Neutral Citation Number: [2017] EWCA Civ 1831

Case No: C1/2016/2662

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION (PLANNING COURT)
THE HON MR JUSTICE SUPPERSTONE
[2016] EWHC 1454 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/17

Before :

LORD JUSTICE TREACY

LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE SINGH

- -

Between :

THE QUEEN ON THE APPLICATION OF
THE FRIENDS OF FINSBURY PARK

Appellant

- and -

HARINGEY LONDON BOROUGH COUNCIL

Respondent

- and -

(1) FESTIVAL REPUBLIC LIMITED
(2) LIVE NATION (MUSIC) UK LIMITED

Interested Parties

- and -

THE OPEN SPACES SOCIETY

Intervenor

- -
- -

Richard Harwood QC (instructed by **Harrison Grant**) for the **Appellant**
Philip Kolvin QC and **Ranjit Bhose QC** (instructed by **Haringey LBC Legal Services**) for the **Respondent**
Robert McCracken QC and **Juan Lopez** (instructed by **PBC Licensing Solicitors**) for the **Interested Parties**
George Laurence QC and **Ross Crail** (instructed by **Richard Buxton Environmental & Public Law**) for the **Intervenor**

Hearing date: 2 November 2017

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Approved Judgment

Lord Justice Hickinbottom:

The Background

1. Large scale music festivals have been a particular feature of London parks since the 1960s. This appeal raises a narrow but important point as to the powers of London boroughs to permit parks to be used for such events.

2. The issue arises in the context of the hire of Finsbury Park ("the Park"), a 115-acre park owned by the Respondent London Borough ("the Council"), for an event known as the Wireless Festival 2016.

3. The Park has played host to large scale events, including commercial ticket-only concerts attended by tens of thousands of people such as this, for many years. These events are controversial, in the sense that they are clearly a source of great entertainment and enjoyment for those who attend; but they are, equally clearly, regarded as a considerable inconvenience to some who do not, particularly local residents and those whose enjoyment of the Park is diminished when they are displaced from those parts of the Park that are, from time-to-time, used for the events. It is therefore unsurprising that, over the last few years, these events have been the subject of much consideration by the Council.

4. The Council's Finsbury Park Management Plan 2013-16 included an events policy, namely that there would be a maximum of five commercial events of up to 30,000 to 40,000 people to be held each year, with a further maximum of three separate funfairs.

5. Under the Council's Outdoor Events Policy (which, after full consultation, was adopted on 7 January 2014), applications for major events in the Park have to be lodged at least nine months prior to the proposed date of the event, to allow for consultation with (amongst others) the Appellant, an organisation of Friends of the Park recognised by the Council. In 2014, the Council also set up the Finsbury Park Stakeholders Group, a group of elected councillors, officers from the Council and the adjacent London Boroughs of Hackney and Islington, local businesses, the police, residents and other interested parties including the Appellant. One key role of the Stakeholder Group is "to review and comment on initial and final draft event management plans for major events".

6. In addition to permission to hire the relevant part of the Park, any promoter of such an event also requires a premises licence from the Council's Special Licensing Sub-committee, under Part 3 of the Licensing Act 2003. That is also subject to a significant procedure, during which interested parties have an opportunity to make representations.

7. The Wireless Festival is an annual event, being held in Hyde Park and Queen Elizabeth Olympic Park before the festival moved to the Park in 2014. It is promoted by the Second Interested Party ("Live Nation"). Its application for a premises licence in 2013 incorporated an Event Management Plan of over 70 pages, a Crowd Management & Security Plan of similar length, a Medical Management Plan, a Waste Management Plan, a Noise Management Plan, a Show-stop Procedure, an Alcohol Management Plan, and Health and Safety Rules for Contractors. The Appellant was

consulted and made representations generally adverse to the application. The application was granted by the Council through its Special Licensing Sub-committee on 16 December 2013, subject to 113 conditions.

8. The Council received many complaints in relation to the 2015 festival, which resulted in the Council's Overview and Scrutiny Committee setting up a review "to reflect on and understand the impact of recent large events that have taken place in Finsbury Park such as the Wireless Festival". The Appellant was invited to give evidence to the review, which it did. The Committee published its report in early October 2015, which set out various ways in which the impact of the festival could be mitigated.

9. The First Interested Party ("Festival Republic") is an associated company of Live Nation. Its application for the Wireless Festival 2016 was notified to the Appellant, as a consultee, on 3 December 2015. It required closing part of the Park from 25 June to 15 July 2016, with a two stage music event (including a community/charity event) on 2 July and a two or three stage music event on 8-10 July 2016. During the performance days, 27% of the Park would be closed to the public. The earlier stage of the event was later cancelled, with the result that the closures began, not on 25 June, but on 30 June 2016.

10. The Appellant submitted an objection, not only on the merits of the application, but also contending that the Council did not have power to authorise such an event. However, on 18 March 2016, the Leader of the Council, purporting to exercise powers under section 145 of the Local Government Act 1972 ("the 1972 Act"), determined to hire the relevant part of the Park to Festival Republic for the festival.

