister would have meant to charge LBM with them.

ix. Reasons for Imposing any New Trust

144. Neither we nor All England's advisors have been able to determine, safely, whether the Golf Course had in fact been appropriated for public purposes prior to 1965.

145. Where All England's interpretation of the relevant provisions depends on the notion that, as a matter of fact, the Golf Course had not been so appropriated, it is for All England to prove the factual issue or abandon its interpretation.

146. Mr Karas says he cannot see why the Local Government Minister would have substantially extended "the rights of the public…in respect of the Estate as part of the reorganisation of local government".[90]

147. If (without prejudice to what we have said at para. 145) one assumes that that is the effect of what the Minister did, and that he was clear that that would be the effect, the justification is not, in our view, hard to imagine. The Minister would have been perfectly entitled to take the view that the Wimbledon Corporation had expressly been empowered to acquire the Estate for "public and local advantage", that a large sum of public money (£65,500) had been spent on the acquisition, and that the Corporation had been permitted to borrow large amounts to finance the acquisition. If, by 1965, the Corporation had not permanently appropriated the Golf Course to public use, but was simply letting matters drift on, renewing the Golf Club's lease as and when it needed to do so, then the Minister might well take the view that post-1965, if and when the determination of the lease happened, it would then be time for the Golf Course to be permanently appropriated to public use, and time that the Golf Course's indeterminate, temporary or indefinite status should come to an end.

148. If, with or without making factual assumptions about the pre-1965 position, one poses the question 'why would the draftsmen of Schedule 5, Part II 1965 Order have selected a reference to section 5 (the power to acquire the Estate and the duty to hold what was acquired), and not section 9 (the power to temporarily use part of the Estate as a PWPGPPRG) or section 10 (the obligation to appropriate a minimum amount of the Estate as a PWPGPPRG)', the available answers, in our view, are as follows:

- The choice is logical. Section 5 in terms required the Corporation to hold land. Sections 9 and 10, being concerned respectively with use and appropriation of land, did not.
- The draftsmen had in mind the issue of 'public and local advantage'.
- Art. 35 of the 1964 Order protected any existing commercial arrangements involving the Wimbledon Corporation's use of the Estate;
- The Wimbledon Corporation would have had an opportunity to make representations to the Ministry before Schedule 5, Part II of the 1965 Order was enacted: had there been compelling reasons not to refer to section 5, it seems likely the Corporation would have raised them and (if they did) the Local Government Ministry must have rejected them.

x. Practice prior to 1965

149. Mr Karas argues that it should be presumed that, in creating the relevant provisions, the Minister would not "subvert the practice which had in fact been consistently adopted under the [1914 Act]" of treating the Golf Course as private space.[91]

150. This argument, and the factual conclusions on which it appears to rest, need to be treated with considerable caution. Mr Karas states, entirely properly, that he and CMS do not have the "documents constituting or directly demonstrating the appropriation of parts of the Estate under [the 1914 Act] sections 10 and 11".[92] We have not yet asked LBM for disclosure on this point, and Mr Karas does not indicate that CMS have asked for or been provided disclosure by LBM. Accordingly, Mr Karas's and Mr Harris's factual conclusions (respectively, that by the early 1960s, the Golf Course had not been appropriated to public use, and that "[a]t no stage at all did the Corporation identify the Property as public walk, pleasure ground, public park or recreation ground") are premature and unsafe.[93]

151. We refer to what we have said about the possibilities of pre-1965 public use or appropriation at para. 94 above. We ask LBM as a planning authority (and as the most likely body in possession or control of remaining records) to carry out a proper investigation before drawing any factual conclusions.

152. As we have also already said, the main purpose of the relevant provisions was not the preservation of the status quo (whatever that may have been). Nor can it be assumed that the Minister knew what the "status quo" was, i.e. the historical and contemporaneous use of the Golf Course. What can be said is that the Minister knew that, whatever the 'practice' may have been in the past, ultimate ownership vested in the freeholders, the Corporation, and that possession would revert back to them when any leases or licenses came to an end.

153. Mr Karas's related point is that it should be presumed that the 1965 Order did not "subvert...the intention of the [1914 Act]".[94] We refer to what we have said at para. 147 above: one might say it follows that the relevant provisions took decision-making power about future potential use of the Golf Course out of local government hands and gave it to central government. Mr Harris picks up this point, when he rejects the notion that the relevant provisions could have been intended to "subvert the wide discretion given to (and exercised by) the local authority to choose which parts of the Estate would in fact be the subject of [a statutory] trust and which would not by the primary legislation".[95]

154. However, central government had always had the right to overrule the Corporation and LBM, or to be the primary decision-maker about use of the Estate: see, e.g., the analysis by the Supreme Court in Day v Shropshire of the statutory history that "*apparently broad powers [of local government] to deal with land have been hedged about with conditions and requirements, in particular for Ministerial consent*", the Local Government Act 1933 reforms (referred to at para. 88 above), and (even before the passing of the 1914 Act) Wimbledon Corporation's desire for future central government oversight of the Estate (quoted at para. 29 above). [96] So the Minister, legislating in 1965, would not have regarded himself as doing anything which might be considered constitutionally improper. Nor is there any presumption against an interpretation of the relevant provisions which would reduce the Corporation's or LBM's rights in the land or its 'discretion'.[97]

155. Mr Harris suggests that such a removal of local government choice would be "inconceivable". [98] That is an overstatement. Precedent would not be a reliable guide to

the unique reforms enacted by and under the 1963 Act, and it is noteworthy that Mr Harris does not claim that this kind of legislating would be unprecedented.

xi. Addition of words to Schedule 5, Part II 1965 Order

156. Although he does not admit it, Mr Karas's interpretation clearly adds words to Schedule 5 Part II of the 1965 Order that the draftsmen have not used. His argument, as we have said, is that land held under section 5 of the 1914 Act was not appropriated to s164 of the 1875 Act unless the land had also already been held under section 10 of the 1914 Act. In other words, he reads the relevant column 2 reference as "sections 5 and 10".

