CO/857/2016

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 8 June 2016

**B e f o r e:**

**MR JUSTICE SUPPERSTONE**

**Between:**

**THE QUEEN ON THE APPLICATION OF WHITSTABLE SOCIETY**
**Appellant**

v

**CANTERBURY CITY COUNCIL**
**Respondent**

Computer aided transcript of the stenograph notes of WordWave International Ltd
trading as DTI
8th Floor, 165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

**Mr D SteadmanJones** (instructed by Richard Buxton) appeared on behalf of the **Appellant**

**Mr J Goudie QC** and **Ms H Emmerson** (instructed by Sarah Bowman City Solicitor) appeared on behalf of the **Respondent**

P R O C E E D I N G S

**MR STEADMAN-JONES:** Thank you my Lord, this is the claimant's renewal application for permission for judicial review of the decisions by the council to enter into a conditional contract for the disposal of the Oval site in Whitstable. I am Daniel SteadmanJones and I act for the claimant. Mr Goudie QC and Ms Emmerson act for the council to my right.

My Lord, this claim is brought on five grounds. The first ground is that the Oval is open space and in accordance with that status, the contract was entered into in breach of the requirement in section 123, subsection 2A of the Local Government Act 1972.

The second ground is that the contract was entered into ultra vires in two respects: the first is that there was no open space provision included within the contract and there has been no other legal agreement entered into to ensure open space provision at the Oval site.

The second way in which the contract was ultra vires was that the resolution to authorise the contract was made on the terms set out in the Director of Resources report and in that report, which can be seen on the plan in the report, the access strip was not included, even though it was subsequently included in the contract for sale.

The third ground, my Lord, is that the item of business, the disposal of the Oval site, was misrepresented, both on the 28 day notice, and the agenda for the meetings of the Oversight and Scrutiny Committee and of the Executive Committee meetings in December 2014 in breach of section 100B(4)(a) of the Local Government Act 1972.

The fourth ground is that the contract was entered into despite a failure to obtain best consideration as required by section 123(2) of the Local Government Act 1972.

The fifth ground is that the council undertook no proper equality impact assessment in relation to the impact of the proposals for the disposal of the Oval site on disabled people in breach of its public sector equalities duty.

Now, my Lord, in view of the time that we have available today, I propose to focus on the two

key aspects of this claim

**MR JUSTICE SUPPERSTONE:** Yes. Mr SteadmanJones, the first issue is delay, is it not, and whether time should be extended?

**MR STEADMAN-JONES:** My Lord, I can take it in that order if you prefer. I was planning to deal with open space first and then to come on to delay but obviously I am in your hands.

**MR JUSTICE SUPPERSTONE:** Yes, well you have to satisfy me that time should be extended before we come to the substantive grounds you challenge.

**MR STEADMAN-JONES:** My Lord, I am content to proceed in that way if that's your preference.

In terms of delay, the issue is a difficult one in terms of comprehending precisely the timetable involved in this case.

The starting point, my Lord, is probably to go to the chronology

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** 0 which we have at 163

**MR JUSTICE SUPPERSTONE:** Well, the claim form was filed on 17 February of this year.

**MR STEADMAN-JONES:** 162, sorry. Yes.

**MR JUSTICE SUPPERSTONE:** And you say that that was within a week of receiving crucial information showing that the Oval was acquired and held as open space. That, as I understand it, is the principal ground on renewal in relation to delay, is that right?

**MR STEADMAN-JONES:** My Lord, that is right, it is not that's not the only fact involved. There are, we say, the information, or the crucial evidence and information necessary for the claimant to be aware sufficiently to bring the claim, emerged first of all in relation to many of the grounds in November, so 17 November in fact was when the council published the redacted Director of Resources report which contained much crucial

information which was necessary to form a basis for the grounds 2, 3, 4, 5. In terms of open space specifically, clearly the claimant has suspected for a number of actually since 2013 that this was open space. As you will have seen from the evidence in the papers, the council repeatedly denied that it was, still do deny that it was, however, after November, once we issued the actual letter at the end of December, firstly on 15 January, in their preaction response, they produced some evidence, crucially the minute from 1944, minute 933, which records, which is the official council

**MR JUSTICE SUPPERSTONE:** That goes to the issue of acquisition.

**MR STEADMAN-JONES:** It does, absolutely, my Lord. That's the first piece of crucial information, if you like, that was produced if you like, that's on 15 January. Then, of course, we make a further request on 2 February by letter to the council for any further material and then we have on 10 February, my Lord, I can take you to that letter if you

**MR JUSTICE SUPPERSTONE:** That's what you refer to as "the crucial information" in your skeleton argument at page 4, paragraph 7, subparagraph 3.

**MR STEADMAN-JONES:** Of the skeleton?

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** Yes.

**MR JUSTICE SUPPERSTONE:** There's the letter to the defendant of 1 February, containing the request and then the response, the covering letter, of 10 February and enclosures there to.

**MR STEADMAN-JONES:** That's correct, my Lord, and as you have rightly noted, there was the issue of the acquisition, and then there was the issue of whether it was held

**MR JUSTICE SUPPERSTONE:** Well, that's the critical issue, whether it was held, because there was a lease or there were leases over a 50year period.

**MR STEADMAN-JONES:** Well, my Lord, with respect, there is no evidence of a lease, certainly no evidence of a lease sufficient for there to be a disposal either under the Local Government Act 1933 as amended in 1959 or, indeed, under the 1972 Act, that is the crucial fact here. Obviously it is open to the council to produce a lease, they haven't. The claimant has undertaken exhaustive researches to see firstly any evidence of a lease or any evidence of an advertisement and consideration that would have been necessary under the preceding local government regime or, indeed, the 1972 Act and there is none.

**MR JUSTICE SUPPERSTONE:** What document do you point to as justifying the delay which only came to light, you say, very recently?

**MR STEADMAN-JONES:** Well, my Lord, the documents that are important in that respect obviously are the black book entry, which is in tab 4, 383. Now, the defendant accepts that this was probably produced some time in the sixties so it certainly superseded the letting arrangements, if you like, that were

**MR JUSTICE SUPPERSTONE:** Well, that's the purpose of the acquisition, isn't it, 1 May 1945?

**MR STEADMAN-JONES:** It is, it is.

**MR JUSTICE SUPPERSTONE:** Development as an open space for the aged of the town.

**MR STEADMAN-JONES:** That's correct, my Lord, however, it is perhaps worth noting that the question of acquisition and being held or kept are very much linked, we say, because if it was acquired as open space in 1944/45, it would have been acquired pursuant to either the 1975 Public Health Act, section 164, or sorry, section 9, excuse me, of the 1906 Open Spaces Act. In either of those instances, the land would have been impressed with a statutory trust that had become public trust land and something has to then intervene to override that status because councils are allowed, or were allowed up to the 1972 Act and

beyond, were allowed to let land for other purposes until the land was required for the purpose for which it was acquired. So the fact of a letting, either in the fifties or the sixties or even up to now is not enough, it is not sufficient to defeat the open space status of the land.

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** So whilst you are correct, my Lord, that that black book entry only refers to acquisition, it is important to note that linkage because if it was required for open space, it then was held under a trust and something has to defeat that trust or override that trust and we say nothing has and, my Lord, the defendant has not produced

**MR JUSTICE SUPPERSTONE:** Well, let's take Mr Blundell(?) has dealt with the acquisition in his advice at paragraphs 41 and 42, didn't he, on page 72 so he made the point that you are making about the acquisition.

**MR STEADMAN-JONES:** Sorry, my Lord, where are we?

**MR JUSTICE SUPPERSTONE:** At page 72 of the bundle.

**MR STEADMAN-JONES:** Yes, he did, exactly.

**MR JUSTICE SUPPERSTONE:** So that's that point. The question thereafter is whether it was held as open space.

**MR STEADMAN-JONES:** Well, indeed, my Lord, and obviously we have, as I have said, the land terrier entry but we also have the memo from 1990, which is from Mr WilsonSharp(?), that's in 384, the following page obviously from the

**MR JUSTICE SUPPERSTONE:** Yes, well, that you say is the critical document because of the second paragraph.

**MR STEADMAN-JONES:** It is.

**MR JUSTICE SUPPERSTONE:** "In the light of this and in view of the public concern of the

matter, I consider it appropriate to regard the land as held as public open space.

I accordingly place a copy of this memorandum in the deed packet in the council terrier."