11. The Appellant commenced judicial review of that decision on 29 April 2016. At an expedited rolled-up hearing on 9 June 2016, Supperstone J granted permission to apply for judicial review, but dismissed the claim, giving his reasons in a judgment handed down on 22 June 2016 ([2016] EWHC 1454 (Admin)).

12. The music festival went ahead. However, on the basis that this was an issue of some importance and would at least determine whether this annual event could take place in the Park in the future, on 19 December 2016, Lewison LJ granted permission to appeal on a single ground, namely that Supperstone J had erred in law in holding that section 145 of the 1972 Act authorised the Council to hire out the Park for the Wireless Festival 2016. Permission was refused in respect of all other grounds, and nothing more need be said about them.

13. Before us, Richard Harwood QC appeared for the Appellant, supported by George Laurence QC and Ross Crail of Counsel appearing for the Intervenor, the Open Spaces Society. Philip Kolvin QC and Ranjit Bhose QC appeared for the Council, supported by Robert McCracken QC and Juan Lopez of Counsel appearing for the Interested Parties. The court is grateful for their able, helpful and focused submissions.

The Law

14. The Park was established by section 7 of the Finsbury Park Act 1857, "for the use, recreation and enjoyment of the public". It was originally owned by the Metropolitan Board of Works (set up in 1855 as a cross-London borough public body, particularly to deal with infrastructure issues in the light of the rapid growth of the capital), but, as

a result of successive local government reorganisations, its ownership has passed through the hands of a number of public bodies, including the London County Council, the Greater London Council and, now, the Council.

15. The 1857 Act has since been repealed; and, pursuant to article 32 of, and Schedule 5 to, the London Authorities (Property Etc) Order 1964 (SI 1964 No 1464), the Park is now held by the Council for the purpose that is set out in section 10 of the Open Spaces Act 1906 ("the 1906 Act"), which provides, so far as relevant:

> "A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest or control was so acquired—
>
> > (a) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose…".

Section 20 defines "open space":

> "The expression 'open space' means any land, whether inclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole of the remainder of which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied."

16. For the sake of completeness, I should say that, even where a park has been established under statutory provisions that contain no express comparable trust (e.g. section 164 of the Public Health Act 1875 ("the 1875 Act")), these have been construed by the courts as having a similar effect (see, e.g., Attorney General v Sunderland Corporation (1876) 2 Ch D 634 at page 641 per James LJ, a case concerning the predecessor provision, namely section 74 of the Public Health Act 1848), i.e. it is held on trust for the purpose of public enjoyment. That construction was recognised by Parliament in section 122 of the 1972 Act, which concerns appropriation of land by local authorities and expressly refers to "land held in trust for enjoyment by the public in accordance with [section 164 of the 1875 Act]".

17. Therefore, the Council hold the Park under section 10 of the 1906 Act on a statutory trust for use by the public for its recreation, such that it has been said that the public are its beneficial owners (see Blake v Hendon Corporation [1962] 1 QB 283 at page 300 per Devlin LJ). Where such a trust exists, it is well-established that the public have a statutory right to use the land for recreational purposes (R (Barkas) v North Yorkshire County Council [2014] UKSC 31; [2015] AC 195 at [20] per Lord Neuberger of Abbotsbury PSC). Therefore, generally, the local authority owner "must allow the public the free and unrestricted use of it" (The Churchwardens and Overseers of Lambeth Parish v London County Council [1897] AC 625 at page 631 per Lord Halsbury LC), and it cannot exclude the general public from it "even for a single day" (Attorney General v The Loughborough Local Board (1881) The Times 31 May 1881, recently quoted and confirmed in Western Power Distribution

Investments Limited v Cardiff County Council [2011] EWHC 300 (Admin) at [16] per Ouseley J).

18. However, of course, that general rule bows to contrary legislative provision. For example, section 44 of the Public Health Acts Amendment Act 1890 ("the 1890 Act") allows for the closure of a park to the general public for a limited number of days per year, and the use of it on those days by some particular public institution or for some particular public event. It originally provided:

> "[An urban authority] may on such days as they think fit (not exceeding 12 days in any one year, nor [four] consecutive days on any one occasion) close to the public any park or pleasure ground provided by them or any part thereof, and may grant the use of the same, either gratuitously or for payment, to any public charity or institution, or for any agricultural, horticultural, or other show, or any other public purpose, or may use the same for any such show or purpose; and the admission to the said park or pleasure ground, or such part thereof, on the days when the same shall be so closed to the public may be either with or without payment, as directed by the [urban authority], or with the consent of the [urban authority] by the society or persons to whom the use of the park or pleasure ground, or such part thereof, may be granted: Provided that no such park or pleasure ground shall be closed on any Sunday or bank holiday."

Section 53 of the Public Health Act 1961 amended that section, so that it now applies to all local authorities, and extends the number of consecutive days upon which a park or pleasure ground might close from four to six, excluding Sundays. Section 12 of the Greater London Council (General Powers) Act 1978 amended the section further to allow for some Sunday closing in London.

19. The power to close parks and pleasure grounds in section 44 of the 1890 Act as amended applies to all local authorities. Specific local provisions are found in other statutes. For example, "notwithstanding the provisions of section 44 of the 1890 Act", section 11 of the Derbyshire Act 1981 gives the Derby council the power to close to the public an area of the Bass Recreation Ground not exceeding 1.42 hectares for 54 days (including Sundays) per year and section 77 of the West Yorkshire Act 1980 gives the Leeds council the right to close Roundhay Park for up to 10 Sundays per year, but in either case otherwise subject to the restrictions found in section 44.

