**Neutral Citation Number: [2018] EWHC 2027 (Admin)**

**CO/826/2018**

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

Royal Courts of Justice
Strand
London WC2A 2LL
2 August 2018

**B e f o r e:**

**DAVID ELVIN QC**

(Sitting as a Deputy High Court Judge)

**Between:**

**THE QUEEN**

**on the application of ERNESTO PINTO**

Claimant

v

**LONDON BOROUGH OF MERTON**

Defendant

**-and-**
**(1) THE GOVERNING BODY OF DUNDONALD PRIMARY SCHOOL**
**(2) HAPPY FACES OUT OF SCHOOL CARE**
**(3) SPORT ENGLAND**

Interested Parties

**David Wolfe QC** (instructed by Holmes & Hills LLP) appeared on behalf of the Claimant

**Kelvin Rutledge QC** (instructed by the South London Legal Partnership) appeared on behalf of the Defendant

The interested parties were not represented and did not appear.

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**Hearing date: 11 July 2018**

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# Approved Judgment

## DAVID ELVIN QC (Sitting as a Deputy Judge of the High Court)

## Introduction

1. The Claimant ("C") brings this judicial review on behalf of the Dundonald Rec Tennis Club ("DRTC"). Permission was granted by Mr Rhodri Price Lewis QC sitting as a Deputy Judge of the High Court on 4 April 2018. C is the Chair of DRTC which is a local tennis club based in the Dundonald area of Wimbledon within the London Borough of Merton. DRTC is an unincorporated association with some 89 members, who live in the area and who use, and wish to use, the communal facilities at the Dundonald recreation ground. The Statement of Facts and Grounds states:

> "The Claimant brings the challenge in part because of the impact that has on DRTC's ability to use the community hall (including for alternative activities such as table-tennis during wet weather) and also on the part of the wider community including others who would wish to use the community hall."

2. As C explains in his evidence:

> "DRTC's Charitable Object is the promotion of community participation in healthy recreation in the interest of social welfare by providing support and assistance for the coaching and playing of tennis and other sports in Dundonald Recreation Ground … as a means of improving health and wellbeing."

3. He explains that membership of DRTC fell significantly due to closure of the tennis courts during the period of works (see below) and due to a period afterwards when there were access difficulties which took a lengthy period of time to resolve.

4. Dundonald Primary School is a school for primary aged children which is maintained by the Defendant Council ("LBM"). Its premises are lie on the northern edge of the recreation ground.

5. On 17 January 2013, LBM's Planning Applications Committee resolved to grant planning permission to itself for (under application reference 12/P1058), amongst other things, construction of additional facilities for the School (extending onto what had previously been part of the recreation ground) and a multi-use sports area (also referred to as a multi-use games area or "MUGA") to replace existing tennis courts lost as a result of the construction works. Of more direct relevance to these proceedings the Permission also provided for the demolition of the existing sports pavilion and construction of a new pavilion (also referred to as the community hall) ("the Pavilion").

6. The works at the school and recreation ground which were carried out in about 2014-5 have proved controversial, since they involved the loss of part of the

recreation ground, and local residents have made several challenges at different stages in the process which led to the grant of the Permission. See, by way of background, King J.'s judgments in ***R (Maries) v London Borough of Merton*** [2014] EWHC (Admin) and [2015] PTSR 295, respectively, where challenges to the appropriation of the land at the recreation ground to enable the implementation of the Permission and a challenge to the Council decision to excluding bowling and to restrict access to the tennis courts were both rejected. The latter became academic with the dismissal of the appropriation challenge.

7. The Pavilion has sports changing rooms, showers and toilets on the ground floor which are used by those booking the football and cricket pitches of the recreation ground. On the first floor there is a community hall, kitchen and store room which can be accessed by stairs and a lift. The first floor can also be accessed directly from the school.