157. Mr Karas has not addressed the stringent requirements (see the quotation from the Inco Europe case at para. 109 above) for adding words to legislation: however, they are not satisfied in this case:

- As we have already discussed, it is not 'abundantly clear' that the intended purpose of the provisions in question was maintenance of the status quo.
- Nor as a matter of fact is it clear what the status quo was as at 31 March 1965, nor what the draftsmen understood the status quo to be.
- Nor is it abundantly clear that the draftsmen have accidentally omitted to refer to section 10. As we have already indicated (see para. 148 above), there may have been several good reasons for such omission: in any event, the omission of a reference to section 10 does not lead to any absurd or perverse outcome (nor, as Mr Karas argues, an 'extremely surprising' outcome). In our view, there is no reason to disapply the interpretive presumption that the Minister has chosen his words carefully and precisely.
- We would add that if LBM considered that there was a mistake in the drafting, it has had nearly 60 years to ask the relevant Minister of Secretary of State to enact a correction to the 1965 Order.[99] No such order has been passed, and there is no evidence in Mr Karas's enclosures or of which we are aware that LBM ever took such a step. On the contrary, LBM granted beneficial occupation to the public when the 1961 Lease came to an end (see further, sub-section G below)
- Finally, the substance of the provision the Minister would have made, if the putative error in the draft 1965 Order had been noticed, is not abundantly clear. In this regard, Mr Karas's main reason for seeking to add to the existing statutory wording appears to be that:

> *Section 11 is a deeming provision: it requires land appropriated under s.10 to be treated as if it was acquired under s.164, even though it was not. This deeming would not survive the intended repeal of ss.10 and 11 of the [1914 Act], and therefore express provision was necessary to extend s.164 to those parts of the Estate previously appropriated for such purposes*.[100]

Yet the same could be true of land temporarily used under section 9(1) of the 1914 Act as a PWPGPPRG, deemed under section 9(2) "to be public walks or pleasure grounds within the meaning of the Public Health Acts", and held under section 5. We infer from his omission to mention section 9 that Mr Karas thinks that when the draftsmen referred to land held section 5, they intended to exclude land so held which was temporarily used under section 9(1). It is not for us to explain why he thinks that (if he does). We raise this merely to illustrate the difficulties of identifying

(on Mr Karas's view of matters) what other sections of the 1914 Act column 2 should be deemed to be referring to.

xii. Conclusions

158. Drawing together the various points of discussion above, we summarise our conclusions about what we regard as the correct interpretation of the relevant provisions (and against Mr Karas's interpretation).

159. The ordinary meaning of the words 'held under section 5 of the 1914 Act' in Schedule 5 Part II of the 1965 Order is clear, and there are no interpretive factors which displace the primacy of the ordinary meaning or the presumption that the Minister was being precise when he used those words.

160. The main purpose of article 32 of the 1964 Order and the associated Schedules was to update and simplify a multitude of old statutory powers concerning recreational grounds and open spaces, and to impose a measure of uniformity. In giving effect to that purpose, the Minister should be presumed to have intended to change the substance of the old laws, not to preserve the status quo as far as possible (because the legislature did not enact any consolidating legislation).

161. Schedule 5 Part II of the 1965 Order achieves the main purpose: it is not necessary to read the words "section 5" in the way Mr Karas does to achieve that purpose.

162. The powers conferred on the Minister to make the 1964 and 1965 Orders are wide enough to include even an order appropriating land to s.164 or open space purposes which had never previously been appropriated or laid out for those or similar purposes.

163. The ordinary meaning of the relevant provisions does not produce unreasonable results or require application of the presumption against absurdity because:

- By article 35(a) of the 1964 Order (or in any event), the 1961 Lease took precedence over the 1965 Order's appropriation of the land previously held under the 1914 Act, not vice versa;
- Both the actual and the objectively foreseeable financial consequences of the s164 trust were not so great that it must be unlikely that the Minister would have meant to burden LBM with them.

164. Under the 1914 Act the Wimbledon Corporation had expressly been empowered to acquire the Estate for "public and local advantage", a large sum of public money (£65,500) had been spent on the acquisition, and the Corporation had been permitted to borrow large amounts to finance the acquisition. The likeliest explanation, in our view, as to why the draftsmen of section 5 Part II 1965 Order selected a reference to section 5 of the 1914 Act, and not sections 9 and/or 10, is that that selection struck an appropriate balance between 'public and local advantage' on one hand and the interests of LBM on the other, where any existing commercial arrangements involving the Wimbledon Corporation's use of the Estate (including the 1961 Lease) would be protected by art 35(a) of the 1964 Order.

165. Where legislation strikes a balance between competing interests, one ought always (as suggested in Macris) to stick closely to the statutory wording. One would do that anyway in the present case, since the ordinary meaning of the relevant provisions is clear.

166. Mr Karas's interpretation of the relevant provisions clearly adds words to Schedule 5 Part II of the 1965 Order that the draftsmen did not use. The strict requirements in Inco Europe for

adding words to legislation are not satisfied in this case. Consequently, Mr Karas's argument on interpretation (and also that of Mr Harris, so far as there is any material difference) would be rejected by a Court and should be rejected by the planning authorities.