20. In addition, for over a century, there have been specific statutory provisions for entertainment in parks etc, including provision for the restriction of access to the parts of parks where and when entertainment is provided. Section 76(1) of the Public Health Acts Amendment Act 1907 ("the 1907 Act"), which applied to the whole of England and Wales, gave power to the Local Government Board (the central government body that oversaw local government) to make rules prescribing restrictions and conditions subject to which the powers conferred in the section "shall with respect to any area in a public park or pleasure ground be exercisable in relation to the enclosure or setting apart of the area…"; and, subject to those rules, it provided:

> "… [T]he local authority shall, in addition to any powers under any general Act, have the following powers with respect to any public park or pleasure ground provided by them or under their management and control, namely powers—
>
> > (a) To enclose during time of frost any part of the park or ground for the purpose of protecting ice for skating, and charge admission to the part inclosed, but only on condition that at least three-quarters of the ice available for the purpose of skating is open to the use of the public free of charge;
> >
> > (b) To set apart any such part of the park or ground as may be fixed by the local authority, and may be described in a notice board affixed or set up in some conspicuous position in the park or ground for the purpose of cricket, football, or any other game or recreation, and to exclude the public from the part set apart while it is in actual use for that purpose;
> >
> > …
> >
> > (e) To enclose any part of the park or ground, not exceeding one acre, for the convenience of persons listening to any band of music, and charge admission thereto;
> >
> > …
> >
> > (g) To provide and maintain any reading rooms, pavilions, or other buildings and conveniences, and to charge for admission thereto, subject in the case of reading rooms to the limitation that such a charge shall not be made on more than twelve days in any one year, nor on more than four consecutive days;…"

21. Section 76(4) provided that no power under the section should be exercised "in such a manner as to contravene any covenant or condition subject to which a gift or lease of a public park or pleasure ground has been accepted or made…", without the consent of the donor or other person entitled to the benefit of such a covenant or condition.

22. Although there were express provisions for excluding the public from part of a park "while in actual use" for games or other recreation, it is clear that the power in section 76 of the 1907 Act was additional to the power to close a park under section 44 of the 1890 Act, the latter being a general power to close the whole or part of a park (subject to time restrictions) and the former being a specific power directed towards recreation, with its own restrictions but not subject to the restrictions in the 1890 Act. In any event, section 11 of the 1907 Act specifically provided:

> "All powers given to a local authority under this Act shall be deemed to be in addition to and not in derogation of any other

> powers conferred upon such local authority by any Act of Parliament, law, or custom, and such other powers may be exercised in the same manner as if this Act had not been passed."

23. As I have indicated, section 76 of the 1907 Act applied to the whole of England and Wales, including London. However, the London County Council (General) Powers Acts 1895-1927 made various specific provisions in relation to parks and open spaces in London. The London County Council (General Powers) Act 1935 generally brought these together, and made specific provision for London local authorities in respect of "open space", which was widely defined 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 the local authority…" (section 41). Section 42(1) gave local authorities broad powers in relation to open space, including the provision of open air baths, places for dancing, golf courses, tennis courts, gymnasia, and rifle ranges (section 42(1)(a)); and also to:

> "(b) provide or contribute towards the expenses of or by way of subsidy to any band of music to perform in the open space;
>
> (c) provide entertainments including bands of music concerts dramatic performances cinematographic exhibitions and pageants;
>
> (d) 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;
>
> …
>
> (g) erect and maintain for the purposes of or in connection with any of the foregoing paragraphs (a) to (f) or for or with any other purpose relating to the open space such buildings or structures as they consider necessary or desirable…
>
> (h) set apart or enclose in connection with any of the matters referred to in this section any part of the open space and preclude any person from entering that part while 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 Act) by such person:
>
> Provided that—
>
> > (i) where any part of an open space is set apart or enclosed under the foregoing provisions of this subsection for the playing of games and that part is not specially laid out and maintained for that purpose the power under this subsection to preclude any person from entering that part

shall not apply while the part is not in actual use for games;

(ii) the part of any open space set apart or enclosed for the use of persons listening to or viewing an entertainment (including a band concert dramatic performance cinematographic exhibition or pageant) shall not exceed in any open space one acre;…".

24. By section 45(a)(iii), a local authority was given power to make reasonable charges for "admission to or the use of any part of any open space set apart or enclosed by them under paragraph (h) of [section 42(1)]".

25. Section 69 of the 1935 Act made clear that the powers conferred by the Act were cumulative to, and not in substitution for or derogation of, powers exercisable by a local authority under any other enactment.