8. Permission was not granted until 27 November 2013 ("the Permission") since it had to await the resolution of an objection by Sport England and the execution of a unilateral planning obligation under s. 106 of the Town and Country Planning Act 1990, which was executed on 27 November 2013. The grant of the Permission was also subject to the grant of a community use agreement ("CUA") which was not executed as part of the planning obligation but forms a separate document and is dated 18 December 2013. These matters were the subject of consultation with Sport England which had initially objected to the proposals as they would lead to the loss of sporting facilities.

9. Sports England's initial objection to the 2013 grant of planning permission was not pursued on the basis that there would be a CUA specifically to secure continuing community use of the MUGA and Pavilion.

10. On 15 January 2013, Sport England wrote to the Council setting out its understanding of the function of the Pavilion:

> "Although the existing pavilion would be lost, it would be replaced by the proposed pavilion and the use of this facility would be secured by the Community Use Agreement"

11. Before the grant of the Permission, Sport England wrote to Merton on 21 November 2013 explaining that:

> "In relation to the Draft Community Use Agreement, Sport England recommends that the following changes are made:
>
> • The email from [the Council's lawyer] dated 27 September 2013 states that the Dundonald School does not intend to use the pavilion facilities.

> This being the case the hours available for community use should be separate for the MUGA and pavilion."

12. The email from the Council dated 27 September, referred to by Sports England stated:

> "[The draft] takes on board the two comments you made at the time namely that the School will not use the Pavilion and so this has been clarified through the amendments."

## The terms of the Permission, planning obligation and CUA

13. Condition 10 of the Permission is the focus of these proceedings ("Condition 10"):

> "10. The changing rooms and associated Pavilion Hall shall only be used for community purposes and purposes ancillary to the use of Dundonald Recreation Ground and for no other purpose (including any other purpose within Classes D1 and D2 of the Schedule to the Town and Country Planning (Use Classes Order) 1997), or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order with or without modification."

(The reference in Condition 10 should have been to the Use Classes Order 1987)

14. The reason given for the imposition of the condition was:

> "Reason: The Local Planning Authority would wish to retain control over any further change of use of these premises in the interests of safeguarding the amenities of the area and to ensure compliance with policy BE.15 of the Adopted Merton Unitary Development Plan 2003."

15. The planning obligation (which the Council executed on 21 November 2013) contained the following covenant by the Council as landowner in Schedule 2:

> "1. Prior to Commencement to enter into a Community Use Agreement substantially in the form of the draft appended hereto at Appendix 2 and thereafter to comply with its term for so long as the MUGA shall remain on the Land
>
> 2. Not to dispose of the Land unless· and until the purchaser of the Land has entered into a Community Use Agreement substantially in the form of the draft appended hereto at Appendix 2 to ensure that community use of the MUGA shall continue for so long as the MUGA shall remain on the Land."

16. The CUA was executed on 18 December 2013 following revisions to the form annexed to the planning obligation. It is described as an "Agreement in relation to arrangements for community use on Multi-Use Sports Area and Pavilion at Dundonald Recreation Ground". The purpose of the CUA is set out in the recitals:

> "1.2 The parties wish to enter into this Agreement in order to make the

> Multi-use Sports Area at Dundonald Recreation Ground available to both the School for their use and the local community.
>
> 1.3 The parties to this Agreement should be open to in the future extending the use of the Multi-use Sports Area to sports interest groups in the local community that promote the use of the facilities for positive sporting benefit
>
> …
>
> 1.4 The Council has responsibility for the provision of sports facilities in the local area for use by and for the benefit of the school and the community and is desirous of entering into this Agreement in furtherance of that responsibility and as the local education authority, landowner and local planning authority in respect of the Development."

17. Clause 4 is headed "Arrangements for Community Use" and provides:

> "The Council agrees to make the Multi-use Sports Area available for School and Community Use in accordance with the provisions of Schedule 2 of this Agreement and the Pavilion available for Community Use."

18. "Community use" is defined by para 2 as meaning:

> "use of the Sports Facilities by the local community including organized sports clubs, organisations and for casual use."