**MR STEADMAN-JONES:** Yes, my Lord, I mean, obviously the third paragraph also refers

**MR JUSTICE SUPPERSTONE:** Certainly.

**MR STEADMAN-JONES:** specifically to the advertisement requirement.

**MR JUSTICE SUPPERSTONE:** But the claimant had knowledge of that opinion much earlier, didn't it?

**MR STEADMAN-JONES:** Well, it had knowledge of a letter from 1996 which refers to this memo as advice. It did not have knowledge of this letter, which is in somewhat more categorical terms.

**MR JUSTICE SUPPERSTONE:** Well, if we look at page 228, that's the letter from Mr WilsonSharp of 20 September 1996.

**MR STEADMAN-JONES:** Yes.

**MR JUSTICE SUPPERSTONE:** Second paragraph, second sentence:

"In 1990 I therefore advised the city estates officer that this land should be treated as held in accordance with those undertakings as public open space."

**MR STEADMAN-JONES:** My Lord, that's correct but in that letter it says nothing about keeping that information with the deed packet and that the council should I mean, the memo should actually be placed in the land terrier. Now, that to me, to us, is a much more categorical statement than was in the 1996 letter and of course the 1996 letter and, indeed, all the other bits of evidence that were pieced together up to that point, had to be counter balanced, of course, by this claimant against what the council has repeatedly told them, which is that there is no question of it being open space.

**MR JUSTICE SUPPERSTONE:** But the claimant knew about the 1996 letter back

in October 2013.

**MR STEADMAN-JONES:** Well, absolutely it did and that's why Mr Cox(?) on behalf of the claimant raised the issue at that meeting and was given the answer he was by Mr Ellender(?) which if we go to page 241, we find at the bottom of that page, in particular the, we say, wholly inaccurate statement, where he is dealing with this letter from Mr WilsonSharp, he says he had given advice to the estates officer but on the face of it that advice was not accepted because:

"As I say, on our own records, not necessarily on the deeds but on our own records, there's no indication that it was to be used as public open space."

**MR JUSTICE SUPPERSTONE:** But he does refer to the advice of Mr Sharp earlier in that passage between the two punch holes. He sets out the advice of Mr Sharp, refers to the 1996 letter and the 1990.

**MR STEADMAN-JONES:** Well, my Lord, he does, but he obviously doesn't give any indication that there are these further pieces of information that indicate that it was being held as open space. There is the third piece of evidence that was actually produced after the claim was produced, again as a result of the claimant's researches, which is the first registration application form, which was signed by Mr Ellender. That was from 2002 and that stated that the land was held as open space. So it was flat wrong, that statement, that there was nothing in the council's records to suggest it was being used as public open space and in fact, my Lord, it reflects an error of law because whether it has to be used in order to be treated as public open space for the purposes of the definition in the 1990 Act is well, that is unnecessary, I mean, if we want to go to the Plymouth matter, I can take you to the key passage there which indicates

**MR JUSTICE SUPPERSTONE:** Just before we leave that, you say I mean, there's reference

to the deeds but bottom of the page, reference to the records, so: "I say on our own records", not necessarily the deeds but "on our own records there's no indication that it was to be used as public open space", and that in particular, you say, is an inaccurate statement?

**MR STEADMAN-JONES:** Yes. Yes.

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** Now, there is obviously this linked question which goes to the substance of open space so perhaps you don't want me to come to it yet but there is the question of whether in fact something needs to be used or open to the public in terms of access in order to be treated

**MR JUSTICE SUPPERSTONE:** Yes, insofar as it impacts on the delay and whether you knew that it was acquired and held as open space, I think it would be sensible if you deal with that at this stage.

**MR STEADMAN-JONES:** Well, I can certainly deal with it. I mean, it doesn't go to the delay point as such because it goes to the arguments that counter really the defendant's point that it is not open space, so perhaps I should hold off.

**MR JUSTICE SUPPERSTONE:** Very well. So those are the critical documents on delay but all this was known at the time when Mr Blundell wrote his advice, wasn't it, because his advice was in October last year.

**MR STEADMAN-JONES:** Indeed, my Lord. On the advice point, because of course the defendants have objected to that or pointed out that the further(?) case shows that you can't rely on legal advice. We don't rely on the legal advice as such, it is merely another evidential piece of evidence that shows that it was at that point unclear in the terms of the test in Sita(?) that my learned friend referred to in his grounds of resistance. It was a crucial piece of evidence which goes to the point that it was not clear to the claimant, as

of October 17th when he produced his advice, because in fact they were being told at that point that there was not enough evidence and of course Mr Blundell's advice did proceed on the basis that there was a valid lease which would, of course, defeat the open space status in the terms that I have described and we have discussed.

**MR JUSTICE SUPPERSTONE:** Yes, and, indeed, the consistency between the number of leases there were or any lease and it is still being held on trust as open space.

**MR STEADMAN-JONES:** Well, but the point is though we don't have, and counsel haven't produced, a lease that would be sufficient to defeat the open space status for the purposes of the Act in terms of the disposal. There has been no disposal

**MR JUSTICE SUPPERSTONE:** Are you any further advanced on that point than you were in October 2015?

**MR STEADMAN-JONES:** Well, we are, my Lord, because there clearly was a letting arrangement but as I have said, as a result of my own researches and also our further attempts, it is now clear that there may well have been lettings, there may well have been annually renewable licences or letting arrangements of one sort or another, they were never formalised to the extent of becoming a lease sufficient to defeat the open space status, as I say, for the purposes of Labour government at 1972, and they were started in the early sixties at which point the law under the 1973 Act applied. Now, that law, of course, allowed for letting of any council land and that would include open space land.

Of course, the idea would be that it would revert to open space at the point at which the letting ended or the licence ended, of course, and that is the point because when this arrangement did end in 2013, initially there was a tenancy at (Inaudible) and then it reverted straight to the council and at that point, we say that the open space status is still there, it hasn't gone away.

**MR JUSTICE SUPPERSTONE:** Yes, so you say the short let say of a year to the yacht club but which continued for 50 years wouldn't in itself be inconsistent with the open space status.

**MR STEADMAN-JONES:** Exactly.

Now, my Lord, there is a point on delay there, of course, because this is an extremely complex area of law in terms of open space status and local government powers and historic powers obviously in this case. It is very common for the unravelling, if you like, of the best understanding of the position that you can get to to take a long time. Now, I don't say you have to have an absolute understanding of everything by any means and we don't, we still don't. However, you do need to reach a level of clarity, again in the words of the test in the Sita case, upon which it is reasonable then to base a claim. Now, I say firmly that that was not the case in relation to open space in October. Mr Blundell's advice was just, as it were, a summation of the position at that point. After September 17th, a lot of the information comes available, the other grounds, the basis for the other grounds, and it is only really once the preaction process has begun that we get further evidence from the council which does tip the balance and says, "Okay, well now we can bring this claim", that's the point on delay

**MR JUSTICE SUPPERSTONE:** And the further evidence specifically is the document at 384, is it?

**MR STEADMAN-JONES:** It is 383, 384, and obviously the minutes, 933, which we have discussed, which goes to acquisition, and then the other point I should say, which has obviously come after proceedings have been issued, is this final piece of evidence which was produced in April which is the digital record of the Oval, again there it says it is designated.

**MR JUSTICE SUPPERSTONE:** Sorry, what page is that.

**MR STEADMAN-JONES:** That's page 412. It is the most recent disclosure from the council.

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** If you look on that, that is the digital record, I guess the digital version, if you like, of the land terrier records, and there you will see, not actually anything to do with acquisition but under "other restrictions", that it is designated public open space. Again, that would mean that its status was open space, unless something intervened to override that status, it remains open space. Then the following page you have the plan which just makes it clear that it is the Oval we are discussing, and also is the Oval that is being referred to.

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** So that is a further piece of evidence on that. Now, of course, it is important to bring proceedings as quickly as possible and we say the claimant has done that actually because, as I say, the evidence on the other grounds primarily emerged after or on 17 November and thereafter, the claimant has acted with the utmost haste, firstly trying to instruct people just before Christmas, getting a letter out on New Year's Eve, and then obviously acting as soon as this evidence became available from the council after January 15th and then February 10th.