26. Section 76(1)(e) of the 1907 Act was repealed by section 147 of, and Part V of Schedule 2 to, the Local Government Act 1948 ("the 1948 Act"). The 1948 Act did not repeal section 42 of the 1935 Act; but section 132 of the 1948 Act expressly applied to all London boroughs including the Common Council of the City of London (section 132(7)). Section 132, under the heading "Provision of entertainments", provided as follows (so far as relevant to this appeal):

"(1) A local authority may do, or arrange for the doing of, or contribute towards the expenses of the doing of, anything necessary or expedient for any of the following purposes, that is to say—

(a) the provision of an entertainment of any nature or of facilities for dancing;

(b) the provision of a theatre, concert hall, dance hall or other premises suitable for the giving of entertainments or the holding of dances;

(c) the maintenance of a band or orchestra;

(d) any purpose incidental to the matters aforesaid, including the provision, in connection with the giving of any entertainment or the holding of any dance, of refreshments or programmes and the advertising of any such entertainment or dance:…

(2) Without prejudice to the generality of the provisions of the preceding subsection, a local authority—

(a) may for the purposes therein specified enclose or set apart any part of a park or pleasure ground belonging to the authority or under their control not exceeding one acre or one-tenth of the area of the park or pleasure ground whichever is the greater;

> (b) may permit any theatre, concert hall, dance hall or other premises provided by them for the purposes of the preceding subsection and any part of a park or pleasure ground enclosed or set apart as aforesaid, to be used by any other person, on such terms as to payment or otherwise as the authority think fit, and may authorise that other person to make charges for admission thereto;
>
> (c) may themselves make charges for admission to any entertainment or dance held by them and for any refreshment or programmes supplied at any such entertainment or dance:
>
> Provided that nothing in this subsection shall authorise any authority to contravene any covenant or condition subject to which a gift or lease of a public park or pleasure ground has been accepted or made without the consent of the donor, grantor, lessor or other person entitled in law to the benefit of the covenant or condition.
>
> (3) The expenditure of a local authority under this section… shall not in any year exceed the product of a rate of sixpence in the pound, plus the net amount of any receipts of the authority from any such charges or payments as are referred to in the last preceding subsection…".

This section thus amounted to a spatial extension from section 76(1) of the 1907 Act, in that, instead of the restriction being one acre, it was one acre or one tenth of the area of the park or pleasure ground whichever was the greater.

27. Following the Report of the Royal Commission on Local Government in Greater London, the London Government Act 1963 effectively abolished the London County Council and all existing London metropolitan boroughs, replacing them with the Greater London Council and 32 new London boroughs. Section 87(3) provided that:

> "For the purpose of securing uniformity in the law applicable with respect to any matter in different parts of the relevant area, or in the relevant area or any part thereof and other parts of England and Wales, any appropriate Minister may, after consultation with such of the appropriate councils as appear to the Minister to be interested, by provisional order made after 1 April 1965 amend, repeal or revoke any Greater London statutory provision…".

28. Under that subsection, the Minister of Housing and Local Government made an Order, entitled "Provisional order for securing uniformity in the law applicable with respect to parks and open spaces". That Order was later confirmed by Parliament in the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967 ("the 1967 Act"). "Open space" was defined in article 6 of the Schedule, widely, as including "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".

29. Article 7 of the Schedule ("article 7 of the 1967 Act") authorises the use of open space in London for the provision of entertainment provided that the area set apart does not exceed one acre or one tenth of the open space, whichever is greater, in terms somewhat similar to section 42(1) of the 1935 Act. It thus gives a local authority power to provide and maintain open air or indoor baths, golf courses and "indoor facilities for any form of recreation whatsoever" (article 7(1)(a)(v)). As particularly relevant to this appeal, article 7 provides:

> "(1) A local authority may in any open space—
>
> …
>
> (b) provide amusement fairs and entertainments including bands of music, concerts, dramatic performances, cinematograph exhibitions and pageants;
>
> …
>
> (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
>
> …
>
> (ii) the part of any open space set apart or enclosed for the use of persons listening to or viewing an entertainment (including a band concert, dramatic performance, cinematograph exhibition or pageant) shall not exceed in any open space one acre or one tenth of the open space, whichever is the greater."

Whilst altering the spatial exclusion, this later wording appears largely to derive from and replicate proviso (ii) to section 42(1) of the 1935 Act.

30. The 1972 Act accompanied the major local government reorganisation of that year. Except where excluded by a particular provision (e.g. section 144, which expressly proscribes all London authorities from having the power to contribute to advertising the commercial and industrial benefits of London), the Act expressly applies to the Greater London Council and London borough councils (section 270). At least to an extent, it sought to rationalise the powers of local government. For example, as I have already indicated, it extended the power in section 44 of the 1890 Act to all local authorities.

31. The 1972 Act did not repeal any part of the 1935 Act or the 1967 Act; but section 272 of, and Schedule 30 to, the 1972 Act repealed section 132 of the 1948 Act. It was replaced by section 145 of the 1972 Act, which is at the heart of this appeal. Falling within Part VII of the Act, under the heading "Miscellaneous powers of local authorities", it provides, under the particular heading "Provision of entertainments":