G. Discussion Part 3—Post-1965

167. Jumping forward in time again, the 1986 Lease was the first new lease of the Golf Course granted after the local government re-organisation. The generous public benefits in schedule 2 of the 1986 Lease (see para. 73 above) are consistent with LBM's obligations as s164 trustee to use the land for public recreation.

168. In Muir v Wandsworth, the Court suggested that to qualify as a "facility for public recreation", a "*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*".[101]

169. Broadly speaking, the public's rights under a statutory trust consist of rights to use the land in question for the purposes for which it is held by the local authority ("*public walks or pleasure grounds"*). In relation to parks, the Courts have held that the local authority was "bound to admit to it any citizen who wishes to enter [the park] within the times when it is open" and not to "interfere with any person in the park".[102] In another case, the Court emphasised that a visitor to trust land was there "not merely as a licensee but as of right",[103] i.e., had a right to gain access.[104]

170. We submit that the public rights under the 1986 Lease fulfil the criteria set out in Muir v Wandsworth (except that members of the public who were not resident in Merton had no rights), and that the Golf Course can be seen as having been a 'public walk or pleasure ground' from May 1986.

171. Just as there would have been no legal doubt in 1914 that golf was a recreational activity (see para. 83 above), so there would be no doubt in 1986.[105]

172. The provisions of Schedule 2 to the 1986 Lease clearly benefited the residents of Merton. Golf on the Golf Course was made sufficiently open or available to the public that it was a public benefit. There is no question that the public had rights of access (i.e. deriving from LBM's grant of the 1986 Lease and not from any revocable permission from WPGC as tenant), and that therefore the Club was not the exclusive occupier of the Golf Course. Schedule 2 makes that clear.[106]

173. Indeed, the 1986 Lease reserved special access rights to residents of Merton and to schools – in that they could use the Course without being members or being required to pay membership fees. Residents also benefited from concessionary (discounted) usage or 'green' fees. The fact that non-member residents would get a better deal on green fees than members is remarkable.

174. Furthermore, the entrances to the Course, in a relatively densely populated area of Greater London, were easily accessible by foot, cycle and motor vehicle.

175. The public can still have beneficial occupation of the space for s164 purposes, notwithstanding the existence of conditions on public access.[107] It is a question of fact and degree: there is no 'hard and fast' rule as to when the space can no longer properly be called public. [108]

176. Here, the terms on which non-members were entitled to use the Course were not prohibitive or restrictive: on the contrary, it is fair to say that objectively they appear designed to encourage public use, and to benefit local education.

177. There were also priority membership rules: 75% of members should be living or having business interests within Merton, and ratepayers within Merton were to be given priority over other applicants. From the Club's perspective, no doubt these were designed to ensure it remained a 'local' club. From the public's perspective, it gave them enhanced opportunities to acquire all the rights of a member of the Club (subject to paying joining and membership fees).

178. In the present case, the public (the residents, ratepayers, and local schools of Merton) can properly be regarded as having been beneficial occupiers or users of the Course under the 1986 Lease.

179. When granting the 1986 Lease, LBM required the Golf Club (and the Golf Club agreed) to 'make available' golfing facilities to residents of Merton and local schools (without requiring membership) and to provide priority membership opportunities to residents, local businesses, and ratepayers. In so doing, LBM as freeholder and statutory trustee in effect reserved the right of beneficial occupation to its residents, subject to the conditions of Schedule 2 and the right of the Club to make rules about visitors' use of the Course.

180. Had it not acted in this way, LBM could have chosen to organise and provide a municipal golf course itself, or to have changed the use of the land altogether and laid it out for other purposes.

181. Notwithstanding that land has been let by a local authority to a private body, land can still be public in character and thus capable of providing the public with the benefits afforded by s164 of the 1875 Act or similar legislation.[109] Allowing WPGC to operate a private members club in the same space (but without excluding the public) was consistent with the duty to provide for recreation for the public and was ancillary to the management of the Golf Couse.[110]

182. The Golf Club was not run with a view to returning profit to its members.[111] It is fair to acknowledge that the Club did participate in paid commercial activities during Wimbledon fortnight, namely car parking. This was an unusual – but limited i.e. brief – feature in the context of management of a public recreational space. If car parking resulted in the temporary exclusion of the public (and members) from parts of the Golf Course, it may be justifiable on the basis that the benefit of the parking revenues was enjoyed by the public, both directly (in the form of a subsidy which allowed the Club to keep green fees down) and indirectly (as the revenue was shared with LBM under Schedule 1 and contributed to the finances of the Borough).

183. In conclusion, the arrangements between May 1986 and December 1993 appear to have provided the public with '*public walks or pleasure grounds*' under s164 of the 1875 Act, or something close to that.