19. "Pavilion" is defined by reference to a plan and corresponds with what was permitted and "Planning permission" is defined as the Permission.

20. "Sports Facilities" are defined as comprising both the Multi-use Sports Area and the Pavilion:

> "the Multi-use Sports Area and Pavilion as further described in Schedule 1 to this Agreement."

21. Schedule 1 stipulates what the Multi-use Sports Area should compromise which includes:

> "• The Pavilion, including ancillary facilities (toilets, changing rooms etc), to be made available for Community Use which shall comprise the following:-
>
> - 4 Team changing rooms
> - Male, female & disabled toilets
> - Lift for DDA compliance
> - Social space with ancillary kitchen on the first floor"

22. Schedule 2 is headed "Arrangements for Community Use for the Multi-Use Sports Area" and provides where relevant:

"**1. Users**

1.1 The Multi-Use Sports Area shall be made available for School and Community Use.

**2. Hours of Access**

2.1 The Multi-Use Sports Area shall be made available for public use during the hours in which the recreation ground is open other than times when it is restricted to use by the School under paragraphs 2.2 and 2.3 of this Schedule.

2.2 School use shall be term-time on Monday to Friday between the hours of 08:00 and 17:00 hours except for the following times during these hours when it will be available for general public use:

**Autumn term (September to December) and Spring term (January to late March/early April)**: Monday to Friday 09:00-10:00 ; Mondays, Wednesdays & Fridays 15:45-17:00

2.3 **Summer term (April to July)**: Mondays, Wednesdays & Fridays 09:00-10:45 and 15:45-17:00; Tuesdays and Thursdays 09:00-10:00 and 13:45-15:15

2.4 School use of the Multi-Use Sports Area will also be required in emergency situations, whereby the whole school needs to use the Multi-Use Sports Area as a mustering point, however the School will not use any Community Hours for practising such emergency evacuations.

2.5 Community use shall be all hours when the park is open and outside of those hours set aside in this agreement for School use.

**Pavilion**

2.6 Community use of the pavilion facility will be available all hours when the park is open and further hours by arrangement.

…

**4. Booking arrangements**

An easy and accessible advance booking arrangement for Casual Use and block bookings shall be established for hire of the Sports Facilities using the Council's online booking system. …"

## The dispute

23. The dispute that has arisen between C, the DRTC and the Council relates to the usage of the Pavilion and to condition 10 attached to the Permission. A considerable amount of evidence has been submitted in support of the claim, and whilst it is clear that there is significant concern in the local community about the division of time available for school use and that available for community use of the Pavilion, it is unnecessary for me to set it out in detail. It should be clear, however, that I have read that evidence and appreciate the concerns expressed but these proceedings focus on the meaning and operation of the condition. I do not doubt that there is a genuine dispute between C, DRTC and the Council.

24. The nature of the dispute is helpfully summarised in the Statement of Facts and Grounds which contends that the Council (as landowner) has allowed, in term time, the school and Happy Faces Out of School Care ("Happy Faces"), a commercial provider of child care after school, to have exclusive access to the community hall in the Pavilion from September 2016 and, during school holidays, has also allowed exclusive access to Happy Faces. Those were previously activities which had taken place within the school buildings. The complaint is that, following the grant of the Permission, not only has the school expanded its own premises but it has also now moved some of its activities into the community hall.

25. C contends that it remains unclear whether the community hall is available for wider bookings and on what basis. Even if so, then the hall is only made available by the Council at hours when the school and Happy Faces are not using it, with them also having exclusive use of the storage facilities within the community hall so that no other groups or users have any access to those facilities as was envisaged by the design. He brings this challenge in part because of the impact that has on DRTC's ability to use the community hall (including for alternative activities such as table-tennis during wet weather) and also on the part of the wider community including others who wish to use the community hall.