> "(1) A local authority may do, or arrange for the doing of, or contribute towards the expenses of the doing of, anything (whether inside or outside their area) necessary or expedient for any of the following purposes, that is to say—
>
> (a) the provision of an entertainment of any nature or of facilities for dancing;
>
> (b) the provision of a theatre, concert hall, dance hall or other premises suitable for the giving of entertainments or the holding of dances;
>
> (c) the maintenance of a band or orchestra;
>
> (d) the development and improvement of the knowledge, understanding and practice of the arts and the crafts which serve the arts;
>
> (e) any purpose incidental to the matters aforesaid, including the provision of refreshments or programmes and the advertising of any entertainment given or dance or exhibition of arts or crafts held by them.
>
> (2) Without prejudice to the generality of the provisions of sub-section (1) above, a local authority—
>
> (a) may for the purposes therein specified enclose or set apart any part of a park or pleasure ground belonging to the authority or under their control;
>
> (b) may permit any theatre, concert hall, dance hall or other premises provided by them for the purposes of sub-section (1) above and any part of a park or pleasure ground enclosed or set apart as aforesaid to be used by any other person, on such terms as to payment or otherwise as the authority think fit, and may authorise that other person to make charges for admission thereto;
>
> (c) may themselves make charges for admission to any entertainment given or dance or exhibition of arts or crafts held by them and for any refreshment or programmes supplied thereat.
>
> (3) Sub-section (2) above shall not authorise any authority to contravene any covenant or condition subject to which a gift or lease of a public park or pleasure ground has been accepted or

made without the consent of the donor, grantor, lessor or other person entitled in law to the benefit of the covenant or condition.

(4) Nothing in this section shall affect the provisions of any enactment by virtue of which a licence is required for the public performance of a stage play or the public exhibition of cinematograph films, or for boxing or wrestling entertainments or for public music or dancing, or for the sale of alcohol.

(5) In this section, the expression 'local authority' includes the Common Council."

32. It was under section 145 that the Council purported to act when hiring part of the Park to the First Respondent for the Wireless Festival 2016.

The Appellant's Case

33. Mr Harwood and Mr Laurence put their submissions somewhat differently, but, as one would expect, there was some significant overlap. Both emphasised that the purpose of the statutory trust under which the Park is held by the Council is for the provision of recreation for the public, an adjunct of which is that the Council is generally unable to exclude the public from the whole or any part of the Park. Exclusion can only be by way of statutory provision. It was common ground that the Council did not have power to hire part of the Park for the Wireless Festival under either section 44 of the 1890 Act (because of the temporal restrictions in that Act) or article 7 of the 1967 Ac (because of the spatial restrictions in that Act). The issue is whether the Council had such a power under section 145 of the 1972 Act.

34. There were two main strands of challenge to the Council's conclusion, with which Supperstone J agreed, that it had.

35. First, Mr Harwood emphasised that section 145 does not authorise any local authority to restrict any private or public rights, including the right of the public to use the Park for the purposes of recreation. He submitted that, in particular, it does not authorise a local authority to exclude the public, or any member of it, from any part of open space. The only relevant extant provisions that allow such exclusion are section 44 of the 1890 Act and article 7 of the 1967 Act. The construction of section 145 favoured by the Council, which would enable any part of the Park to be hired out for any length of time, renders both of those provisions redundant, and implicitly repeals them. That cannot have been the intention of Parliament, particularly as section 44 has been amended since the passing of the 1972 Act, by the Greater London Council (General Powers) Act 1978 (see paragraph 18 above).

36. Mr Laurence's primary point began from a different starting point. For the purposes of this appeal, he accepted that a local authority did have the power to restrict access to any part of an open space that it may enclose or set apart under section 145(2)(a). However, he submitted that article 7 of the 1967 Act confers upon London councils a power to close parks and pleasure grounds for the purposes of providing entertainment. It is intended to deal with essentially similar circumstances as section 145, but is of more particular application. The maxim *generalia specialibus non*

derogant applies, i.e. in bringing in the general power in section 145, Parliament cannot be taken as intending to repeal, derogate from or otherwise alter the more specific power, particularly as section 145 was enacted only five years after article 7 of the 1967 Act.

The Judgment of Supperstone J

37. Supperstone J dealt with these arguments, insofar as they were before him, in reasonably short order, as follows:

> "45. … I consider that section 145 of the 1972 Act, of itself and standing alone, provides the Council with the necessary power to permit Wireless 2016 to take place in the Park.
>
> 46. On a proper analysis of the legislative provisions, as Mr Kolvin submits, each of these Acts creates different powers for different places subject to different limitations.
>
> 47. There is express power under section 145(2)(a) to 'enclose or set apart' any part of a park. I agree with Mr Kolvin that 'enclosing' an area in a park must mean or entail closing it to the public, otherwise this would be an unnecessary provision. Sub-sections (2)(b) and (c) make clear that the power includes closing the park in question to members of the public, save for those who pay for admission. In any event section 145(1) confers on the council an express power to do 'anything' that is necessary or expedient for the purposes of the provision of an entertainment 'of any nature'. I accept Mr Kolvin's submission that includes closing the Park to the extent and for the time necessary to set up and take down the event infrastructure, and to hold the event safely for the benefit of those members of the public who wish to buy tickets to attend it. Wireless 2016 is an event that falls within section 145(1)(a) and (e).
>
> 48. Section 145 replaced section 132 of the Local Government Act 1948, which conferred a similar power to provide, or provide for, entertainment of any nature. However it is to be noted that the limitation on how much of the park may be closed or set aside in section 132(2)(a) is not reproduced in section 145 of the 1972 Act. The specific power in section 145(2) is also without any limitation on the period of time during which such enclosure or setting aside may continue.
>
> 49. Section 145 does not state that its exercise is subject to any other enactment, or that it is to be read or qualified by any such enactment, whether in London or elsewhere in England and Wales. It applies to the individual London boroughs and also, significantly, to the City of London (see sub-section (5)).