184. As to Mr Karas's discussion of the 1986 Lease:

- His argument is internally inconsistent: he recognises beneficial occupation of the public as an aspect of s164 rights or privileges; yet he goes on to say that Schedule 2 "…seems to me to have fallen far short of allowing the public access to the land as a matter of right" (emphasis added). He does not explain what he means by that.[112]

- He limits himself to saying that WPGC "was only required to allow use of the course to those who complied with the Club's rules, and who paid 50% of the Club's green fee" (ibid).
- He does not say what those rules were (and they do not appear in the enclosures to his submission). And of course it is perfectly common for recreation grounds such as public parks or municipal sports fields to be subject to rules or byelaws – indeed s164 of the 1875 Act itself expressly authorises the making of byelaws.
- He fails to mention what the green fees were at any point during the term of the 1986 Lease (notwithstanding CMS, instructing him, act for WPGC's parent company and should have access to the records). In fact, the rate for non-member Merton residents was £30 (£60 for members) in 2022.[113]
- Mr Karas also fails to give any consideration to the fact that Merton residents have been exempt from joining and membership fees thanks to the 1986 Lease. We understand from a former Golf Club member that around 1986, the joining fee was about £500 and annual subscription was the same. By 2019, the annual subscription was £1750.[114]

185. Mr Harris's assertion that "[t]he public has had no rights of recreation over the Property" is inconsistent even with Mr Karas's limited recognition of Schedule 2 to the 1986 Lease and is unsustainable on any fair reading of the 1986 Lease.[115]

186. Returning to the sale of the freehold (covered in detail in section 2 above), LBM reached diametrically opposed conclusions in 1993 about whether the Golf Course was "open space" (as can be seen from paras. 14, 16 and 24 above). It finally came down on the affirmative side - the Golf Course <u>was</u> an open space - when (see para. 76 above) it required AELTG to agree not to use the land otherwise than as an open space. The planning status of the Golf Course (as 'Metropolitan Open Land') played a part in these decisions: but at very least LBM failed to take proper legal advice before it disposed of the freehold.

H. <u>Discussion Part 4 – Further Comment on Mr Karas's and Mr Harris's legal submissions</u>

187. In the Executive Summary (section I above), we invited the local planning authorities to treat Mr Karas's legal submission with a great deal of caution. Having responded to the substance of his submissions, we now explain why we said that. It is not merely because his main conclusions are wrong.

188. **First,** Mr Karas is not an independent advisor to the planning authorities. He was instructed by CMS, a law firm acting for AELTG in a planning dispute with WPRA. No weight should be attached the purported view of Mr Karas, in the absence of disclosure of all instructions to him and comments on drafts of the document by CMS. Such disclosure would be particularly important where he has prepared a document entitled "opinion" apparently in contemplation of publication - whereas such documents normally are kept confidential and (if there is a dispute) may be expected, unlike Mr Karas's submission, to advise the client of the risk of a legal tribunal or decision-maker taking a view differing from those of the advisor.

189. **Second**, Mr Karas's factual conclusions are based on the evidence provided to him by CMS. He has not conducted an independent inquiry, nor does he have powers to obtain documents or testimony. CMS's first duty is to its client, AELTG. It has no duty to provide Mr Karas with all relevant factual materials in its possession, or to undertake reasonable searches to find such materials.

190. **Third,** we are concerned that CMS have a conflict of interest, which could affect the way in which they instructed a barrister and the materials they supplied to him with his instructions. CMS were legal advisors to AELTG on its £65m acquisition of WPGC in 2018. No mention of a trust was made in the offer made to WPGC members, nor in the documents filed at court in connection with the takeover by way of scheme of arrangement (copies of which we have seen). If CMS omitted to advise AELTG at least of the possibility of the existence of a statutory trust over the Golf Course, then AELTG may have a claim against them. In such circumstances, CMS would have a clear reason to seek to persuade their client and the planning authorities that there was no such trust, and to try to get other legal advisors like Mr Karas and Mr Harris to support such a view.

4. CURRENT SITUATION

A. Planning Application

191. AELTG has set out its plans to develop the land on which the Golf Course is based. However, that planning application ought to be rejected on account of the statutory public trust.

192. The decision in Day v Shropshire confirmed that the presence of a statutory public trust will be a 'material consideration' for the purposes of planning (see the judgment at para.114). We would go further and argue that where permission for development, if implemented, would override the public's rights under a statutory public trust, a planning authority exercising its discretion under the 1990 Act must give that factor decisive weight. The principle was neatly summarised in Attorney General v Sunderland Corporation: "*buildings which are intended for purposes not connected with public walks or pleasure-grounds are plainly unlawful*".[116]

193. Fundamentally, AELTG is seeking to develop the site to establish, consolidate or protect the position of the Wimbledon Tennis Championships as the pre-eminent sporting and commercial event of the ATP tour.[117] Tennis is like golf a recreational activity, but running a professional tennis competition for paying spectators and television broadcasting is incompatible with AELTG's duties under the statutory public trust.

194. AELTG argues the developed site will have several public benefits (see, e.g., Planning Statement para. 7.2.31, and Planning Addendum, paras. 4.5.110 - 4.5.137). However, only the proposal to develop a new park is even capable of meeting the public's right to enjoy the land.

195. AELTG proposes to retain the freehold in the proposed park and to grant permission (which it could revoke) for the public to enter, rather than gifting it back to LBM or otherwise securing the public's right to the park in perpetuity.[118] That proposal if realised would also be inconsistent with its obligations as trustee. The whole point of the statutory trust is that it confers a right to enjoyment of the trust land: the public's enjoyment is irrevocable and is not dispensed by the local authority as a favour, gift, or matter of goodwill (as discussed at para. 169 above).

196. AELTG's description of the Golf Club as a private members club is wrong, for the reasons given above.[119] Rather than generate 30% more public open space (as alleged at para. 7.4.62 of the Planning Statement), the plan to develop the site instead decreases the amount of previously available public open space by 70%.

197. In conclusion, the community benefits outlined in AELTG's planning statement and planning addendum would not discharge AELTG's duties under the statutory public trust – indeed, they were never intended to discharge those duties, since AELTG made its application not knowing of or disregarding the existence of the trust. And AELTG still denies the existence of the trust.