My Lord, if you are not with me on the fact that those are, as it were, good reasons, and we say that they are very good reasons, but if you are not with me on that, I would say, in terms of delay, that this is an issue actually of general importance in the sense that Mr Justice Taylor applied in the White Ap(?) case, the Ruddock(?), case which we could go to if you like but if you are sufficient

**MR JUSTICE SUPPERSTONE:** No, I am conversant with that.

**MR STEADMAN-JONES:** Of course. The point there obviously it is not White Ap(?) in our case but, I mean, there are very important issues. There are two major reasons why this raises issues of general importance. The first is the issue of probity, transparency and accountability of local government decisionmaking is of fundamental importance in terms of government. Now, of course, we bring this claim on various grounds which we say illustrate that the council has fallen short in various ways in relation to three different things, for your purposes, for our purposes, it is sufficient that it is arguable that that is the case in terms of permission but the second issue of general importance is that if this is open space land, and we are in the context at the moment of wide ranging cuts in local government, councils across the countries are looking around at what assets they have, what land they have, what they might dispose of, what they might appropriate to other uses, what they might lawfully gain income from and the rest of it. Now, it is absolutely of fundamental importance that the courts supervise this properly and ensure that councils act lawfully in these respects and if they don't then obviously it brings the system into disrepute. So that is a huge issue and we say that councils across the country may be thinking of similar arrangements in terms of conditional contracts, in terms of possibly ambiguous parcels of land which may or may not be open space. It is of crucial importance that the courts supervise this properly and therefore this case should proceed as a result of those very important issues.

**MR JUSTICE SUPPERSTONE:** Thank you very much.

I will hear from Mr Goudie now on delay.

**MR GOUDIE:** My Lord, yes. My Lord, my learned friend accepts before your Lordship that "clearly there were letting arrangements". My Lord, their argument, such as it may be, that those arrangements do not affect the legal basis upon which the land has been held has

been available to them all along. Nothing has changed in that respect since Mr Blundell's opinion in mid October last year, if, indeed, not a couple of years before that. My Lord, if your Lordship has the point that our learned friend has a high hurdle to surmount, the hurdle of a long delay, he simply falls well short of surmounting that hurdle. The claim is one that is far out of time. There is no good and sufficient reason for extending time at this point and we say permission should be refused on that ground alone and that Mr Justice Hickinbottom's decision on the papers is a characteristically sound one and, of course, as your Lordship well appreciates, delay is of particular significance when decisions have legal effect, especially in the context of land contracts and third party (Inaudible) and, my Lord, there are two main reasons why we say that permission should be refused on the grounds of the claimant's undoubted delay. First, there has never been any ground for extending time at all. Second, even if there were some basis for extending time, that might have justified delay up to May or perhaps even July of 2015, it certainly doesn't justify any delay beyond that, and certainly not until mid February of 2016.

My Lord, as to why there has never been any ground for any extension of time, there is, as your Lordship appreciates, a dispute between the parties as to whether the land was at the material time, December 2014, January 2015, public open space or not. It has been the claimant's case since at least October 2013 that it was. The claimant has since long before the council sale decision in December 2014, implemented in January 2015, had evidence which it says supports its case. All that has happened since is that it has some more evidence that it says supports its case and that doesn't begin to justify any extension of time at all.

**MR JUSTICE SUPPERSTONE:** Well, Mr Goudie, what do you say about the accuracy of Mr Ellender's statement in October 2013 I am looking now specifically at page 241

**MR GOUDIE:** Yes.

**MR JUSTICE SUPPERSTONE:** that there's no question of any public open space, any use of it, nothing on the deeds, and then he refers to the council's records and says in addition in effect, and in addition to the deeds, "on our own records there's no indication that it was to be used as public open space". Was that an accurate statement?

**MR GOUDIE:** My Lord, that's open to debate as to whether that was a statement not only made in entirely good faith but whether it was in all respects accurate. In particular, I mean reference has been made by my learned friend this morning to the application in 2002 to the Land Registry for first registration, and that was signed in Mr Ellender's name as the chief solicitor at the time, but that's not to say that he was aware of the way in which that was expressed.

**MR JUSTICE SUPPERSTONE:** You say signed in his name, was that not his signature?

**MR GOUDIE:** No. I mean, not in the sense of a signature that he himself appended, and as your Lordship appreciates, it is common in local authorities for documents to go out in the name of the chief officer without the chief officer necessarily being aware of them being dealt with by subordinate

**MR JUSTICE SUPPERSTONE:** I looked at this, this signature I forget which page it is on but it is in manuscript, with his position underneath typed out, isn't it?

**MR GOUDIE:** Yes.

**MR JUSTICE SUPPERSTONE:** So the signature is in manuscript.

**MR GOUDIE:** It is certainly done in his name precisely

**MR JUSTICE SUPPERSTONE:** Someone has written his name.

**MR GOUDIE:** because of his position.

**MR JUSTICE SUPPERSTONE:** Yes.

**MR GOUDIE:** My Lord, in our submission that, of course, is something post the proceedings being commenced and hardly therefore relevant to the delay in bringing the proceedings and, my Lord, as your Lordship has already seen in relation to page 241 specifically, I mean, this is a classic instance of the point, that what the claimants have acquired as time has gone by has been essentially more of the same, that they had the 1996 letter from Mr Ellender's predecessor, Mr WilsonSharp, they had that since at least October 2013, they were trying to make of that what they might, and actually having the document from 1990 as well is simply the same point being restated.

**MR JUSTICE SUPPERSTONE:** Well, is it? I mean, that document's at page 384 and what he says is that he is actually placing a copy of the memorandum in the deed packet and in the council terrier, so if that was done, then that document was there in the council records. And that, the claimant says, was particularly important and really translated as suspicion into facts that warranted the bringing of the proceedings, that's as I understand it.

**MR GOUDIE:** Rather the position is, my Lord, that the claimant has consistently over a long period of time believed, or at least stated that it believed, that it was open space. The council has equally consistently maintained that that had not been the case for many a long year and the fact that there was this context has, of course, been well known to both parties for a long time. It is not as if the claimant has become aware of a case of which they were unaware before, simply an accretion of evidence.

**MR JUSTICE SUPPERSTONE:** Was the memorandum placed in the deed packet in the council terrier?

**MR GOUDIE:** Sorry, my Lord?

**MR JUSTICE SUPPERSTONE:** Was the memorandum of 1990 placed in the deed packet and in the council terrier?

**MR GOUDIE:** My Lord, I don't know whether that's a reference to the black book entry on the previous page or not.

**MR JUSTICE SUPPERSTONE:** I am interpreting, and tell me if I am wrong, but I am interpreting that sentence in Mr WilsonSharp's memorandum, he being the chief solicitor, as saying that this is a matter of public concern, appropriate, in the light of what is noted in the first paragraph, to regard the land as held as public open space and "I am accordingly placing a copy of this", without reading that out again, I interpret that as shorthand to be saying "in the council records".

**MR GOUDIE:** Yes. But my Lord, this is I mean, whether one is dealing with Mr WilsonSharp or 1990, or Mr Ellender in 2013, or now, of course, none of them had any involvement or awareness in 1944/1945 as to what the position was at the time of acquisition but in any event, the material time with which we are concerned is the better part of 70 years later.

**MR JUSTICE SUPPERSTONE:** But time of acquisition, it seems to be clear, that the purpose of acquisition was for development as an open space for the aged of the town. I mean that seems clear now.

**MR GOUDIE:** Well, save that was not expressed as a term of the conveyance or whatever but be that as it may

**MR JUSTICE SUPPERSTONE:** But undertakings were given.

**MR GOUDIE:** In very general terms and, of course, it is one thing it being open space, it is another matter it being public open space, but the main point is that whatever the position may or may not have been in the mid 1940s, we are concerned with the position in 2014/2015 and we are being asked to deal with that in 2016 because of the claimant's delay.

**MR JUSTICE SUPPERSTONE:** But when the council's chief solicitor wrote his

memorandum in 1990, there had been lettings to the yacht club for some decades by that stage.

**MR GOUDIE:** Indeed, certainly.

**MR JUSTICE SUPPERSTONE:** Are there any leases? Are there any documents recording the lettings?

**MR GOUDIE:** There are, I believe, documents. They may be described as licensed rather than leased and certainly they were not longterm documents, it was annual renewals, but my learned friend has accepted that there were lettings or letting arrangements and plainly there were.

**MR JUSTICE SUPPERSTONE:** Well, he is accepting that in broad terms without having seen any documents and knowing the terms.

**MR GOUDIE:** It is the broad term that matters, I mean, the fact is, as, of course will be physically observable on the ground, that the Whitstable yacht club year upon year, decade upon decade, was in physical occupation of the site and obviously with some form of authorisation from the council so the fact that the land was not being used as public open space was conspicuous all round and nothing has changed in that respect, that position has developed

**MR JUSTICE SUPPERSTONE:** I think I picked up some conflict of evidence as to certain areas of the land that were used for open space, on public open space, on certain occasions only

**MR GOUDIE:** Certainly there is some suggestion that there was occasionally, and I think generally relatively recently, sporadic use of part of the site for what might be called "informal recreation" but obviously that was by permission of the yacht club, until the yacht club's arrangement terminated relatively recently, and did not amount to public

recreation as of right in terms of public open space. It wasn't public open space, it was the yacht club's premises, and that's the salient fact, so far as that is concerned.