> 50. I also accept Mr Kolvin's submission that the power contained in section 44 of the 1890 Act is an additional power that an authority may rely upon should it so choose. This is made clear by section 341 of the Public Health Act 1875…. Similarly article 7 of the Schedule to the 1967 Act provides the Council with a power in addition to any other power that it possesses (see article 20 of the Schedule)."

Discussion

38. Despite the submissions of Mr Harwood and Mr Laurence, I am unpersuaded that Supperstone J erred. Indeed, I am firmly of the view that he was right, for the reasons he gave.

39. Before us, Mr Harwood focused upon the proposition that section 145 did not authorise the Council to exclude members of the public from the area of the proposed festival. He contrasted the wording of section 145(2)(a) ("a local authority may… enclose or set apart any part of a park or pleasure ground…"), with article 7(1)(g) of the 1967 Act ("A local authority may… set apart or enclose… 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" (italics added)). He submitted that the italicised words were crucial: it was those that gave an authority the power under article 7 to exclude from an event in a park those who had not paid. If, as Mr Kolvin and Mr McCracken submitted, the power to "set apart and enclose" part of a park, and charge people to go into that part, necessarily included the power to exclude other members of the public, those italicised words would be otiose in article 7. There is a tenet of construction that Parliament does not use empty words in legislation. They are not empty, he submitted, because, on the true construction of section 145, the power to "set apart or enclose" land does not incorporate the power to exclude people from it.

40. This argument, I admit, had some superficial attraction; but, when the words are seen in their full context, I find it unconvincing.

41. Mr Kolvin and Mr McCracken accepted that the italicised words in article 7 were superfluous, because the concept of "enclosing or setting apart" land inherently includes the concept of being able to keep people out of that land once it had been set apart or enclosed. That was particularly the case here, where there was a statutory power to charge people for entering the land, a pointless power if, anyway, the public could not be prevented from entering the land without paying anything. Both considered that the otiose words were probably there for historic reasons, given the lengthy evolution of article 7.

42. In my view, as a matter of ordinary language, "enclosing" an area of land necessarily connotes putting some form of barrier round the whole of that area, with a view to preventing access to and/or egress from it. Mr McCracken cited the example of the movement involving the enclosure of public lands by private landowners for the purposes of cultivation; but, in case that might be regarded as use as a term of art, an animal enclosure or a members' enclosure has the same connotation. It is difficult to think of a use of the word where it does not have that connotation. Mr Harwood

suggested that something could be "enclosed" even if there were gaps to enable public access; but, in my view, such gaps would be inconsistent with the concept.

43. Mr Kolvin submitted that the tenet of construction that Parliament does not use otiose words – i.e. that Parliament intends that every word used in legislation has some purpose and meaning – is weak in circumstances where, as here, there is a long history and borrowed phraseology. That submission has considerable power.

44. However, in this particular case, I consider there may be more than usual grounds for caution. The use of "set apart" and "enclose" in this context appear to have been used first in the 1907 Act. "Set apart" is used in section 76(1)(b) in the context of sports pitches: there is provision to "set apart" a part of the park for that purpose, and "to exclude the public from the part set apart while it is in actual use for that purpose". "Enclose" is used in a different context, namely for the purpose of protecting ice for skating and charging for the enclosed part. There is no discrete reference to any power to exclude persons from the enclosed area; although, from the context, it is clear that such exclusion is necessary and allowed. Unlike land which is "set apart", the concept of land which is "enclosed" appears there to include the ability to exclude the public from that land. That appears to me to be consistent with the ordinary use of the respective words. It is noteworthy, that section 76(1)(e) of the 1907 Act referred to merely "enclose" any part of a park or ground, and did not have an express specific power to exclude persons from the part enclosed.

45. I accept the strength of support is, at best, modest; and is, perhaps, very modest. The phrases "set apart" and "enclosed" are put together in later statutes – first, it seems, in section 42 of the 1935 Act – and, in some, an express power to exclude (or preclude the entry of) members of the public is maintained. Indeed, by section 44 of that Act, a local authority is given the power to "enclose" any part of any open space "for the purpose of or in connection with the cultivation or preservation of vegetation in the interests of public amenity; or… in the interests of the safety of the public; and may preclude any person from entering any part so enclosed"; which reduces the force of the point I make.

46. In any event, however the phrase "enclose or set apart" came to arrive in section 145 of the 1972 Act, given that, as a matter of ordinary language, "enclosing" an area of land necessarily connotes putting some form of barrier round the whole of that area with a view to preventing access to and/or egress from it, in its full context, in my view, Parliament intended section 145 to give a power to the relevant local authority to exclude members of the public, e.g. those who do not have a ticket and have not paid, from that part.

47. Two further matters in my view support that conclusion.

48. First, the 1967 Act does not apply out of London. I do not accept that Parliament could sensibly have intended out of London local authorities to have no power to restrict access to parts of their parks for the purposes of entertainment (other than the power to close parks for a particular public institution or event under section 44 of the 1890 Act).

