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Neutral Citation Number: [2018] EWCA Civ 1035
Case No: C1/2017/2293

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE HON MRS JUSTICE LANG DBE
[2017] EWHC 1947 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL
9 May 2018

B e f o r e :

LORD JUSTICE PATTEN
LORD JUSTICE FLOYD
and
LORD JUSTICE COULSON

Between:

THE QUEEN on the application of ALEXANDER KEAY MUIR	**Claimant/ Respondent**
- and -	
WANDSWORTH BOROUGH COUNCIL	**Defendant/ Appellant**
- and –	
SMART PRE-SCHOOLS LIMITED	**Interested Party**

Nigel Giffin QC (instructed by Sharpe Pritchard LLP) for the Appellant
Victoria Wakefield (instructed via the Bar Pro Bono Unit) for the Respondent

Hearing date: 19 April 2018

HTML VERSION OF JUDGMENT APPROVED

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Lord Justice Floyd :

Introduction

1. The issue in this appeal is whether the appellant local authority ("Wandsworth") has the necessary *vires* to grant a lease of premises situated on Wandsworth Common to the interested party (Smart Pre-Schools Limited) for the purposes of allowing it to operate a pre-school nursery there. Wandsworth considers that it does have the necessary *vires*, and accordingly decided that it would in due course grant such a lease. The respondent ("Mr Muir"), who had himself made a competing proposal for the use of the premises, applied for judicial review of Wandsworth's decision to grant the lease to the interested party. The resolution of the issue turns on the correct construction and application of the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967 ("the 1967 Act", sometimes referred to as the "Long Act").

2. Articles 7(1)(a)(v) and (vi) of Schedule 1 of the 1967 Act give to a local authority the power "in any open space" to provide and maintain: "*indoor facilities for any form of recreation whatsoever*" and "*centres and other facilities (whether indoor or open air) for use of clubs, societies or organisations whose objects or activities are wholly or mainly of a recreational, social or educational character*" respectively. Wandsworth contended before the judge, Lang J, that the interested party's proposed pre-school nursery fell within one or other or both of these descriptions. In her judgment, handed down on 28 July 2017, the judge disagreed with Wandsworth and, by her order, granted a declaration that the decision to grant the lease was unlawful. Wandsworth is dissatisfied with the judge's conclusion and appeals to this court.

3. In the appeal, Mr Nigel Giffin QC appeared for Wandsworth and Ms Victoria Wakefield for Mr Muir. We were greatly assisted by the submissions of both counsel. In addition, we are grateful to Ms Wakefield for appearing *pro bono* for Mr Muir.

The facts in more detail

4. The relevant factual background is not in dispute. The proposed lease is in respect of premises known as Neal's Farm Lodge and Cottage situated on Wandsworth Common. The interested party is a limited company which intends to operate a day nursery at the premises for up to 62 pre-school children, aged 2 to 5 years.

5. For many years the premises were used partly as a café (the Skylark Café) and partly to provide residential accommodation for groundsmen under residential service tenancies. Those tenancies were terminated in 2013/14 leaving the premises unoccupied (apart from the café). In January 2015 Wandsworth decided to let the premises on the open market, inviting offers for a 10-15 year lease. Their advertisement provided that "any use must provide a recreational or educational facility servicing the Common". Ten expressions of interest were received and the interested party was the highest bidder. The estate agents described the interested party as "an established nursery and nanny provider". Wandsworth accordingly decided to lease the premises to the interested party. The tenth expression of interest had come from Mr Muir who proposed an educational and recreational facility to be used by local maintained schools.

6. The interested party subsequently applied for planning permission, which was granted subject to a number of conditions. These included a restriction on the number of children enrolled at the nursery to a maximum of 62; a restriction on the hours of opening to "customers" to between 08.00 and 18.00 excluding weekends and bank holidays; and a restriction on the use of the premises to a nursery or preschool and for no other purpose.