**MR JUSTICE SUPPERSTONE:** Yes.

**MR GOUDIE:** Now, my Lord, our alternative position is even if it could be said that the claimant didn't have sufficient knowledge at the time of the material decisions that are the subject matter of this judicial review, that is December 2014, perhaps January 2015, it certainly knew about the contract then and it knew that the quantum of open space that it was seeking was not being provided in that contract, that was apparent from the public minutes in December 2014, but even if they hadn't been aware of that at the very time, they were very well aware of that by May of 2015, or at any rate at the latest July of 2015, but it did not act promptly even then. It didn't act promptly when it obtained further information in September 2015, it didn't act promptly when it obtained yet further information in October 2015, it didn't act until February of 2016 and, my Lord, what we submit is that when a claim is already well out of time by reference to the three month long stop period, never mind promptness, and an extension of time is, as here, sought by reference by some subsequent event, plainly once there is knowledge of that event, an extension can be granted based on it only if the claimant acts promptly after learning about it. My Lord, here, in terms of what the claimant says they learnt in November, we are looking at the period after Mr Blundell's opinion in mid October of 2015, insofar as what the claimants learned in November 2015, in our submission, apart from the fact it doesn't really carry matters any further forward, that doesn't assist them in relation to any extension of time because it is a fallacy to suppose that if you have a basis for an extension of time, you have until the last day of three months in order to bring your claim because of course the three month period, apart from the fact it is promptly and in any event within three months, the

three month period is totally irrelevant to any question of the extension of time and plainly an extension of time based on some event can be sought plausibly only if it is made promptly from whatever it is said is the trigger for the extension of time. The three months still runs from when the original decision was made and so open space plainly was an issue from October 2013 at least, the 1996 letter was being waved about at that stage, indicating that Mr WilsonSharp had advised in 1990 that the Oval was open space, that's the significant effect about the letter and indeed the memorandum, and also on the other side Mr Ellender was saying it was not public open space, so the issue was identified, so the claimant was well aware from at least October 2013 that there were contradictory claims, there were statements that it was open space and statements that it was not, and that has been the situation since and is the situation today. All that had changed is that the volume of material on either side of the argument has expanded somewhat, as, for example, the memorandum referred to in the letter so, my Lord, we go as far as to say that if the claimant ever had a case, they had it with the 1996 letter which they were aware, referring to the 1990 advice, and therefore that it is with respect nothing short of absurd to suppose that the 1990 advice starts time running again, or is material knowledge for the purpose of determining whether or not time should be extended long after December 2014/ January 2015. There's no relevant distinction, both by reference to that or by reference to more recent matters. So, my Lord, we submit that neither the November 2015 material, nor the February 2016 material, nor, indeed, the accumulation of them provide any good and sufficient basis for extension of time long after the event.

My Lord, I have dealt with matters broadly rather than breaking it down in relation to particular grounds. Your Lordship may not be assisted by doing that because the arguments basically apply across the board in relation to all the grounds and there simply wasn't an eureka

moment, the case has always been about open space and the dispute in relation to that, that is not something that has just been revealed, there has been no eureka moment, there has been nothing more at most than an arguable confirmation of what had been believed for some time. My Lord, putting it another way, the vast majority of the evidence relied upon by the claimant in support of their contention, both about the acquisition of the land and its subsequent use, does not turn on recently disclosed material. When one looks at their grounds of claim, and we give the references in our skeleton, they refer to a series of matters in support of their case on open space which they knew well before October of 2015, what there has been since has been a bit more of essentially the same sort of material. My Lord, we rely obviously not only on what Mr Justice Hickinbottom said but on what appears in our response to the preaction protocol, our summary grounds of defence, and our skeleton argument. Your Lordship will have observed that the preaction protocol was expressed in terms of challenging our decision at October 2015, preaction protocol in December 2015 was based on challenging our position in October 2015, in effect not to rescind the contracts and what purpose was in the contract, obviously trying to get in within three months of that. That has quite rightly been abandoned and the focus is now on the decisions which are indeed very much earlier so getting the report to the 2014 meeting is not a pivotal moment, seeing an opinion of mine that's in the public domain is hardly an event that transforms the situation, and so this is a claim which, if it isn't defeated by delay, it is somewhat difficult to see when claims this stale would be defeated by delay.

My Lord, I think I have covered the essential points. It is possible, of course, to elaborate upon them, but in our submission this is a very strong case for not extending time.

**MR JUSTICE SUPPERSTONE:** I don't need to trouble you Mr SteadmanJones.

Despite the closing words of Mr Goudie, I am persuaded that the disclosure of material

documents post November 2015, in particular the memorandum of the chief in solicitor in 1990, warrants extension of time. In reaching this conclusion, I have had regard to the fact that this claim raises issues of general public importance. So time will be extended.

Now, on the issue of time, I was asked to take this case after I had received the papers in the other case, which is due to last one day. That's the time estimate. Mr SteadmanJones, Mr Goudie, with regard to leave, permission, and the, I think, four or five grounds, how long do you anticipate your submissions will take on the substantive challenge?

**MR GOUDIE:** Well, my Lord, it is for my learned friend really.

**MR STEADMAN-JONES:** My Lord, on that, I mean realistically half an hour.

**MR JUSTICE SUPPERSTONE:** Yes. And Mr Goudie? Obviously it depends on whether anything new comes up

**MR GOUDIE:** Yes, whether my learned friend is running all five grounds or concentrating on one.

**MR JUSTICE SUPPERSTONE:** Yes. Certainly there were two in particular that I identified that you may wish to pursue, some others perhaps not so much so but on the other hand, in broad terms, if it is arguable that this is open space and remains as such, then you may want to keep at least four of the five in the air, whether the public equality duty is still in the air and whether there's any evidence in relation to that is another matter but

**MR GOUDIE:** My Lord, also best consideration is a distinct issue from open space, indeed there is something of a tension between the two and, my Lord, certainly our submission is there is no arguable case on any of the grounds but alternatively we would say that permission, even if it was granted on one ground, should not be granted on other grounds, and 1 doesn't carry 2 and 3 with it.

**MR JUSTICE SUPPERSTONE:** I quite understand that. I have focused on the first hurdle,

delay. I have looked at the material and there's a fair amount of it, in relation to the substantive challenge. It doesn't seem to me that this is a permission hearing, having got over the first hurdle, that can be completed within half an hour, I think certainly half an hour, 45 minutes is a more realistic estimate. There's some urgency about the matter, I appreciate that. Can I just ask counsel in the other case; time estimate, you have all said a day, does it remain a day?

**MR KOLVIN:** My Lord, for our part we assumed there may be some significant prereading, I don't know whether my Lord has had any chance

**MR JUSTICE SUPPERSTONE:** There has been a little prereading, not as significant as I would have hoped, I have read the skeleton arguments, I have looked at some of the documents.

**MR KOLVIN:** We tried in our case to put everything in the skeleton argument, just to save time.

**MR JUSTICE SUPPERSTONE:** No, very helpful.

**MR KOLVIN:** I am anticipating being on my feet for an hour or so. I am not sure about Mr McCracken and I am not sure

**MR JUSTICE SUPPERSTONE:** I don't want to take up too much time, I just

**MR MCCRACKEN:** I don't know whether I shall be adding to what has been said by Mr Kolvin but I imagine that Mr Harwood(?)

**MR JUSTICE SUPPERSTONE:** If we were to start at 12 o'clock, would we be completed in the day? I have to rise today at 4.30.

**MR MCCRACKEN:** It is realistic to hope that we would but I think it would be quite wrong to say that we certainly would. Much depends really upon how Mr Harwood opens.

**MR KOLVIN:** My Lord, can we say just from our point of view, and probably also Mr

McCracken's point of view, there is real urgency about this.

**MR JUSTICE SUPPERSTONE:** In yours? I know, I have seen the dates and the timing.

**MR KOLVIN:** I was summing myself up to ask my Lord, even if my Lord wasn't able to deliver a judgment today, would you be able to give an indication because we really are up against it, this day by day.

**MR JUSTICE SUPPERSTONE:** Yes, well, I won't even give an indication as to whether I can give an indication at this stage.

Right, well thank you very much.

**MR STEADMAN-JONES:** My Lord, is it possible, or is it a useful suggestion, that we might want to come back for a rolled up hearing? That would obviously save everyone's time.

**MR JUSTICE SUPPERSTONE:** Mr Goudie?

**MR GOUDIE:** My Lord, might I take instructions?

**MR JUSTICE SUPPERSTONE:** Yes, of course. Please do.

**MR GOUDIE:** My Lord, I think, because it is not necessarily all or nothing so far as permission is concerned, it would be better to have a permission stage and then, if there were to be any substantive hearing, to know what grounds it would be on, rather than for it to go to a rolled up hearing, which would presumably have to be on all the grounds.