49. Second, local statutory provisions, to which we have been referred, generally appear to proceed on the basis that a power simply to "enclose" includes a power to restrict

access to the general, non-paying public, and consequently do not include a separate, express power to do so. For example, paragraph 9 of Schedule 2 to the West Yorkshire Act 1980, under the heading "Power to enclose lakes for skating and to charge for admission", provides:

> "The Bradford council during times of frost may for the purpose of protecting ice for skating on all or any part of any lake or piece of water on [Baildon] Moor enclose such parts of the Moor as may be necessary to effect such purpose and charge for admission to any part so enclosed."

It is clear that that provision allows the relevant local authority to restrict access to the area enclosed. Indeed, that is made the clearer in some local provisions which, whilst giving the relevant authority power to enclose identified open space under section 145, expressly require access to be maintained to a particular part of it (see, e.g., section 5 of the Shrewsbury and Atcham Borough Council Act 1988).

50. Mr Laurence did not support Mr Harwood's contention that the 1972 Act did not include a power under which a local authority could restrict access to part of a park etc used for entertainment. Indeed, for the purposes of this appeal, his primary submission was based on the premise that, like the 1967 Act, it did. He submitted that, although the 1967 Act and 1972 Act did not have precisely the same consequences, the two statutes dealt with the same "state of facts", i.e. the proposed enclosure or setting apart of part of a park or pleasure ground belonging to or under the control of a London borough council for the purposes of providing entertainment for the public. In those circumstances, the maxim *generalia specialibus non derogant* (a general provision does not derogate from a special one) applied. That maxim was explained neatly, he submits, in Section 88 of Bennion on Statutory Interpretation: A Code (6th Edition) (2013), as follows:

> "It may be that, while a state of facts falls within the literal meaning of a wide provision, there is in an earlier Act a specific provision obviously intended to cover that state of facts in greater detail. Where the effect of the two enactments is not precisely the same, and the earlier one is not expressly repealed, it is presumed that Parliament intended it to continue to apply. The Earl of Selborne LC said [in Seward v The Owners of the Vera Cruz (The Vera Cruz) (1884) 10 App Cas 59 at page 68]:
>
> > '… where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so.'"

51. Mr Laurence submitted that, read in context, the 1967 Act effectively provides a comprehensive regime for the holding of entertainments in parks and pleasure grounds in London. That separate and distinct regime, he submits, has been in place

since the 1935 Act. He rejects the suggestion that section 132 of the 1948 Act applied to London at all; because it too was general, and bowed to the special provisions of the 1935 Act. Of course, the 1972 Act expressly applies to London (including the City of London); but, he submitted, the 1972 Act confers upon authorities a mass of powers not covered by the 1967 Act (e.g. the provision of swimming baths etc). Given that the 1972 Act was passed only five years after the 1967 Act, the "glaring contradiction" between the explicit spatial limitation in article 7 and the lack of any such limitation in section 145 can only be explained by such a construction. Had it been intended that the former should be made redundant, it is inconceivable that the draftsman would not have made that clear.

52. In my view, this was the most powerful argument against the construction of section 145 pressed by the Council, skilfully put by Mr Laurence; but, again, I have been ultimately unpersuaded. It is based on the premise that Parliament intended article 7 of the 1967 Act to be specifically directed towards the holding of entertainments in parks and pleasure grounds in London to the extent that it can be assumed that Parliament intended that section 145 of the 1972 Act, that would otherwise apply, should not apply to London. That is a premise I cannot accept.

i) The 1967 Act, and the provisional Order that preceded it, were adopted after the local government reorganisation in London, expressly to secure "uniformity in the law applicable with respect to parks and open spaces". There is nothing to suggest that it was intended to effect any radical change.

ii) It is also noteworthy that section 145(3) of the 1972 Act expressly retains private covenants and conditions upon which a gift of a public park has been made; but remains silent about the rights of the public to enjoy the park and the proviso (ii) in article 7(1) of the 1967 Act.

iii) The 1972 Act is, of course, the later statute. Section 145 of it applies to all local authorities, which include all 32 London borough councils (section 270). It is especially clear that the draftsman intended section 145 to apply to London because (a) section 145(5) expressly includes the City of London within its scope, and (b) it is clear that, where the draftsman intended to exclude London, he did so, as in the immediately previous section (see section 144(3)). Section 145 also expressly includes the power to enclose (and, hence, restrict general public access to) any part of a park or pleasure ground. It is clear that it is intended to give power to enclose any part of a park in London for the purposes of "an entertainment of any nature", which includes music festivals.