7. The present claim for judicial review was commenced on 24 May 2016. Pending the outcome of these proceedings Wandsworth decided not to complete the grant of the lease to the interested party, but there is a draft in evidence before us. The draft lease contained the following covenants by the interested party:

> "2.16(i) To use the demised premises only for the purposes of a nursery and/or pre-school whose objects or activities are wholly or mainly of a recreational, social or educational character within the requirements of the [1967 Act] ("the Permitted Use")
>
> (ii) Not to use the demised premises before 7.00am or after 8.00pm but otherwise to keep the demised premises open for business during normal business hours for a nursery and/or pre-school taking into account normal school holidays and any other periods of ordinary closure
>
> (iii) To provide early education places reflecting the Council's policies relating to section 7 of the Childcare Act 2006 (or such replacement or alternative scheme) as reasonably required by the Council from time to time
>
> (iv) Not to make unreasonable charges for its services provided in accordance with the permitted use
>
> (v) To comply with the admission policy annexed hereto or as varied in agreement with the Council."

Legislation

8. Section 87(3) of the Local Government Act 1963 ("the 1963 Act") gave the Minister of Housing and Local Government power to amend, revoke, repeal or extend any Greater London statutory provision by order, for the purposes of securing uniformity. The provisions with which this appeal is concerned were originally contained in the "Greater London Provisional Order For Securing Uniformity In The Law Applicable With Respect To Parks And Open Space" ("the Greater London Provisional Order") which was made pursuant to the powers in section 87(3) of the 1963 Act. The 1967 Act 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", and I shall refer to it as the 1967 Order.

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

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

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

> "7 **Facilities for public recreation**
>
> (1) A local authority may in any open space -
>
> (a) provide and maintain—
>
> (i) swimming baths and bathing places whether open air or indoor;
>
> (ii) golf courses and grounds, tracks, lawns, courts, greens and such other open air facilities as the local authority think fit for any form of recreation whatsoever (being facilities which the local authority are not otherwise specifically authorised to provide under this or any other enactment);
>
> (iii) gymnasia;
>
> (iv) rifle ranges;
>
> (v) indoor facilities for any form of recreation whatsoever;
>
> (vi) centres and other facilities (whether indoor or open air) for the use of clubs, societies or organisations whose objects or activities are wholly or mainly of a recreational, social or educational character;
>
> (b) provide amusement fairs and entertainments including bands of music, concerts, dramatic performances, cinematograph exhibitions and pageants;
>
> (bb) without prejudice to the generality of the powers in the last foregoing sub-paragraph, provide exhibitions and trade fairs for the purpose of promoting education, the conservation of the environment, recreation, industry, commerce, crafts or the arts;
>
> (c) provide and maintain in time of frost facilities for skating and flood any part of the open space in order to provide ice for skating;
>
> (d) provide meals and refreshments of all kinds to sell to the public;
>
> (e) provide and maintain swings, platforms, screens, chairs, seats, lockers, towels, costumes and any apparatus, appliances, equipment or conveniences necessary or desirable for persons resorting to the open space;
>
> (f) erect and maintain for or in connection with any purpose relating to the open space such buildings or structures as they consider necessary or desirable including (without prejudice to the generality of this paragraph) buildings for the accommodation of keepers and other persons employed in connection with the open space; and
>
> (g) set apart or enclose in connection with any of the matters referred to in this article any part of the open space and preclude any person from entering that part so set apart or enclosed other than a person to whom access is permitted by the local authority or (where the right of so setting apart or enclosing is granted to any person by the local authority under the powers of this Part of this order) by such person:
>
> Provided that …
>
> (vi) in exercising their power under heads (v) and (vi) of sub-paragraph (a) of this paragraph a local authority shall satisfy themselves that they have not unfairly restricted the space available to the public for recreation in the open air in any open space …"

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

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

12. Article 10 is concerned with charging:

> "10 **Charges in respect of user of open spaces**"

A local authority may—

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

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

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

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

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

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

The judgment of Lang J

13. The judge considered (see paragraph [82]) that the overall purpose of the powers conferred under Articles 7 and 8 of the 1967 Act was to enable Wandsworth "to provide and maintain recreational facilities for the public i.e. public recreation." She considered this to be supported by references to the interests of the public in the Articles themselves and the headings to Articles 7 to 9. It was also consistent with the statutory trust created by section 10 of the Open Spaces Act 1906 which provided that local authorities hold open spaces:

> "… in trust to allow, and with a view to the enjoyment thereof by the public as an open space … and for no other purpose".