B. Breach of trust

198. Consistent with its obligations as statutory trustee, AELTG must permit public recreational activity to return to the Golf Course. Currently, the public is being deprived of any kind of beneficial occupation of land held in trust for them.

199. Ultimately, legal action to enforce the trust obligations would be available if this were to continue: either at the suit or with the consent of the Attorney General (who is the

guardian of the public interest in the administration of public trusts) or in limited circumstances at the suit of a private individual or body even without the Attorney General's consent.[120] Counsel for WPRA, Mr George Laurence KC, has expressed the view: "If [the public] sought a mandatory injunction requiring the AELTC to remove the locks, open the gates and let them in, the court would in my opinion grant it".[121] Be that as it may, we would like to see interested parties reach a solution without resort to litigation.

5. THE WAY FORWARD

200. The obvious solution – at least in the interim – would be for AELTG to allow LBM to manage the Golf Course as an extension of the municipal park. The cost should be manageable and the burden on LBM's parks team (which already manages the public park) would not be excessive. In any case, the work could be subcontracted if necessary. No major works would be needed to the Golf Course to convert it to this use, and the benefit to the public from access to a substantially greater open space would be considerable.

201. AELTG is entitled to the purchaser protection in s128(2)(a) of the 1972 Act. This effectively prevents the sale from being invalid or ineffective. It should be deemed to have known the risks of the deal it did in 1993: it agreed to limit its enquiries about LBM's rights under s. 123, 1972 Act, as shown at para. 78 above.

202. Ultimately, a negotiated outcome is the least costly option to resolve the impasse. That is principally a matter for LBM and AELTG as the parties to the 1993 sale. However, the residents of Merton and Wandsworth ought to be kept informed and consulted as to developments in any negotiation, and LBM will need to consider public views as well as considerations of cost during the process.

203. Day v Shropshire is a cautionary tale. Having lost in the Supreme Court, Shropshire Council is currently in negotiations with the developers who bought the statutory trust land to buy it back. The council leader says there is "quite a lot of public money at stake".[122] A similar situation arising over what was clearly a mistake by LBM in 1993 is obviously undesirable for both AELTG, LBM, and the residents of Merton and Wandsworth.

204. The capital expenditure on the freehold is not the only issue. AELTG paid about £65 million to Golf Club members in 2018 to acquire the Golf Club, as a means of acquiring control of the 1986 Lease. AELTG had independent legal and financial advice on that transaction: it should again be deemed to have known the risks.[123]

205. AELTG has the right to use the Golf Course as such, subject to the terms of the 1986 Lease: but that is unlikely to be practicable, now that the membership of the Golf Club has dispersed and joined other clubs.

206. AELTG can also use the Golf Course land under such other arrangements as will satisfy the public's rights under the statutory public trust. An obvious proposal would be public facilities for tennis: but tennis courts will require building on the landscape and may not be acceptable from a heritage preservation perspective (and for other planning reasons). On any view, tennis courts will require substantial planning permission which would be likely to attract its own controversies, given the mood created by the existing planning applications.

207. We emphasise the need for LBM and AELTG to work together with the local community, and to come up with imaginative, innovative solutions that will be sustainable long-term within existing and projected funding for maintenance of the space for public purposes.[124]

208. We will shortly be publishing our Vision for Capability Brown's Wimbledon Park with Full Public Access, based on updated plans that we are currently discussing. We will be

inviting LBM, All England, The Wimbledon Club and local community groups to join us to discuss and implement these proposals in due course.

