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Greenfields Recreation Ground in Shrewsbury

Full name

R (on the application of Day) (Appellant) v Shropshire Council (Respondent)

Neutral citation no.

[2023] UKSC 8

Link to judgment

www.supremecourt.uk/cases/docs/uksc-2021-0031-judgment.pdf

Summary

The supreme court held that, owing to the clear and specific wording in section 123 of the Local Government Act 1972 (as amended) (LGA), the generally applicable provision in section 128(2) LGA cannot be used to override the statutory trust arising in open space held by a local authority. The continuing existence of the statutory trust over the land is an important factor when considering a planning application. This was not considered by the planning authority, and the supreme court concluded that the grant of planning permission must be quashed.

Background

On appeal from [\[2020\] EWCA Civ 1751](#)

Land, such as open space or public park, which is subject to a statutory trust in favour of the public is held by a local authority for the purpose of the public recreation. To dispose of this type of land lawfully, local authorities must comply with statutory consultation requirements. The issue in the supreme court concerns what happens to the public's rights to use this such land when the local authority disposes of the land but fails to comply with the statutory requirements.



The Open Spaces Society 25a Bell Street Henley-on-Thames RG9 2BA

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This issue arises in the context of a challenge to the grant of planning permission by the respondent, Shropshire Council, to CSE Development (Shropshire) Limited (CSE). In October 2017, Shrewsbury Town Council (STC) sold the land which was subject to a statutory trust to CSE. At the time STC was not aware that the land was open space subject to a statutory trust and so did not comply with the required consultation procedure under section 123(2A) LGA as applied to STC by section 127(3). CSE then applied for planning permission to build houses on the land and Shropshire Council, as planning authority, granted this.

Dr Peter Day, a local resident, brought judicial review proceedings to challenge the grant of planning permission. He argued that because STC did not comply with the statutory requirements, the public trust continued to bind the land that CSE acquired. To that extent, the grant of planning permission must be quashed because the existence of the trust was a material factor which Shropshire Council should have considered when deciding whether to grant planning permission.

The high court dismissed Dr Day's application for judicial review. The judge held that even if the public's rights under the statutory trust had survived the sale, those rights were now unenforceable against CSE. The court of appeal dismissed Dr Day's appeal and held that the statutory trust was extinguished on the sale of the land. Dr Day appealed to the supreme court.

Discussion

Sections 123(2A) and (2B) LGA 1972 provide that, before disposing of land which is subject to a statutory trust (for example land held as open space), the council, as owner, must advertise its intention to do so in the local newspaper for two consecutive weeks. It must then consider any objections it receives to the proposed disposal. If the council disposes of land having complied with that procedure, then the land is freed from any public trust and the disposal of such open space is lawful.

In addition, section 128(2)(a) LGA provides that a disposal of land which was subject to the consultation requirement 'shall not be invalid by reason that' the requirement has not been complied with. Section 128(2)(b) LGA says that the purchaser of the land 'shall not be concerned to see or enquire' whether any such requirement has been complied with.

Shropshire Council argued that section 128(2) LGA extinguishes the rights enjoyed by the public under the statutory trust, or at least that the rights of the public to access the land did not survive in a form that was to be regarded as a material consideration that the planning committee needed to consider when deciding whether to grant planning permission. The supreme court considered the history of the provisions and concluded that section 128(2) LGA does not extinguish the rights enjoyed by the public under the statutory trust. Those rights are only extinguished if the local authority complies with the consultation requirements as set out in section 123 LGA 1972.

If it were correct that as soon as the land comes into private ownership, the trust must be extinguished, then it would be easy to get around the restrictions and conditions attached to the



sale of statutory trust land. If that were the case, there would hardly be any need for the protection of the purchaser as provided for under section 123(2B) LGA or section 128(2)(b) LGA.

The court stated that parliament used very clear words in section 123(3) LGA when setting out the action a council needs to undertake in order to dispose of land in a way which extinguishes the public's rights under the statutory trust. The detailed provisions of section 123 LGA were evidently, in the court's opinion, designed to ensure that members of the public should have the opportunity to be informed about and be able to object to a proposed sale of statutory trust land.

Comment

The important words of Lady Rose should be heeded by all councils (at paragraphs 117–118):

I referred in the Introduction to this judgment to the public interest report issued to Shrewsbury TC by its auditors following the judgment of Lang J. The auditors expressed the view that there had been serious governance failures in the sale of the land:

'It is our view that [Shrewsbury TC] must put robust procedures in place to ensure that an oversight such as this is not permitted to recur. Where there should be any future sale of land [Shrewsbury TC] must be able to demonstrate that [it] has taken sufficient steps to establish the legal status of that land and act in accordance with all relevant legislation prior to sale. [Shrewsbury TC] should consider whether it has the legal power to proceed with any future disposals and, for the sake of good governance, should formally document the powers on which it has relied when making any such decisions.'

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



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