**MR JUSTICE SUPPERSTONE:** Yes, quite understand. Let's push on. I will say 12 o'clock for the second case.

Thank you.

**MR STEADMAN-JONES:** My Lord, I am grateful. I will proceed as quickly as possible. It may help to start with obviously start at ground one and start with open space and in particular pick up on a few points that were made by my learned friend because they have a bearing on whether the ground is arguable, certainly, and also whether it is made out.

With the greatest of respect to my learned friend, he is wrong to suggest that there needs to be as of rights user of the open space, rather the definition in the

Town and Country Planning Act simply says that that has to be used for the purposes of public recreation so, of course, that would be by right and one of the key arguments here, certainly one of the claimants' key arguments, forgive me if you are

**MR JUSTICE SUPPERSTONE:** No, I am listening. I am listening.

**MR STEADMAN-JONES:** Sorry. My Lord, one of the key arguments here is, of course, whether use or access is necessary for the land still to be treated as open space.

Now, my Lord, it is probably the moment to come to the Plymouth case because in that case, it was actually about right to buy but in that case, it's 17, tab 17 in the authorities bundle, my Lord.

**MR JUSTICE SUPPERSTONE:** Thank you.

**MR STEADMAN-JONES:** And if we could go, please, to the the open space argument begins on page 336. It was about a lease given to a tenant who had two landlords and the issue was whether that tenant had a right to buy the property and he advanced an argument that in fact the land on which he lived was open space and so that the lease had been invalidly granted precisely for the reasons that we say in our case because it was not advertised and the objections considered pursuant to the process, in that case actually under section 26(2) of the Town and Country Planning Act 1959 sorry, and the Housing Act. If you go, my Lord, to the bottom of 337.

**MR JUSTICE SUPPERSTONE:** Yes, I am looking at it.

**MR STEADMAN-JONES:** You can see there the open space definition in that case, obviously it was an earlier Act, was the same, and then going on, the advertisement requirements were the same in section 26(2) of the 1959 Act. Now, the argument was advanced by

Mr Freeman(?) in that case, can I draw your attention, my Lord, to point 5 on 338?

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** "The lodge was itself used for the purpose of public recreation in the sense that the building and the surrounding areas formed part of the country scene. It was not to the point that the public did not have access to the lodge or its gardens, the lodge formed part of the background in the same way as did the folly(?) and the arch."

Now, that was the argument advanced in particular on the access point. If we turn over the page, in that case, his Lordship held on 339, if we go to the paragraph "In my judgment":

"In my judgment, the lodge forms part of the Mount Edgcumbe Country Park. It was acquired as part of an integral whole and lies within the perimeter of the park. Furthermore, although Lord Irvine expressed reservations about the architectural merits of the lodge, I am satisfied [and this is the key passage] that the lodge and the surrounding trees can properly be regarded as being used for public recreation although there is no public access to the lodge, indeed, Lord Irvine was constrained to perceive that the position might be different."

That is not relevant for our purposes but the key point there, my Lord, is that the Oval can be considered to have been public open space, and actually "public" is a red herring, I should say, because my learned friend has raised that a couple of times but in neither the Local Government Act 1933 or, indeed, the Open Spaces Act, or, indeed, the 1972 Act, is public open space referred to. It is simply open space, which is, of course, how it was acquired in 1944. The point about the Oval is that if the yacht club had occupation, as it were, of the site between 1961 and 2013, leaving aside our primary case which is that we have witness evidence that goes to show that it was being used, in the brain(?) sense anyway, but in fact access is not a decisive factor, shall we say, in whether it then reverts to open space status

on the ending of whatever the letting arrangement was.

So that is the point on whether in fact you need use(?) or access. In terms of whether there was a lease, well, my learned friend has helpfully accepted that there is no lease, so there's a letting arrangement or a licence is how he characterised it. Now, that is critical again to the points on arguability, let alone whether you find or, were you to be the judge for the substantive hearing, as whether you agree with that, but certainly on arguability, a licence cannot defeat public open space status, I mean, it simply can't and my learned friend hasn't pointed to any law to suggest that it can, whereas, of course, we have pointed to law that suggests that it can't. It was perfectly open to a local authority under section 157 to acquire the land for any of its purposes, obviously under the Open Spaces Act 1906 and the 1875 Act, it could also acquire the land specifically for the purposes of public recreation, but also under section 164, if you want to go to it, my Lord, it is at tab 13 of the authorities bundle. Forgive me, it is 157 I want to refer to in this instance, which is no, sorry, it is at tab 15, thank you.

**MR JUSTICE SUPPERSTONE:** Tab 15.

**MR STEADMAN-JONES:** Tab 15, my Lord, forgive me.

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** And then 13, so that's the acquisition point and then at 13:

"Any local authority may purchase or take on a lease, lay out, improve and maintain lands for the purpose of being used as public walks or leisure grounds and may support or contribute to the public. They're to support public walks or pleasure grounds provided by any person whomsoever."

I am actually trying to find the provision that authorised this letter. Sorry, my Lord, forgive me.

**MR JUSTICE SUPPERSTONE:** Yes, certainly. **(Pause)**

**MR STEADMAN-JONES:** My Lord, it is section 157. 157, forgive me, of the Local Government Act 1933, and that's the acquisition. **(Pause)**

Forgive me. Sorry, my learned friend is correct, I have been looking at section 164 of the 1875 Act. It is in tab 15, it is section 164 of the Local Government Act and it says there:

"The local authority may let any land which they may possess with consent of the minister for any term without the consent of the minister for a term not exceeding seven years."

So clearly an annually renewable licence would be perfectly lawful in that context. So that is the crucial point and, of course, it is open to the council, my Lord, to defeat that, and by my learned friend's admissions as to what the status of that arrangement was, it is clear that that would not have defeated the open space status.

**MR JUSTICE SUPPERSTONE:** So that's ground 1, open space status.

**MR STEADMAN-JONES:** That's ground 1.

My Lord, ground 2 is that

**MR JUSTICE SUPPERSTONE:** I am following your submissions, Mr SteadmanJones, through your claim form, and I am at page 42 in the bundle. Paragraph 110, through to 114.

**MR STEADMAN-JONES:** Sorry, page 42?

**MR JUSTICE SUPPERSTONE:** Page 42 and 43, ground 2.

**MR STEADMAN-JONES:** Yes, ground 2, yes.

Now, my Lord, the critical point we say here is that the contract was entered into outside of the authority given by the resolution and I say this because if we go to the resolution that was agreed, the minutes are at 260 to 262 of the bundle.

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** Now, you will see that the resolution was that the head of property

was authorised to conclude a sale of the land on the terms set out in the report. Now, we say that in the report, it was envisaged in the report quite clearly that there ought to be a legal agreement put in place to ensure that there would be open space provision. That was never done. That was admitted, it was admitted by the council chief executive that it was never done in his CEO report of October last year and, indeed, it was accepted that that was a weakness of the contract negotiations and the resulting document.

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** So that's the first point, that it was envisaged and authorised by that committee that there ought to be an open space provision within the contract and there was none, so obviously that ground is also clearly relevant to open space and open space forms a part of that ground.

In terms of the second element, the access strip was not authorised as part of that report. Now, if we go to page 248, my Lord, of the bundle, you can see there the plan, it is just below the background of the first section, or the first paragraph, if you like, and you can see the shaded area. Do you have that, my Lord?

**MR JUSTICE SUPPERSTONE:** Yes, I do.

**MR STEADMAN-JONES:** If you look just at the bottom of the shaded area to the right, you will see a little strip there and that's obviously not shaded.

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** So clearly this report concerns a shaded area that did not contain that access strip so once again, bearing in mind the resolution which was to authorise the head of property to enter into the contract on the terms set out in that report, there was no access strip as part of that authority.

So my Lord, that is ground 2, it is not a

**MR JUSTICE SUPPERSTONE:** Yes, that's paragraph 113 of the claim form, yes.

**MR STEADMAN-JONES:** Indeed, and it is not a long ground in that sense.

Now, forgive me, my Lord. **(Pause)**

My Lord, my instructing solicitor has helpfully pointed out that there is a better map for your purposes at 233 which just shows clearly there in yellow and pink the difference between the Oval site and the access strip.

**MR JUSTICE SUPPERSTONE:** Yes, I see. Yes.

**MR STEADMAN-JONES:** Now, my Lord, again, it is a short point, ground 3, but the claimant submits that the item of business which was the disposal of the Oval site, at the very least the disposal but obviously possibly the sale should be relevant as well, was misrepresented first on the 28 day notice, so we can go to that, my Lord, that's at page 243.