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[1] Wimbledon Park Residents' Association, 'AELTC application to develop Wimbledon Park Golf Course Merton 21/P2900, Wandsworth 2021/3609' (12 April 2023) ('**WPRA Submission 12 April 2023'**), appendix VII, 23, para.2.2.
[2] Ibid, 24, para.4.4.
[3] See WPRA Submission 12 April 2023, paras.6.18-6.24.
[4] Until the passing of the Local Government, Planning and Land Act 1980, a local authority could not appropriate or dispose of any open space without the consent of the Secretary of State and he could require a public inquiry if, following advertisements, there was any objection, see Select Committee on Environment, Transport and Regional Affairs, 'Memorandum by The Open Spaces Society (TCP 19)' April 1999 <https://publications.parliament.uk/pa/cm199899/cmselect/cmenvtra/477/477mem23.htm> ('**Open Society Memo**'), para.6.5. See also R (Day) v Shropshire Council [2023] UKSC 8 ("**Day SC**"), [109].
[5] Ibid, Day SC
[6] See e.g. R. (Glosby) v Lambeth London Borough Council [2001] EWCA Admin 680; [2002] P.L.C.R. 15, [13]-[15]
[7] (1987) 19 H.L.R. 328, 339 per Neill LJ. We are grateful to George Laurence KC, instructed on behalf of WPRA, for drawing this case to our attention.
[8] Enclosure 58 to Mr Karas's "Opinion" dated 23 June 2023 ("**Karas**"), 651. We reserve our right to comment on any parts of Karas or its enclosures which we have not addressed at this time.
[9] Ibid, 653
[10] Ibid, 652
[11] Quoted in Wimbledon Society submission to LBM, 13 August 2022, p4
[12] Although the statutory wording is different under TCPA, s336(1) ("land laid out as a public garden, or used for the purposes of public recreation") from that under s164 of the 1875 Act ("lands for the purpose of being used as public walks or pleasure grounds"), it is in our view necessarily implicit that any land held or required to be held for s164 purposes must qualify as 'open space' within the meaning of s123(2A) of the 1972 Act.
[13] Minutes of Evidence, House of Commons Committee on Local Government, 23 July 1914 ("**Commons Committee Minutes**") (Annex 20 to Karas), p7
[14] Day SC, [91] (Lady Rose JSC)
[15] Ibid, [110]
[16] See e.g., Bernard Rondeau, *Wimbledon Park: From Private Park to Residential Suburb* (self-published, 1995) ('**Rondeau 1995**').
[17] See, e.g., A. Noble & M. Noble, 'Wimbledon Golf Club Centenary Brochure' (1998, Carrera Litho Ltd) ('**Centenary Brochure**'), 4-5; London Borough of Merton, Wimbledon North Conservation Area: A Character Assessment – Sub Area 2: Wimbledon Park (November 2006) ('**Wimbledon North Conservation Area report**'), paras.12.11.1-12.11.12.
[18] See, e.g., Centenary Brochure, 4-5; Wimbledon North Conservation Area report, paras.12.11.14-12.11.16.
[19] Rondeau 1995, 77; Centenary Brochure, 7. We note Annex 8 to Karas – a lease dated 6 January 1905, for six years; and annex 9A – a lease dated 9 April 1906, for ten years.
[20] Annex 11A to Karas. See also Centenary Brochure, 7; and the 1915 Indenture, held at HM Land Registry under title no: TGL95509, Schedule 1.
[21] Rondeau 1995, 82.
[22] See Commons Committee Minutes, remarks of leading counsel for the Wimbledon Corporation, p5
[23] Commons Committee Minutes, p19
[24] See Wimbledon North Conservation Area report, paras.12.11.20.
[25] London Gazette, 6 Oct 1922, 7072.
[26] Karas, 71a
[27] Rondeau 1995, 76, citing The Wimbledon News, 9 January 1925.
[28] Centenary Brochure, 8.
[29] *Dashwood v Wimbledon Corporation* 93 JPN 403, 418-419
[30] See, e.g., Centenary Brochure, 20.
[31] See Wimbledon Park Golf Club Limited Declaration of Compliance with the Equirements [sic] of the Companies Act 1948, 29 December 1948, Company Number: 462846.
[32] There is nothing very remarkable about the 1961 Lease for present purposes. It imposed on the Club some fairly modest obligations to provide the Corporation with facilities for public bathing and aquatic sports in connection with

the lake, but otherwise did not expressly provide for public enjoyment of or in connection with the demised premises.

[33] "The Greater London Provisional Order For Securing Uniformity In The Law Applicable With Respect To Parks And Open Space" ("the Greater London Provisional Order") was made pursuant to the powers in section 87(3) of the 1963 Act. The Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967 confirmed the terms of the Greater London Provisional Order, enacting it as Schedule 1 to the Act. Article 1 states that "This order may be cited as the Greater London Parks and Open Spaces Order 1967". see also Open Space Society Memo, para.2.8.

[34] Local Government (Miscellaneous Provisions) Act 1976, s19.

[35] Centenary Brochure, 9.

[36] Ibid

[37] WPRA (13 August 2023, para. 2.4) confirm they have searched for and found no evidence of advertisement of the grant of the 1986 Lease.

[38] WPRA submission, 29 September 2021, [8]

[39] Mr Karas argues that "Section 164 was *not* deemed to apply [by section 11] if land was used for other purposes (such as… a municipal golf course if land was appropriated under s.8" (Karas, [29]). If Mr Karas's reason for this argument is that he considers that a municipal golf course could not a PWPGPPRG, we disagree.

[40] See e.g., Assessor for Ayrshire v Troon Town Council 1964 SC 424.

[41] Section 164 confers a power principally concerned with the provision of new open space for public recreation: R (Barkas) v North Yorkshire County Council [2013] 1 WLR 1521, [29] ("**Barkas CA**") (affirmed, [2015] AC 195); Central Electricity Generating Board v Denning [1970] Ch 643, 652-653.

[42] Commons Committee Minutes, p32

[43] 'Public health acts' was undefined in 1914 Act. The Wimbledon Corporation Act 1933, s.4(2) defines 'the Public Health Acts' as the Public Health Act 1875 and the Acts amending and extending the same, which may give some clue as to the meaning of the like term in ss9 and 11 of the 1914 Act. The wording of s11 seems to have been a technical formulation deemed worthy of repetition/re-use by local government law draftsmen, see, e.g., s66(4) Guildford Corporation Act 1926 and s70 West Yorkshire Act 1980.

[44] See, e.g., Attorney-General v The Loughborough Local Board 1881 Times 31 May, as quoted in Western Power Distribution Investments Ltd v Cardiff CC [2011] EWHC 300 (Admin), para.16 (Ouseley J); see also Barkas CA, para.31 (Sullivan LJ), R (Friends of Finsbury Park) v Haringey London Borough Council [2018] PTSR 644, paras.16-17 (Hickinbottom LJ):

[45] Barkas CA, [14], [29] (Sullivan LJ)

[46] Oxy-Electric Ltd v Zainuddin (unreported) 22 October 1990 (QBD) cited in R (Goodman) v Secretary of State for Environment Food and Rural Affairs [2015] EWHC 2576 (Admin), [20].

[47] Commons Committee Minutes, p6

[48] Commons Committee Minutes, p21; see also 25 (suggesting that the scheme the surveyor was valuing involved 105 acres being dedicated to public use).

[49] As regards the acquisition of the Estate, see Rondeau 82-83 and Karas Enclosure 15. As regards the sale of Banky Fields, see Rondeau, 86-87.