26. As C says in his evidence:

> "I would like to see the facilities properly available to the local community for sports and other uses, as the Council promised (including to Sport England, which had objected to the planning permission until they had been reassured that the community interest would be protected) and as we had understood the planning permission and CUA would secure."

27. Happy Faces is a commercial provider of "after school care" and operates across three sites including this school. All of its sites are associated with schools and C submits that its activities are seen by it as linked to the School's functioning. For example, Happy Faces' brochure explains that it takes referrals from the School and the Council. It is subject to inspection by Ofsted including needing to meet the educational requirements of the "Early Years Foundation Stage" and is also one of the providers of child care on which the Council relies to discharge its statutory obligations under the Childcare Act 2016 to provide sufficient childcare in its area.

28. Karen Reddy, the owner and registered proprietor of Happy Faces @ Dundonald states in her witness statement:

> "3. … Happy Faces @ Dundonald was set up in 1990 as a response to the so-called "latch key kid" problem that was being reported in the press at that time as a child "who returns from school to an empty home, or who is often left at home with little parental supervision, because their parent or parents are

away at work."

…

6. When Happy Faces initially opened it was not exclusive to children attending the schools from where we were based. In the past we took children from Squirrels, The Oratory, The Ursuline, The Hall, to name a few, on the condition that parents could arrange for their child to be brought to us as we did not have staffing to collect. Other providers can now collect children from these schools or they have their own facilities on site.

6. Happy Faces is registered with Ofsted and has always had a good reputation, well thought of by parents in the local community and by others in the wider Borough Community. We have worked in partnership with Wimbledon School of Art, grandparents who can knit and sew and other groups or individuals in the past to provide the children with activities they have enjoyed. During holidays children come from the local and extended community.

…

12. Whilst Happy Faces does charge fees these are to cover costs for rental, staffing, food, equipment, consumables, registration, staff training (first aid, safeguarding, food hygiene etc) and more. We have always been affordable for parents especially in comparison to other facilities in the area. We have always run as a service to parents before a business.

13. Due to the popularity of the local ward, more families have moved into the area and others have stayed and had more children. Many nurseries have established themselves over time in the area to supply the demand for childcare ranging from babies to 4-5 year olds. Other than Happy Faces @ Dundonald there is only one other local provider who can accommodate the age range 5-10 years. We both have waiting lists to the frustration of local parents who cannot find alternative care for their children."

29. The Council does not accept that it has operated the Pavilion, and its community hall, in breach of planning control, or unlawfully, in the light of the Permission. It considers that the childcare facilities provides a valuable community benefit. According to the statement of Thomas Procter (Head of Contracts and School Organisation, Children, Schools and Families Department):

> "10. The purpose of the childcare facilities is to enable parents to take up or remain in work as envisaged by the 2006 Act. The use of the Hall is helping parents in that regard ... By allowing parents living in the local community to work, and therefore remain in the area, there cannot in my view be a better example of community use".

30. He explains why the school premises cannot continue to be used for Happy Faces:

> "11. … Previously Dundonald Primary School had an official maximum pupil number of 210 plus nursery and had the spare space for outside activities referred to by Ms Dawson, which was also used as a specific dining hall. The expanded school needs to provide for 420 pupils plus nursery and does not have

> a spare multi-purpose space. Its larger hall is used throughout the day for assemblies, PE and dining with limited storage. With the quick turn-around from childcare to the school use it is not practical to use the school facilities for before and after school childcare unless the school is further extended."

31. Neil Milligan (Building and Development Control Manager) states:

> "8. Whilst the current childcare facility is not one that is enjoyed by all local residents, it does involve a broad community participation. The School is a very important aspect of the local community and the childcare facility is potentially of benefit not only to every family with children currently attending the School but also to those who wish to raise children in the area. It facilitates a community spirit amongst local families and assists working parents enabling them to remain in the area. The fact that the facility is run by a private company does not detract from this.
>
> 9. It is therefore the Council's view that the childcare facility is serving an important "community purpose", in accordance with Condition 10. I am satisfied that it does not have an adverse impact on the amenity of the pavilion or the Dundonald Recreation Ground.
>
> 10. Even if the childcare facility were considered to an impermissible use under Condition 10, the Council would not consider it expedient to enforce it because it is providing a valuable service for local children and their families at times when the pavilion is generally quieter."