**MR JUSTICE SUPPERSTONE:** Yes, what does that ground 3 add?

**MR STEADMAN-JONES:** Well, it is important, isn't it, for public awareness that even if an item of business may be confidential for various commercial reasons, it is not a misdescribed or misrepresented. Now, that is important, we say, because, of course, it does go to questions about whether the public can sufficiently supervise or oversee or bring their government, if you like, to account and in this case, both (Inaudible) in the 28 notice, it is on page 244 in the middle, the reference there is: "Approval of terms for the development of the site".

Now, that is highly ambiguous and it doesn't express any of the important facts about that item ie

**MR JUSTICE SUPPERSTONE:** What should it read?

**MR STEADMAN-JONES:** It should read "disposal" and if not "disposal", possibly "sale".

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** But certainly disposal. There's a similar lack in the agenda, my Lord, which is at 254.

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** Here it is, if you turn on that's actually page sorry, forgive me, it is at page 259 of that document and you see item 24:

"The Oval (former skating rink, rear of The Tile Warehouse, Sea Street, Whitstable): to consider the report of the Director of Resources."

Those two indications, if you like, on those agendas are simply inaccurate and they don't tell you what the item is about. That's the point.

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** It may well be that if the council had acted impeccably in every other respect, that wouldn't be sufficient to ground our claim but it is another example, my Lord, of the particular approach taken.

**MR JUSTICE SUPPERSTONE:** You say look at the overall picture hence. Yes.

**MR STEADMAN-JONES:** Yes, my Lord.

Now, in terms of the best consideration point, clearly the claimant in this has been somewhat in the dark about this because no information, except the redacted parts of the urban delivery advice, have been produced except that that was contained in the CEO report, if, so my Lord, you want to go to that, it begins at page 280.

**MR JUSTICE SUPPERSTONE:** Well, you refer to it at paragraph 120.

**MR STEADMAN-JONES:** Yes, exactly. Now, there is an important point here which is that at 284, if you look at 284 of the bundle, which is internal page 4 of the CEO report. At the bottom there and obviously this is way after the event, this is in October 2015, this doesn't go to what was before the committee or what was understood by anyone who was

interested in this decision at the time, but the CEO report here refers to the general disposal consent at the bottom of that page. Now, he doesn't say in terms there that that was the basis for the best consideration decision but the strong implication here is that that is being invoked because probably if the defendant was to characterise it, it would have made no difference because we could have simply made the decision anyway under that consent but of course it is very important that councils don't try and justify things post hoc. It was very important for the council to identify, if they believed this was an under value sale for very good reasons, they needed to do that at the time, and they don't do that at the time, they didn't do that in the redacted Director of Resources report. We know now that the contract sum is very low, it is £165,000. That's the base price, I accept that there may be additional money to pay, but that is a very low sum. I, of course, accept that our alternative valuations are no more than indicative but we do have two alternative valuations, one of 1.3 million and one a red book valuation in the region of 1.6 million. Now, on any view, there's a huge, huge discrepancy there. Now, we can only say that that appears extraordinary in the circumstances and that it shouldn't simply be justified without an explanation and there was no explanation for an under value sale, if that's what it was, and there had to be. There had to be under the terms of the general disposal consent itself. It was important to identify what the economic, social, environmental wellbeing, if that was the case being advanced, why

**MR JUSTICE SUPPERSTONE:** What is being said is that it wasn't an under value sale, I assume.

**MR STEADMAN-JONES:** In which case why are they referring to it here? Why is the chief executive invoking it on page 284/85? If the answer is that it wasn't, then it didn't need to be referred to, did it, or identified as a justification, and if it wasn't an under value sale,

then why £165,000?

My Lord, just on that point, at paragraph 25 of the defendant's skeleton, they make reference to a valuation officer

**MR JUSTICE SUPPERSTONE:** Well, you have got to read 284 and 285 together, haven't you? The bottom two paragraphs on 284 and the first on 285, they have referred there to the general disposal consent 2003 but said, haven't they, that:

"In view of the value of the site, members need not be concerned with the financial limits applicable to the 2003 consent."

**MR STEADMAN-JONES:** Well, my Lord, they do say that but they only say that, as it were, in order to pull the wool over people's eyes by saying, "Well, if you have got a problem with it, they could have done it anyway".

**MR JUSTICE SUPPERSTONE:** What's the evidence that it was under valued?

**MR STEADMAN-JONES:** Sorry?

**MR JUSTICE SUPPERSTONE:** What is the evidence that it was under valued.

**MR STEADMAN-JONES:** Well, the only relevant question is whether the proposed use does secure the promotion or improvement of the economic, social or environmental wellbeing of the area, is what's being said in that first paragraph. I agree with you, my Lord, we don't have the evidence because the council has not ever produced it. The worry and the concern and the question that my clients have, and the claimant has, and the public have, in Canterbury or in Whitstable, is: why was this price so low and where is the evidence that it did represent best value? Now, I understand my learned friend's point, of course there is no particular process

**MR JUSTICE SUPPERSTONE:** Sorry to cut you short but do you have any evidence that it should have been higher?

**MR STEADMAN-JONES:** Well, yes, we have got the valuation evidence that we produced, two separate valuations, one of 1.3 million

**MR JUSTICE SUPPERSTONE:** Can we just look at those?

**MR STEADMAN-JONES:** Yes, my Lord. The first one is from Kent Estate Agencies and that's 272 to 273. That was the initial valuation. The more detailed valuation was from

**MR JUSTICE SUPPERSTONE:** So let's just look at this. This is so what are they saying is the value? I see the various figures.

**MR STEADMAN-JONES:** It is on page 273.

**MR JUSTICE SUPPERSTONE:** In excess of a million, is that it?

**MR STEADMAN-JONES:** That's the first one but then there is an additional valuation which comes out higher at the top of page 273.

**MR JUSTICE SUPPERSTONE:** Yes. 1.3. Yes.

**MR STEADMAN-JONES:** And then another, and obviously there are various scenarios being envisaged there and there's an estimate given in relation to each obviously. Now, the second valuation, my Lord, which is the red book buyer valuation, and that's at 334, I think. I will just double check. 334. And that's somewhat more detailed.

**MR JUSTICE SUPPERSTONE:** Whose speech is this, starting at 374?

**MR STEADMAN-JONES:** 334?

**MR JUSTICE SUPPERSTONE:** No, whose speech is it starting at 374?

**MR STEADMAN-JONES:** I think that's Mr Kim Foster, yes, it says at the top.

**MR JUSTICE SUPPERSTONE:** Who is he?

**MR STEADMAN-JONES:** He is a fellow of the National Association of Estate Agents and he was talking in that instance on behalf of the Oval Chalet Preservation Community Group which was formed by

**MR JUSTICE SUPPERSTONE:** And he refers there, 275, first holepunch, to Kent Estate Agencies, indicating the site value to be in excess of a million and then other figures further down, comparable evidence.

**MR STEADMAN-JONES:** My Lord, Mr Foster is here to answer

**MR JUSTICE SUPPERSTONE:** Yes. Then paragraph 3, 275, region of 1.3, yes. So I see all that. So second document you want me to refer to?

**MR STEADMAN-JONES:** Yes, my Lord, it is page 334 onwards.

**MR JUSTICE SUPPERSTONE:** BTF being?

**MR STEADMAN-JONES:** BTF being an independent I will just double check exactly what they are. **(Pause)**

They are chartered surveyors, my Lord, in Canterbury.

**MR JUSTICE SUPPERSTONE:** Thank you. November 2015. So Oval site in isolation in the region of what, 600,000/700,000, is that the figure to extract from this?

**MR STEADMAN-JONES:** Yes, my Lord.

**MR JUSTICE SUPPERSTONE:** 600 to 800 near the bottom of the page.

**MR STEADMAN-JONES:** But of course the development value itself when combined and that is crucial because this contract is with

**MR JUSTICE SUPPERSTONE:** But you say very substantial difference between the 165 and these figures and therefore it calls out for a response. Has there been any response?

**MR STEADMAN-JONES:** There hasn't, except there is this rather cryptic reference in paragraph 25 of my learned friend's skeleton which refers to a valuation of this agency's, a subsequent or rather valuation at the time in April 2014 of the site, which I presume must be much higher, and there is a reference there to certain questions being asked by the council.

**MR JUSTICE SUPPERSTONE:** Yes, the council raising a number of queries.

**MR STEADMAN-JONES:** Now, just on that, my Lord, we wrote immediately to ask for disclosure of that document. Clearly, there may well be some commercial sensitivity in relation to the parties, on the other hand, this is a public agency document and this is obviously now in issue in litigation and therefore there is a public interest reason why that should be disclosed.