14. The judge went on to hold at [88] that Wandsworth's proposals to lease the premises to operate a private fee-paying nursery would not provide facilities for public recreation:

> "… since members of the public would not have a right of access to the premises, which would usually be limited to its staff and up to 62 enrolled children in any one term, and visits by parents. Facilities would only be provided for the cohort of children enrolled in the nursery, not for children generally."

15. At paragraph [94] to [104] the judge went on to hold, in any event, that the proposed nursery use fell outside the meaning of the term "recreation" in sub-paragraphs (v) and (vi) of Article 7(1)(a). The nursery would primarily be providing a child care facility, within which it would provide pre-school education and play for the children, as well as rest, exercise and evening meals. The hours of operation of the school were far in excess of those which would be expected for educational purposes or for socialising and play, and demonstrated that the facility was intended to provide childcare for working parents, allowing them to drop off and collect their child at the beginning and end of the working day. Such a child care facility did not come within the description "recreation". The fact that children could play in the course of the day at the nursery was not the main purpose of the facility.

16. Finally, at paragraphs [105] to [108] the judge held that the proposed nursery use would not fall within Article 7(1)(a)(vi). This was because (paragraph [107]) the charging power in Article 10 only allowed a charge to be made to "clubs, societies or organisations", not to individual parents. It was also because (paragraph [108]) the *ejusdem generis* principle of construction meant that "organisation" meant "not-for-profit groups which share a common interest of a recreational, educational or social character", and therefore excluded the interested party.

17. Accordingly, the judge held that the challenge to the decision to grant the lease to the interested party succeeded. An additional ground based on Wandsworth's internal decision-making was rejected and there is no appeal from that conclusion.

The grounds of appeal

18. There are four grounds of appeal. These are that the judge was wrong in each of the following respects:

i) in holding that Article 7 could not be relied on because the proposed nursery did not provide a facility for <u>public</u> recreation;

ii) in holding that the provision of childcare in a nursery setting, including pre-school education and play, did not fall within the meaning of the term "recreation" in Article 7;

iii) in holding that the person to whom a lease was granted under Article 8 could not also be the organisation with objects or activities of a recreational, social or educational character under Article 7(1)(a)(vi); and

iv) in holding that an organisation could not fall within Article 7(1)(a)(vi) unless it was of a not-for-profit character.

19. It is convenient to consider the appeal under slightly different heads, taking first the question of whether the proposed nursery fell within sub-paragraph (v) of Article 7(1)(a).

Sub-paragraph (v): "indoor facilities for any form of recreation whatsoever"

20. Mr Giffin submitted that the definition of "recreation" was broad, and this was emphasised by the words "any form … whatsoever" in sub-paragraph (v). It was not limited to sports and games, as was shown by the express reference to the provision of a "reading room" in the proviso to Article 10, which did not fit easily under any of the other descriptions in Article 7. He accepted, however, that education, for example formal secondary school education, was not recreation within sub-paragraph (v). The interested party's nursery for 2-5 year old children was, however, one in which children were looked after while they engaged in play and learning through play, and should not properly be characterised as education.

21. Ms Wakefield supported the judge's interpretation of "recreation". She accepted that the children at the proposed nursery would engage in play and therefore in recreation, but the purposes of the interested party's facility were not so limited. At least for the purposes of sub-paragraph (v) it was necessary to ask whether the purpose was wholly or mainly recreation. If one asked that question, the answer was that the IP's nursery was obviously not within sub-paragraph (v).

22. I agree with Ms Wakefield that, to come within sub-paragraph (v), the facilities must be wholly or mainly for recreation. I would accept that a facility which is wholly or mainly for recreation is not disqualified because some necessary ancillary activity will also be carried on there. Thus an indoor recreational facility for children does not become disqualified under sub-paragraph (v) because it is pointed out that children learn through play, and that the children are thereby being provided with a form of education. The purpose of the facility remains wholly or mainly recreational. It is not enough, however, that recreation occurs or may occur within the facility. So to construe Article 7(1) would give the local authority free rein to provide any service to the public by means of an indoor facility in an open space provided they included a play area within the facility. Sub-paragraph (v) does not permit additional or different facilities which do not meet the description "recreation".

23. The expansive wording of sub-paragraph (v) ("any form of recreation whatsoever") does not assist Wandsworth. The language is concerned to embrace all forms of recreation, but does not cause sub-paragraph (v) to cover activities which are not properly described as recreation at all. Mr Giffin's concession that it does not cover predominantly educational facilities, such as a secondary school, is rightly made. The fact that a reading room may be considered to be a recreational facility does not really assist.