iv) The 1890 Act provides a specific power to close a public park or pleasure ground for a limited number of days for any charitable or other public purpose. It is not suggested that that is a special provision which trumps the general power in the 1972 Act. In respect of the 1967 Act and the 1972 Act, Supperstone J concluded that, as Mr Kolvin submitted before him and this court, article 7 and section 145 are stand alone provisions, creating "different powers for different places subject to different limitations" (see [46]). I agree. The 1972 Act is restricted in its scope to parks and pleasure grounds; whilst the 1967 Act applies to "open space" which is defined much more widely to include, not only those, but also heaths, commons, walks, and disused burial

grounds. The 1972 Act is specifically focused on "entertainment" of a performing kind; whilst the 1967 Act has within its scope a much wider variety of facilities for public entertainment, including swimming baths, golf courses, gymnasia, swings and other such apparatus, and centres and facilities for clubs and other organisations. The whole focus of these two (indeed, three) statutes is different. I do not accept the submission that the two sets of provisions "conflict": they are, in my view, simply separate and distinct powers, subject to different criteria and restrictions. That seriously undermines the contention that the 1967 Act was a special provision for the same "state of facts" as those for which the 1972 Act provided. It is insufficient for the application of the maxim – and, hence, the assumption that the Parliamentary intention was to deny London boroughs the powers in relation to entertainment in parks provided by the 1972 Act – that there was merely some overlap.

v) Indeed, far from suggesting that the 1967 Act excluded powers which, on the face of it, were given to London boroughs in respect of entertainment in parks, the various statutes expressly provide that the powers they give are supplementary to any powers derived from other Acts (see, especially, article 20 of the 1967 Act). In my view, that is a clear flag of the intention of Parliament.

vi) Section 145 replaced section 132 of the 1948 Act. Insofar as out of London authorities are concerned, it removed the spatial restriction imposed by section 132(2)(a) of the 1948 Act on the power to enclose or set apart any part of a park (i.e. the greater of one acre or one tenth of the area of the park). Of course, one can see why the extension of powers in respect of a particular area may be appropriate: I have referred to some such local extensions. But there does not appear to be a logical reason why London boroughs should be deprived of the powers which non-London local authorities have in respect of entertainment in parks under section 145. Mr Harwood suggested that there might be a rationale in the population density in London and/or the size of the capital, but there is nothing to suggest that Parliament had that in mind as a reason to reduce the powers in London.

vii) I do not accept Mr Laurence's submission that the provisions of section 42 of the 1935 Act were, so far as London is concerned, *specialia* to the provisions of section 132 of the 1948 Act's *generalia*, so that the latter did not apply to London either. For the same reasons, I consider those two statutes gave London authorities two distinct powers, under either of which they could have acted in particular circumstances.

53. For those reasons, I do not consider that Mr Laurence (or, insofar as he made a supporting submission, Mr Harwood) can obtain any significant support for the contention that Parliament intended that section 145 of the 1972 Act should not apply to London from the maxim.

54. Indeed, I am satisfied that that was not Parliament's intention; but, rather, that section 145 provides the Council power to enclose part of the Park for the purposes of events such as the Wireless Festival, entirely distinct and separate from the power in article

7, such that the Council can, in any particular circumstances, exercise either power it chooses. The power under section 44 of the 1890 Act is, likewise, distinct.

55. Mr Laurence and Mr Harwood relied upon other submissions based upon the rights of the public to have free and unrestricted access to the park, under the statutory trust established now by section 10 of the 1906 Act. Mr Laurence submitted that the power under section 145 to enclose part of a park has to be construed, so far as possible, in the light of that statutory trust, which imposes a primary obligation on the Council. Where Parliament has given an authority to do things which may potentially interfere with the free and unrestricted use by the general public of parks, then, relying on Blake v Hendon Corporation [1962] 1 QB 283, Mr Laurence submits they "are to be construed (if possible, which it is) as conferring powers that are to be exercised in a way that is consistent with and ancillary to "beneficial occupation by the public" and "compatible with the full use by the public of [the land] as [a public park or] as a pleasure ground". That, he says, informs "the correct approach to the interpretation and application" of section 145.

56. There is here, I consider, room for confusion. This appeal concerns the issue of whether, as a matter of jurisdiction, the Council had power under section 145 to hire out part of the Park for the purposes of the Wireless Festival; or whether, as a matter of jurisdiction, they were limited to considering the application for hire only under section 44 of the 1890 Act or article 7 of the 1967 Act. In respect of that issue, it seems to me that that the statutory trust provisions of section 10 of the 1906 Act are of limited value, because section 145 clearly gives local authorities the power to enclose parts of a park that is subject to that trust: the issue is whether it applies to London, and hence the Park. Of course, if the Council has the power to consider the application under section 145, they must use that power lawfully, and not (e.g.) to frustrate the legislative purpose (Padfield v Minister of Agriculture Fisheries and Food [1968] AC 997) or perversely (Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223). But that is a different and highly fact-specific question, which involves an assessment of the various rights and interests involved – quintessentially a question for the democratically-elected Council, subject to control by the courts on well-established principles of judicial review – and one that does not arise in this appeal. There is no challenge to the Council's exercise of the section 145 power in this case, if it had such a power; and, consequently, no evidence has been lodged by the Council in respect of it. Given the consultation and other processes that went into the Council's policy on events in the park generally, and its decision to grant Festival Republic a premises licence and Live Nation a hiring of part of the Park for the festival, it may be that such a challenge would have been difficult to mount or even untenable; but, as no such challenge has been made, it would be inappropriate to say anything further about it.

Conclusion

57. For those reasons, I would dismiss this appeal.

Lord Justice Singh :

58. I agree.

Lord Justice Treacy :

59. I also agree.