**MR JUSTICE SUPPERSTONE:** Right. So that's essentially ground 4 and then the Equality Act, ground 5?

**MR STEADMAN-JONES:** The Equality Act, my Lord, is again inseparable from the open space. It is slightly difficult because the proposal before the decision makers in November/ December 2014 was very different from the one which emerged in July 2015, so that's the problem in evidential terms, but as we identified in our grounds, the proposal that had been described at the meeting included a staircase which would have made it very difficult for disabled people to access the proposed open space on the development plan/proposal at that stage. Now, there is the one liner in the DR report and I should take you to that just so you can see that there was clearly some consideration, at least, of the proposal that the DR report was considering and that on page 252 and it is item K.

**MR JUSTICE SUPPERSTONE:** 352.

**MR STEADMAN-JONES:** Sorry, 252.

**MR JUSTICE SUPPERSTONE:** 252. Thank you.

**MR STEADMAN-JONES:** You will see there, just towards the top of the page, item K, bullet point K:

"Equality impact assessment: no adverse implications are envisaged."

Now, that obviously was on the basis of a scheme which we can see, my Lord, at page 105, no,

sorry, 106 of the bundle, if you just have both of those pages open. 106 of the bundle was the original scheme and it is the one that was referred to in the October meeting by the head of property which I can take you to in a second, but if you look at that plan there, you can see that the open space was largely intact and it is probably in the region of 90 per cent open space of the Oval site because you see that the area that's white that says "Plaza" is largely the Oval.

**MR JUSTICE SUPPERSTONE:** This ground is interlinked, isn't it, with ground 1, open space?

**MR STEADMAN-JONES:** It is. It is, my Lord.

**MR JUSTICE SUPPERSTONE:** If the land was acquired for the purpose of open space for the aged of the town, then even more reason to have regard to the Equality Act provisions, you say, is that correct?

**MR STEADMAN-JONES:** It would be, although, I mean, I should say in fairness though that the Help the Aged aspect of the original sale was deleted actually in the minute.

**MR JUSTICE SUPPERSTONE:** I saw that.

**MR STEADMAN-JONES:** So it became general open space but the key point is again, on the terms of this report, that the assessment, if it was an assessment, sufficient under the Equality Act, was on the basis of this proposal which would have included a large amount of open space. That open space was not then guaranteed in the contract, that's the key point, and then it didn't emerge in the subsequent proposals. There was no provision in the contract, albeit by any other legal agreement, which is what was envisaged by the Director of Resources report, to guarantee the open space. So this equality impact assessment was on a false premise or on a faulty premise, shall we say.

**MR JUSTICE SUPPERSTONE:** Yes, so linked it really with

**MR STEADMAN-JONES:** It does link it with open space.

**MR JUSTICE SUPPERSTONE:** Thank you very much.

**MR STEADMAN-JONES:** Thank you, my Lord.

**MR JUSTICE SUPPERSTONE:** Mr Goudie?

**MR GOUDIE:** My Lord, briefly, first of all on ground 1, which we've loosely termed "the open space ground", but your Lordship knows what that in fact is, it turns on section 123(2)(a) of the 1973 Local Government Act, a requirement to advertise, public advertisement before sale, if one is selling open land. Open space. "Open space" being the expression that's used in that subsection of the 1972 Act. As your Lordship will have appreciated, the definition of open space is in fact one that is taken from the

Town and Country Planning Act 1990, section 336, and that indicates the land can be open space for these purposes in one of three circumstances and not otherwise: any land laid out as a public garden, not applicable here, or, secondly, used for the purposes of public recreation, that is presumably what is sought to be relied upon here, or, thirdly, land which is disused burial ground, which obviously is not applicable here. So, my Lord, what one is looking is whether land is used for the purposes of public recreation and that makes clear two things: first of all one is looking at the user at the time of the disposal and secondly well, that embraces two things, that one is looking at the time of the disposal and one is looking at the user, and the other point is that one is looking to see whether any recreation there may have been is public recreation and, my Lord, therefore we do maintain that when one is talking about open space, one is talking about public open space which is contradicted by the letting arrangements to the Whitstable Yacht Club over those many years and that certainly the situation by 2013/14/15 was very different from the situation, whatever it may have been, in 1944 and 1945 and our learned friend, of course, accepts

that the relevant time for open space status purpose in this case is December 2014/ January 2015, after all those years of the space being the subject of the arrangements with the yacht club. So we are not talking about any of the elements of public open space that are material purposes, in effect the claimant's case is based on the fundamental fallacy: once open space always open space, unless and until there's a formal appropriation but, my Lord, obviously the position can change over seven decades and may well do so and the position, indeed, is very well stated in Mr Blundell's advice in that respect.

**MR JUSTICE SUPPERSTONE:** But save for the conflict of evidence relating to use as open space on occasions.

**MR GOUDIE:** Yes, although there is a conflict there but even taking the claimant's evidence at its high point, as no doubt for today's purposes may be appropriate, albeit not at any hereafter, my Lord, the evidence of use is a pretty sporadic use; the occasional kicking around of a football, that sort of thing. I won't have it said that those who might be described as aged might not want to kick around a football but it does seem rather different from what was envisaged.

My Lord, so ground 1 and any other grounds that are parasitic upon it are not remotely arguable.

My Lord, ground 2 is not remotely arguable. My Lord, this is essentially, of course, a challenge to a decision in December 2014 implemented in January 2015. As your Lordship knows, the minutes of the December meeting run from page 260 and the resolutions, which is what matters for ground 2 purposes, is at page 262 of the bundle and it is first that the head of property be authorised to conclude a sale of the land on the terms set out in the report and then, 2:

"That the head of legal be authorised to prepare sale contracts and all other legal documentation, as is appropriate to conclude this transaction."

So the resolution in terms of the detail of the sales contract was that that was delegated to the head of legal and was to be, as is appropriate, to conclude the transaction and, my Lord, there's no basis for saying that there was any breach of that provision.

My Lord, I have got nothing to add to what we have said in writing so far as ground 3 is concerned. Of course, there may be some degree of affinity between ground 1 and some of the other grounds but, my Lord, one ground in respect of which there is not affinity, which is a distinct point entirely, is the best consideration point, ground 4, and therefore, my Lord, we do strongly submit that even if your Lordship was minded to grant permission on any of the other grounds, that permission should be refused on ground 4 on the basis that there's simply no basis for granting permission.

**MR JUSTICE SUPPERSTONE:** But the figures are very stark aren't they, the difference between 165,000, I think it was, on the one hand, which was the sale price, and any other figure which is well in excess of 600,000 going up to 1.3 million.

**MR GOUDIE:** My Lord, it appears stark if one simply looks at the figures. That, however, ignores a number of essential features. One is that the 160,000 or 165,000, whatever it was, was a base price and there was also, as part of the consideration, an additional price, in other words what is sometimes termed an "element overage", obviously by definition one doesn't know how much that may prove to be but it does mean that using the base figure in blinkered isolation is a totally misconceived approach, one is simply comparing apples and pears rather than apples and apples. Now, my Lord, that is one point.

Secondly, my Lord, these valuations that my learned friend has, of course, are long after the event, your Lordship saw, I think, middle of November of 2015, they were obviously not valuations that were before the council in December 2014.

**MR JUSTICE SUPPERSTONE:** Long after the event, yes, 11 months, but that can't possibly

account for 165 to 1.3 million.

**MR GOUDIE:** My Lord, it may not do that but the point is they weren't before members, and there's no reason why they should have been, when decisions were made in December 2014 or by officers, when implementing that decision, deciding to implement that decision in the way they did in January 2015

**MR JUSTICE SUPPERSTONE:** But going back to your first point, what was the figure, taking into account the additional element, that you say could legitimately be taken into account, to increase the figure of 165?

**MR GOUDIE:** We still don't know.

**MR JUSTICE SUPPERSTONE:** No, I know, but the claimants are entitled to say, "All right, assume for the moment you are correct, assume you don't know the specific figure, what sort of figures are you talking about?"

**MR GOUDIE:** My Lord, the claimants are hardly entitled to say that because the contract of course was conditional on planning permission, planning permission has recently been granted, they are seeking to challenge that

**MR STEADMAN-JONES:** There has been a resolution to grant planning permission.

**MR GOUDIE:** There has been a resolution to grant planning permission, my learned friend is quite right, that's the position on the planning side, notwithstanding it is only a resolution that they are seeking judicially to review that, that's of course another matter, but my Lord, therefore until the condition is fulfilled, one doesn't know what the overage will be and obviously this litigation hasn't assisted in the timing so far as resolving that is concerned.