24. To my mind, therefore, the proposed facilities do not fall within sub-paragraph (v) for essentially two reasons. Firstly, the proposed facility is more in the nature of a school than a recreational facility. The "Proposed team and classroom structure" for the Neal's Farm site, described by Ms Hogstrand, the interested party's director, in her witness statement, consisted of a total of 5 "classes", with 14 members of staff, including 5 "qualified teachers" and 6 "teaching assistants". The judge was right to characterise the proposed facility as a combined nursery school and day nursery, and therefore an educational rather than a recreational facility. Secondly, the proposed facility will offer services which are not a necessary or inherent part of recreation and which go far beyond it, by providing all-day child care for pre-school children while their parents are at work or engaged elsewhere. This was far in excess of anything required for recreation or even education. It is conceptually distinct from the facility offered in traditional One o'clock Clubs, where parents can drop in with their own children for an hour or two in a park or on a common. Because parents remain to supervise the children while they play, there is no real sense in which such facilities provide childcare services. They are recreational.

25. The contrary view, that the interested party's proposed nursery school is a predominantly recreational facility with ancillary educational and child care facilities is, to my mind, not a natural or appropriate way of describing what is proposed, and is driven by a desire to shoe-horn the proposed facility into the category of facilities defined in sub-paragraph (v) of the Article. To do so would be inconsistent with the Council's own guidance, cited by the judge, which accurately described a day nursery as providing childcare and a nursery school as providing education. This was in contrast to a play group, where children "learn and play".

26. Mr Giffin submitted, alternatively, that "facilities for recreation" did not have a hard-edged definition, and that accordingly whether a given facility could properly be provided under this head was a decision for the local authority, under the constraints imposed by proviso (vi) to Article 7(1) (that it should not unfairly restrict the area available for public recreation) and *Wednesbury* reasonableness. He maintained that Wandsworth had, at the very least, been entitled to decide that the proposed nursery was a recreational facility. I cannot accept that argument. It is possible that there may be a penumbra around the terms "facilities for … recreation" in sub-paragraph (v), but the meaning of the term itself is a question of law which the court can and must decide. Given the conclusion I have reached, the question of whether the proposed nursery school is wholly or mainly for recreation is, in my judgment, only capable of being answered in the negative.

Sub-paragraph (vi): "facilities for the use of clubs, societies or organisations"

27. Mr Giffin submitted that the judge had been wrong to hold that the IP was not an "organisation" because it was commercial and not "not-for-profit". An organisation was a body with a structure or degree of permanence, but excluded individuals. Even applying the *ejusdem generis* approach to construction, the judge had misidentified the class represented by clubs and societies. A club could be a proprietary club, and therefore be profit-making. The 1967 Act was not hostile to charges being made for things people do in open spaces. Mr Giffin also drew our attention to section 19 of the Local Government (Miscellaneous Provisions) Act 1976, which refers to a "*voluntary* organisation" rather than an organisation, and submitted that there was no such limiting requirement here. Finally, he submitted that the word "organisation" would add nothing to "clubs" and "societies" if restricted in the manner proposed by the respondent.

28. Ms Wakefield pointed out that the judge's conclusion on the relevant class for the purposes of the *ejusdem generis* rule had been that "the identifiable class is not-for-profit *groups which share a common interest of a recreational, educational or social character*". She supported the judge's conclusion that the organisation had to be not-for-profit, but, if she was wrong about that, the organisation still had to be a group which shared a common interest of the specified character. The interested party did not satisfy that requirement.

29. I am prepared to assume in Mr Giffin's favour, without deciding, that paragraph (vi) does not impose a hard-edged requirement that the organisation be not-for-profit. Nevertheless I consider that the interested party is not the type of "club, society or organisation" with which sub-paragraph (vi) is concerned.

30. It is common ground that the interested party is not a club or society. The term "organisation" in sub-paragraph (vi) is, in my judgment, there to sweep up organisations which are not strictly or properly described as clubs or societies, but which nevertheless share their principal characteristic of being run for the benefit of members sharing a common interest. The interested party does not operate on this basis, but is a limited company providing services for clients or customers. If Wandsworth's construction were correct, it is difficult to see why the words "clubs" and "societies" were used in sub-paragraph (vi) when the words "any organisation" would have had the effect for which they contend.