[50] Karas Submission, [70]

[51] See, e.g., R (Quintavalle) v Secretary of State for Health [2003] UKHL 13, [2003] 2 AC 687 [38] (Lord Millett); R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd [2001] 2 AC 349 ("**Spath Holme**"), 396F–397A (Lord Nicholls). We don't detect any significant difference between our proposition and Karas [58] "The task of the Court in construing delegated legislation such as this is to determine the intention reasonably to be attributed to the person making the instrument in respect of the words used."

[52] [2022] UKSC 3, [2023] AC 255 Lord Hodge DPSC (para 31)

[53] Maunsell v Olins [1975] AC 373 (HL), Lord Reid 382E–F

[54] See Spath Holme [2001] 2 AC 349, 397B (Lord Nicholls); Majorstake Ltd v Curtis [2008] UKHL 10, [2008] 1 AC 787 [44] (Lord Carswell); Edwards v Kumarasamy [2016] UKSC 40, [2016] AC 1334 [17] (Lord Neuberger)

[55] [2015] UKSC 58, [2016] AC 429 [20]–[21] (Lord Reed); see also Hotak v Southwark London Borough Council [2015] UKSC 30, [2016] AC 811 [59] (Lord Neuberger).

[56] [2014] UKSC 10, [2014] AC 1189 [72] (Lord Neuberger); see also Seal v Chief Constable of South Wales Police [2007] UKHL 31, [2007] 1 WLR 1910 [5] (Lord Bingham).

[57] [2014] UKSC 48, [48], Lord Neuberger

[58] See Spillers Ltd v Cardiff (Borough) Assessment Committee [1931] 2 KB 21, 43 (Lord Hewart CJ); approved in Attorney General's Reference (No 1 of 1988) [1989] AC 971, 993H–994G (Lord Lowry) and recently in R. (Shropshire and Wrekin Fire Authority) v Secretary of State for the Home Department [2019] P.T.S.R. 2052, [58] (Garnham J).

[59] [2011] UKSC 25, [10] (Lord Mance)
[60] [2017] 1 WLR 1095 [25]
[61] R (Kelly) v Secretary of State for Justice [2009] QB 204, [24]
[62] [2017] UKSC 70, [2018] AC 869, Lord Reed and Lord Hodge JJSC [39]
[63] [2023] UKSC 28, [43] (Lord Sales)
[64] Greenweb Ltd v Wandsworth London Borough Council [2008] EWCA Civ 910, [2009] 1 WLR 612 [28]–[31] (Stanley Burnton LJ)
[65] 2000] 1 WLR 586 (HL) 592C–D (Lord Nicholls)
[66] See R (Noone) v HMP Drake Hall [2010] 1 WLR 1743) [75] (Lord Mance).
[67] Karas submission, [58]
[68] ibid, [59]
[69] Ibid, [70]
[70] Ibid, [65]
[71] Ibid, [70]
[72] Report of the Royal Commission on Local Government in Greater London, 1957–60, (Cmnd. 1164); Government White Paper, Cmnd 1562
[73] See, to similar effect, "MITCHAM GREENS PROTECTION: Reviewing the legality of Merton Council's damage to Cranmer Green & Three Kings Piece" (February 2017), by Mitcham Cricket Green Community and Heritage (a civic society for Mitcham Cricket Green Conservation Area): https://mitchamcricketgreen.files.wordpress.com/2017/02/mitcham-greens-protection-feb-17.pdf. The society told us that they were advised by the Open Spaces Society.
[74] The 1965 Order cannot obviously be seen as 'updating' the 1914 Act position, where it in fact compelled an appropriation of land to an older (1875) Act: but in many cases, holdings under pre-1906 local powers yielded to holding powers under the Open Spaces Act 1906.
[75] The Local Law (City of London) Order 1965, 1965 No. 508
The Local Law (London Borough of Newham) Order 1965, 1965 No. 509
The Local Law (North East London Boroughs) Order 1965, 1965 No. 510
The Local Law (South East London Boroughs) Order 1965, 1965 No. 531
The Local Law (South West London Boroughs) Order 1965, 1965 No. 532
The Local Law (North West London Boroughs) Order 1965, 1965 No. 533
The Local Law (Greater London Council and Inner London Boroughs) Order 1965, 1965 No. 540
[76] See e.g. the rather general Explanatory Notes: [1964 Order] "general provision consequential on the London Government Act 1963 in relation to property, liabilities, contracts etc.," [1965 Order] making "miscellaneous incidental, consequential, transitional and supplementary provision in relation to Greater London".
[77] [2003] UKHL 13, [2003] 2 AC 687, [8] (Lord Bingham)
[78] Karas, [70]
[79] "Greater London statutory provision" means "any local statutory provision in force immediately before 1st April 1965 and not expressly repealed or revoked by this Act, being a provision…applying to any part of [Greater London] or to things or persons connected with a part of [Greater London]".
[80] Karas, [66]
[81] Ibid, [65(b)]
[82] Ibid, [71b, c]
[83] [2014] EWHC 2872 (QB) [13] (Sales J), [13], and cases cited there
[84] Karas, [69]
[85] Ibid, [68]
[86] Ibid, [61d]
[87] It may be – as argued by George Laurence KC for WPRA – that this would have happened in any event.
[88] Ibid, [61[d]]
[89] The Corporation's actual knowledge or state of mind is irrelevant to statutory construction. However, it is worth noting that it would or should have viewed the financial burden of an obligation to hold the land under s164 as being postponed, potentially, to the end of the 1961 Lease in 1998 (33 years), or even later if (as Mr Karas suggests) the Club had a right to renew the 1961 Lease on the same terms and chose to exercise it.
[90] Karas, [66]
[91] Ibid, [61b]
[92] Ibid, [71a]
[93] ibid [42]; Russell Harris KC's Opinion dated 6 July 2023 ("**Harris**"), [9]
[94] Karas, [67]
[95] Harris, [11]