**MR JUSTICE SUPPERSTONE:** Where in the evidence do I see your response, however general it may be, to the valuations of the claimant?

**MR GOUDIE:** My Lord, we haven't sought to cross swords, certainly at this stage, with the

claimant in relation to valuation because in judicial review, we would respectfully suggest it is not a question of expert evidence and conflicts of expert evidence as to valuation, the question is: in terms of the valuation evidence that was before the council, at the material time when it's made its decision, did that support its conclusion? Did it obtain expert internal advice as to valuation? Yes, it did. Did it act in accordance with that advice? Yes, it did. Therefore, in public law terms, it has acted lawfully and the fact, which will nearly always be the case, of course, that somebody who wants to challenge can get an alternative valuation with a different figure is neither here nor there and doesn't begin to become something simply because of the scale and the disparity

**MR JUSTICE SUPPERSTONE:** Can you point me to that advice, Mr Goudie?

**MR GOUDIE:** My Lord, it is summarised, we don't have it in itself but it is summarised very fully, indeed quoted from very fully, in the chief exec's report in October 2015. My Lord, that begins at page 281 of the bundle and, my Lord, from page 288, this went to the Regeneration of Property Committee in October 2015. Page 288, just above the first hole punch, I set out below extracts from Urban Delivery's report and then, running over a number of pages, all the way through to just above the holepunch on 294, are the extracts from the Urban Delivery report. So my Lord, there is simply no basis for contending that best consideration was not achieved on the advice before the council at the relevant time. One simply got others who take different views but that's not nearly good enough, particularly when it's a substantial period of time after the event.

**MR JUSTICE SUPPERSTONE:** But all figures redacted?

**MR GOUDIE:** My Lord, figures are redacted, yes, as being commercially sensitive. There has, as your Lordship has heard, been a leak as to the figure so it is now in the public domain, but the council obviously was quite legitimately seeking to preserve commercial

confidentiality, not only, of course, in its interests but in terms of its duties to the interested parties whose interest, of course, must not be lost sight of and, my Lord, which are perhaps particularly material in relation to this particular ground. So my Lord, also, in other respects, one is comparing apples with pears, or apples with bananas, or whatever, rather than like with like because neither of the claimant's two valuations allow for open space, rather they are on the premise of building over the whole site, and my Lord, of course, there is no question of that, and the planning resolution which has been granted does make provision for a considerable quantity of open space and, my Lord, here, of course, is where there is some tension between the front legs of my horse and the rear legs in that the more open space there is, the less best consideration there's going to be and my Lord, obviously best consideration, the claimants would have it that best consideration should be even less because there should be, presumably they are saying, even more open space but, my Lord, on the basis that there is going to be the open space, which there is going to be, that obviously is highly material to the valuation as compared with a remunerative building over the whole rather than merely a part of the site so, my Lord, the claimants are just scraping around and their point about the reference to general disposal consent, when that wasn't what was being relied on, just shows how they are scraping around to try and make something to support the case on ground 4 and there simply is no such case.

**MR JUSTICE SUPPERSTONE:** Yes, and then ground 5.

**MR GOUDIE:** My Lord, ground 5 we have dealt with in our skeleton. Essentially, of course, the sale of the site, nor the identity of the purchaser, nor indeed the price, have any adverse impact on any protected group. The development, of course, is a different matter but that's part of the planning process and I wouldn't be surprised if that were part of the challenge to the planning decision in respect of which a preaction protocol letter has, I gather, just been

received. But my Lord that's a matter

**MR STEADMAN-JONES:** My Lord, that's not true.

**MR GOUDIE:** in a separate channel. What's not true?

**MR STEADMAN-JONES:** No preaction letter has been sent.

**MR GOUDIE:** It is a preplan, I gather, we have had such a communication, it is not yet a formal pack, again it would seem that promptness and the claimants are not bed fellows but I must not revisit that. Not at the moment of course, that may be highly material to the question of any relief on any ground but that's not for today.

**MR JUSTICE SUPPERSTONE:** Thank you very much.

Response?

**MR STEADMAN-JONES:** Yes, my Lord, thank you.

Just on that, since it was raised; there's no decision notice issued yet, that's why there's no formal pack letter, so clearly matters of promptness, six weeks or whatever, have not yet arisen.

Can I just on the point of valuation, my learned friend just suggested that the valuations that we put in evidence were not on the basis of open space. Well, that's wrong because if you go to page 337, the valuations are actually on the basis of the site in isolation, as it was, nothing to do with the scheme. 337.

**MR JUSTICE SUPPERSTONE:** Yes.

**MR STEADMAN-JONES:** And of course there are alternative values there given which would be development value figures.

**MR JUSTICE SUPPERSTONE:** So in isolation we have 600 to 750.

**MR STEADMAN-JONES:** Exactly, and that's without any development on there, so that's just the site itself.

My Lord, just in terms of the summary of the advice from Urban Delivery, we have never seen

the instructions which were given to Urban Delivery which is obviously critical to the scope of what they were looking at and we have obviously requested all of that, never received it.

Now, my Lord, I don't need to detain us, I think, those are the points.

Again, my Lord, just the recent valuation of the valuation office agency, that's also been withheld but I have obviously made that point.

**MR JUSTICE SUPPERSTONE:** And that's something they are looking into, as I understand it? Yes.

**MR STEADMAN-JONES:** Thank you, my Lord, those are our submissions. You have our points.

**MR JUSTICE SUPPERSTONE:** What do you say about public sector, the equality duty?

**MR STEADMAN-JONES:** I can't add to what I have already said, which is to say that the resolution was made on the basis of the terms of the report, the report envisaged open space being guaranteed under the contract or by a legal agreement, if not by that contract, by some other legal agreement. That hasn't happened therefore that's equality impact assessment

**MR JUSTICE SUPPERSTONE:** Therefore they may have thought that they had complied but didn't do so because they didn't ask the right question.

**MR STEADMAN-JONES:** Indeed, and obviously that the contract then subsequently entered into was not compliant with that equality impact assessment.

**MR JUSTICE SUPPERSTONE:** Ground 1, anything further on that?

**MR STEADMAN-JONES:** My Lord, I think you have our points, I mean, obviously I have made the points about use and access not being strictly necessary for the status of the open space land. That's critical and again, I will just emphasise for the purposes of today, it

must at least, at the very least, be arguable that this was open space land on the basis of what we have put before the court.

**MR JUSTICE SUPPERSTONE:** Yes. Thank you.

**MR STEADMAN-JONES:** Thank you, my Lord.

**MR JUSTICE SUPPERSTONE:** I am satisfied that all five grounds are arguable.

**MR GOUDIE:** My Lord, in the light of that, may I respectfully suggest that consequential matters are dealt with by written submissions to your Lordship because they would be likely, if we went ahead with them now, to take some time

**MR JUSTICE SUPPERSTONE:** I think that's very sensible.

**MR GOUDIE:** and involve issues like questions of costs capping on each side and also we obviously will be seeking that it be a condition of the claim proceeding that there be some individuals added as coclaimants which would give us some measure of protection in relations to costs and so forth and, my Lord, as I say, that will take some time, so if we might be able to deal with that by written submissions on that.

**MR JUSTICE SUPPERSTONE:** Yes, Mr SteadmanJones, that's sensible, isn't it?

**MR STEADMAN-JONES:** My Lord, the claimant's position on our case is that there's a straightforward and obvious claim so whether that takes time

**MR JUSTICE SUPPERSTONE:** I understand that, but Mr Goudie must be entitled to time to develop his argument.

**MR GOUDIE:** Ground 1 is argued, the others are not.

**MR JUSTICE SUPPERSTONE:** And other arguments. This is not a matter that I can determine in five or ten minutes.

**MR GOUDIE:** No, it is not.

**MR STEADMAN-JONES:** My Lord, there is a key issue here about the claimant's resources.

**MR JUSTICE SUPPERSTONE:** Yes, I understand that, that's why it is an extremely important matter for both sides and I think it very important that both sides have proper opportunity to set out their full arguments. Obviously I have read what has been said in particular about house convention, capping, I am conversant with the general principles. I appreciate the importance to your clients, in particular because of their status and what they say as to whether they can proceed if there's not costs capping. You have succeeded today, you have extended time, you have got permission on the five grounds, I think it is only sensible that some thought is given to these other matters and that should be done in writing. Any directions or not can you agree between yourselves?

**MR GOUDIE:** Yes.

**MR JUSTICE SUPPERSTONE:** Thank you both very much indeed. I am going to rise for one moment. We will start in five minutes.