31. Accordingly, the proposed nursery would not fall within sub-paragraph (vi) either, and the judge was correct to hold that the judicial review should succeed.

Other grounds

32. I should mention briefly two other arguments which commended themselves to the learned judge but on which I prefer not to express a concluded view. The first of these was that the word "recreation" in sub-paragraphs (v) and (vi) is to be interpreted as "public recreation", so that a nursery which was only available to a cohort of 62 children per term, and which excluded the public and other children, could not be described as offering public recreation.

33. I would accept that it is implicit in Article 7 that all the facilities specified must be open to the public (although, as Article 10 makes clear, the local authority may make reasonable charges for the use the facilities provided). So much is clear from the context provided by Section 10 of the Open Spaces Act 1906, which requires the local authority to hold the land for public enjoyment, the definition of "open space" in the 1967 Order, and the headings to Articles 7 and 8. However the parties approach the next stage of the argument from very different perspectives. Wandsworth contend that a facility is open to the public if the public can avail themselves of it by right of being a member of the public. Mr Muir does not challenge this, but contends that once the 62 places are taken up, the public no longer have access to the facility and the facility is therefore not open to the public.

34. I think it may fairly be said that there is a question of fact and degree involved here. Whenever a facility in a public open space is booked for use by some person or persons, the public are temporarily restricted from using it. For example, the public would be impeded from access to a tennis court or bowling green when it has been booked or is being played on by those who got there first. A more extreme example, discussed by the judge, is whether a private members' golf course would be sufficiently public. There clearly comes a point where the restrictions on public access become too onerous for it to be possible to say that the facility is still available for public recreation. I would be reluctant to lay down a hard and fast rule as to where that point occurs, or whether the judge was right to say that the interested party's proposal, if within Wandsworth's powers in all other respects, fell on the wrong side of the "public" line.

35. The second argument concerns the way in which Articles 10 and 8 interact with Article 7 in the circumstances of this case. I set out below what the judge said in paragraphs [105] to [107] of her judgment:

> "105. Mr Bhose QC submitted that, under Article 7(1)(a)(vi) of the 1967 Order, the Council was empowered to provide and maintain centres and other facilities, whether indoor or outdoor, for the use of a[n] organisation such as the IP. By Article 8(1) the Council was empowered to let the premises to the IP. By Article 10(1)(b), the Council was empowered to authorise the IP to make reasonable charges in respect of the purposes for which it may itself make charges, namely, to charge parents for use of the nursery.
>
> 106. In my judgment, this analysis misconstrued the Council's powers. Under Article 7(1)(a)(vi):
>
> > "(1) A local authority may in any open space
> >
> > (a) provide and maintain -

(vi) centres and other facilities ….. for the use of clubs, societies, or organisations …..."

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

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

36. In essence, the point being made is that the interested party would be exercising a charging power which went beyond the charging power which Wandsworth itself would enjoy if it provided the facilities itself. However it may be an unduly restrictive reading of the provisions to say that if Wandsworth were running the facility itself it could only charge the club or organisation, and not its individual members. By Article 10(1)(a) it may make reasonable charges "for the use or enjoyment of anything provided by them under sub-paragraphs (a) to (e) of paragraph (1) of article 7". The club and its members both use and enjoy the facilities. If the interested party were a "club, society or organisation" with the parents and/or the children properly regarded as its members, and the services being provided were wholly or mainly recreational, then I doubt that any charges made would fall outside the powers afforded to Wandsworth under Article 10.

37. A related point is whether the charges proposed to be made by the interested party exceed reasonable charges. However, the lease itself would be subject to an obligation not to make unreasonable charges: see clause 2.16(iv). This gives rise to a difficult point, on which we did not hear full argument, about whether a power to make "reasonable charges" in this context is limited to recovery of costs. Given that it is not necessary to decide either of these points, and that we have heard only limited argument about them, I would prefer to say no more about them.

Conclusion

38. It follows, for the reasons I have given, that the judge reached the correct conclusion, and, if my Lords agree, that the appeal must be dismissed.

Lord Justice Coulson

39. I agree.

Lord Justice Patten

40. I also agree.

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