32. During the hearing, Mr Rutledge QC, for the Council, accepted with regard to the point made at para. 10 that this is not an appropriate case to ask the Court to exercise its discretion to refuse relief or to apply s. 31(2A) of the Senior Courts Act 1981. I consider he was right to do so since, if the Council has misunderstood the terms of the Permission, then it ought to reconsider its position in the light of the judgment of the Court as to the proper meaning of Condition 10 and of all the circumstances as they stand at the date of their reconsideration.

33. If the usage of the facilities and the division of time came down to an issue of Council officers' judgment as to allocation of time, that would be a matter of discretion for the Council with which the Court would not interfere unless it could clearly be shown to be unreasonable. Given the competing public interests involved here that would be a very high hurdle indeed to overcome. However, that is not the basis on which this challenge is brought.

## Issues

34. As already noted, the dispute in these proceedings turns on the meaning of Condition 10 and whether it precludes school use of the changing rooms and Community Hall. The rival interpretations can be stated as follows.

35. Mr Wolfe QC, for C, contends that "shall only be used for community purposes and

purposes ancillary to the use of Dundonald Recreation Ground and for no other purpose (including any other purpose within Classes D1 and D2 of the Schedule to the Town and Country Planning (Use Classes Order) [1987]" means that the facilities may only be used for (1) "community purposes" and (2) "purposes ancillary to the use of Dundonald Recreation Ground" and that, since school use would fall within Class D1 of the Use Classes Order 1997 ("the UCO"), it is precluded whether or not the Council is right that it might otherwise be considered a "community use".

36. It is essential to Mr Wolfe's case that the phrase in parenthesis "(including any other purpose within Classes D1 and D2 of the Schedule to the Town and Country Planning (Use Classes Order) [1987])" should be read as precluding any use falling within Classes D1 or D2.

37. Mr Rutledge QC, for the Council, submits that "community purposes and purposes ancillary" define the permitted use and that the phrase "no other purpose (including any other purpose within Classes D1 and D2 .. etc" is there to prevent <u>other</u> uses with D1 and D2 which might otherwise be permitted as falling within the same use class. It is, his says, simply making it clear that the permission granted to change uses within a use class is precluded in the case of the Permission. It follows that the fact that a community or ancillary use might also fall within D1 or D2 does not, contrary to C's case, preclude them.

38. The relevance to the CUA to the construction of Condition 10 is also in issue since, it is submitted, if Condition 10 is ambiguous then regard can be had to the CUA to resolve the ambiguity.

*The Use Classes Order 1987*

39. S. 55(2)(f) of the Town and Country Planning Act 1990 provides:

> "2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land—
>
> ….
>
> (f) in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class."

40. Art 3(1)-(3) of the UCO provides:

> "**3.— Use Classes**
>
> (1) Subject to the provisions of this Order, where a building or other land is used

for a purpose of any class specified in the Schedule, the use of that building or that other land for any other purpose of the same class shall not be taken to involve development of the land.

(2) References in paragraph (1) to a building include references to land occupied with the building and used for the same purposes.

(3) A use which is included in and ordinarily incidental to any use in a class specified in the Schedule is not excluded from the use to which it is incidental merely because it is specified in the Schedule as a separate use."

41. The Schedule to the UCO defines Classes D1 and D2:

"**Class D1. Non-residential institutions**

Any use not including a residential use—

(a) for the provision of any medical or health services except the use of premises attached to the residence of the consultant or practitioner,

(b) as a crêche, day nursery or day centre,

(c) for the provision of education,

(d) for the display of works of art (otherwise than for sale or hire), (e) as a museum,

(f) as a public library or public reading room, (g) as a public hall or exhibition hall,

(h) for, or in connection with, public worship or religious instruction

(i) as a law court.