[96] Day SC, Lady Rose JSC, [66]; see also [92]. For the full statutory history, see [65]-[87] of her judgment. Section 179(g) and Schedule 7 to the Local Government Act 1933 preserved local Acts, including the 1914 Act.
[97] Hosebay Limited v Day [2012] 1 WLR 2884 at [6] (although Lord Carnwath JSC's comments there were made in the context of specific legislation, not directly comparable to the 1964 or 1965 Orders).
[98] Harris, [11].
[99] It appears that the Ministry did a round of corrections, under the Local Law (Further Provisions) Order 1966, 1966 No. 1250 – entering into force on 8 October 1966
[100] Karas, [67]
[101] Muir HC, [87]
[102] Hall v Beckenham Corporation [1949] 1 KB 716, 728 (Finnemore J).
[103] Glasgow Corporation v Taylor [1922] 1 AC 44, 51 (Lord Atkinson).
[104] Ibid, 60 (Lord Shaw).
[105] The High Court recently glossed recreation as being 'the action of recreating oneself or another, or the fact of being recreated by some pleasant occupation, pastime or amusement' or a '…means of refreshing or enlivening the mind or spirits by some pleasant occupation, pastime or amusement…': R (Muir) v Wandsworth LBC [2018] EWHC 1947 (Admin) (**"Muir HC"**) [98]-[99].
[106] 1986 Lease, schedule 2.
[107] See Sheffield Corporation v Tranter [1957] 2 All ER 843, 850-853; Burnell v Downham Market Urban District Council [1952] 2 QB 55, 67-68; Kingston-on-Hull Corporation v Clayton [1963] AC 28, 44.
[108] See R (Muir) v Wandsworth LBC (CA) [2018] PTSR 2121, para.34.
[109] See e.g. Sheffield Corp v Tranter, 854-856; Burnell v Downham Market UDC, 67-68. The latter case was followed in Muir HC, [73]-[74]
[110] ibid
[111] The 1948 Company was a limited company by guarantee until 21 December 2018. The Company's accounts spanning 1948-2022 only show limited examples of profit/surplus distribution, most notably when the lease was bought out by AELTG. The Company was only allowed to distribute surplus value in limited circumstances. Initially, between 1948-2003, no capital distribution was possible under the Company's various articles of association adopted in that period. After 2003, but for circumstances of dissolution, distribution of surplus was only permitted to charitable organisations (see, e.g., articles of association adopted 22 January 2003). It is only from when the Company re-registered as an unlimited company in December 2018 that profit/capital distributions were permitted (in the way of dividends) (see articles of association adopted 21 December 2018). These changes were part of AELTG's acquisition of WPGC.
[112] Karas Submission, [39c], [54b]
[113] https://www.wpgc.co.uk/green_feesin
[114] We understand that WPGC latterly made a substantial income during the Wimbledon fortnight from commercial activities like hospitality and car parking; which income effectively subsidised the club's finances and enabled it to keep charges down. We understand that two fairways were typically devoted to car parking during the Championships.
[115] Harris, [15]
[116] (1876) 2 Ch D 634, 639 (Bacon VC); quoted in Day SC, [42]
[117] See, e.g., AELTG/Rolfe Judd Planning, 'The AELTC Wimbledon Park Project – Planning Statement' (July 2021) <AELTC REF: 51365–RJP–XX–XX–RP–T–00002 P01> ('**Planning Statement**'), para.1.1.2, 1.4.5, 7.2.35, 8.1.1; and AELTG/Rolfe Judd Planning, 'The AELTC Wimbledon Park Project – Planning Statement Addendum' (May 2022) <AELTC REF: 51365-RJP-XX-XX-RP-T-00004 P01> ('**Planning Addendum**'), para.4.5.3-4.5.4.
[118] See Planning Statement, para.7.4.61; Planning Addendum, 5.1.12.
[119] See Planning Statement, para.7.2.6; Planning Addendum, 4.5.101.
[120] See Boyce v Paddington Borough Council [1903] 1 Ch 109, 114 (Buckley J); and Gouriet v Union of Post Office Workers [1978] AC 435.
[121] "Opinion in response to the Opinion of Mr. Jonathan Karas KC dated 23 June 2023 submitted to Merton planning department 7 July 2023 in respect of application 21/P2900", [26]
[122] David Tooley, 'Leader aims to 'limit financial damage' to Shrewsbury Town Council of Greenfields park sale mistake', The Shropshire Star (26 April 2023): https://www.shropshirestar.com/news/local-hubs/shrewsbury/2023/04/26/leader-aims-to-limit-the-financial-damage-to-shrewsbury-town-council-of-greenfields-park-sale-mistake/. See also https://www.bbc.co.uk/news/uk-england-shropshire-66311686
[123] From the offer that AELTG made to the Golf Club members in 2018, it appears that AELTG was unaware of its duty as freeholder to make the land available for public recreation. It was only after AELTG ended golf play altogether (on 31 December 2022) that the statutory trust became a live issue.

[124] LBM and LB Wandsworth will of course know the problems: nevertheless, the report of the House of Commons Communities and Local Government Committee "Public parks", 30 January 2017 (HC 45); and "State of UK Public Parks 2021" by The Association for Public Service Excellence are well worth reading or re-reading, and show examples of solutions.