**Class D2. Assembly and leisure**

Use as–

(a) a cinema,

(b) a concert hall,

(c) a bingo hall,

(d) a dance hall,

(e) a swimming bath, skating rink, gymnasium or area for other indoor or outdoor sports or recreations, not involving motorised vehicles or firearms."

42. The National Planning Policy Guidance on the Use of Conditions states in its current form (the substance of this has been national policy guidance for many years):

"**Is it appropriate to use conditions to restrict the future use of permitted development rights or changes of use?**

Conditions restricting the future use of permitted development rights or changes of use will rarely pass the test of necessity and should only be used in

> exceptional circumstances. The scope of such conditions needs to be precisely defined, by reference to the relevant provisions in the Town and Country Planning (General Permitted Development) (England) Order 2015, so that it is clear exactly which rights have been limited or withdrawn. Area wide or blanket removal of freedoms to carry out small scale domestic and non-domestic alterations that would otherwise not require an application for planning permission are unlikely to meet the tests of reasonableness and necessity. The local planning authority also has powers under article 4 of the Town and Country Planning (General Permitted Development) (England) Order 2015 to enable them to withdraw permitted development rights across a defined area.
>
> Paragraph: 017 Reference ID: 21a-017-20140306"

43. It has been established for many years that the use of appropriate language in a condition may restrict the scope of what is permitted even where it restricts statutory rights that would be otherwise available as permitted development or under the UCO, or would otherwise not fall within the scope of "development" in s. 55. See e.g. ***City of London Corp v Secretary of State*** (1972) 23 P. & C.R. 169, ***Dunoon Developments v Secretary of State*** (1993) 65 P. & C.R. 101 and ***Dunnett Investments Ltd v Secretary of State*** [2017] J.P.L. 848.

*Construction of the Permission and the condition: authorities*

44. Both parties agree that the starting point with respect to the construction of the Permission, and Condition 10 in particular, is the Supreme Court's decision in ***Trump International Golf Club Scotland Ltd v Scottish Ministers*** [2016] 1 WLR 85.

45. Lord Hodge, with whom the other members of the Supreme Court agreed, set out the approach to interpretation and distinguished that issue from the question of implication:

> "33. Whether words are to be implied into a document depends on the interpretation of the words which the author or authors have used. The first question therefore is how to interpret the express words, in this case the section 36 consent. There is a modern tendency in the law to break down divisions in the rules on the interpretation of different kinds of document, both private and public, and to look for more general rules on how to ascertain the meaning of words. … Differences in the nature of documents will influence the extent to which the court may look at the factual background to assist interpretation. Thus third parties may have an interest in a public document, such as a planning permission or a consent under section 36 of the 1989 Act, in contrast with many contracts. As a result, the shared knowledge of the applicant for permission and the drafter of the condition does not have the relevance to the process of interpretation that the shared knowledge of parties to a contract, in which there may be no third party interest, has. There is only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning

permission or a section 36 consent: *R v Ashford Borough Council, Ex p Shepway District Council* [1999] PLCR 12, per Keene J at pp 19C–20B; *Carter Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions* [2003] JPL 1048, per Buxton LJ at para 13 and Arden LJ at para 27. It is also relevant to the process of interpretation that a failure to comply with a condition in a public law consent may give rise to criminal liability. In section 36(6) of the 1989 Act the construction of a generating station otherwise than in accordance with the consent is a criminal offence. This calls for clarity and precision in the drafting of conditions.

34. When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference (as in condition 7 set out in para 38 below) or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent.

35. Interpretation is not the same as the implication of terms. Interpretation of the words of a document is the precursor of implication. It forms the context in which the law may have to imply terms into a document, where the court concludes from its interpretation of the words used in the document that it must have been intended that the document would have a certain effect, although the words to give it that effect are absent. … While the court will, understandably, exercise great restraint in implying terms into public documents which have criminal sanctions, I see no principled reason for excluding implication altogether."

46. Lord Carnwath added at [66]:

"66 … in agreement also with Lord Hodge JSC, I do not think it is right to regard the process of interpreting a planning permission as differing materially from that appropriate to other legal documents. As has been seen, that was not how it was regarded by Lord Denning in the *Fawcett* case [1961] AC 636 . Any such document of course must be interpreted in its particular legal and factual context. One aspect of that context is that a planning permission is a public document which may be relied on by parties unrelated to those originally involved. (Similar considerations may apply to other forms of legal document, for example leases which may need to be interpreted many years, or decades, after the original parties have disappeared or ceased to have any interest.) It must also be borne in mind that planning conditions may be used to support criminal proceedings. Those are good reasons for a relatively cautious approach, for example in the well established rules limiting the categories of documents which may be used in interpreting a planning permission (helpfully

> summarised in the judgment of Keene J in the *Shepway* case [1999] PLCR 12, 19–20). But such considerations arise from the legal framework within which planning permissions are granted. They do not require the adoption of a completely different approach to their interpretation."

47. Accordingly, it is necessary here to ask what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. There is only limited scope to have regard to materials extrinsic to the Permission itself which is a public document and available for public inspection on the Council's planning register (as is any associated planning obligation).

## Discussion

48. I have come to the conclusion that the meaning of Condition 10, although disputed, is not ambiguous such that reference needs to be made to the CUA which is extrinsic to it on one of the limited grounds explained by Keene J. (as he then was) in ***R v Ashford BC ex p, Shepway DC*** [1999] PLCR 12, cited in ***Carter Commercial*** and ***Trump International*** as demonstrating the limited scope for referring to extrinsic evidence to construe a public document.

49. There appears to be little dispute that the Happy Faces use was either educational or amounted to day care within Class D1 and, in any event, it appears to me that it does fall within that Use Class. It is central to Mr Wolfe's case that it does fall within D1. However, he submits that it is not a "community purpose" given its association with the School. I do not consider such a close association to be determinative of its function or that the concept of a "community purpose" is not wide enough to include at least some educational activities. The terms do not appear to me to be mutually exclusive since "community purpose" is not a term used in the UCO and neither is it a term of legal art nor is it defined by the Permission. Its meaning must have regard to its ordinary English meaning and the context in which it has been used.

50. With regard to the ordinary meaning of "community", the Shorter OED gives a number of meanings which include a body of people in the same locality:

> "I A body of individuals.
>
> …
>
> 2 An organized political, municipal, or social body; a body of people living in the same locality; a body of people having religion, profession, etc., in common; a body of nations unified by common interests (freq., with cap. initial, in the title of an international organization).
>
> b The members of such a body collectively."

51. The provision of a service, albeit through a commercial provider, for childcare both before and after school, and during the school holidays, is a service benefitting the local community and thus a "community purpose" within Condition 10. I have quoted the evidence of Karen Reddy and Neil Milligan and consider them to satisfy the broad meaning of "community purpose". On the face of it the provision of after-school and holiday care, even if educational in content, is capable of being a "community purpose" if it is connected with the local community (as is the case here) and provides a service to that community which is not provided by schools. As Neil Milligan states "It facilitates a community spirit amongst local families and assists working parents enabling them to remain in the area". It is unsurprising that an after school provider should be associated with schools since its purpose is to provide childcare outside the formal provision of education by the school.

52. The question is therefore whether the fact that such a community purpose nonetheless falls within Use Class D1 as "day care" brings it within the phrase in parentheses and thus excludes it from the permitted activities within the Pavilion and Community Hall.

53. I do not consider that the Happy Faces use and activities are excluded.

54. In my judgment, approaching the meaning of the condition read as a whole in the context of the Permission and from the viewpoint of the reasonable reader, the references to "community purposes' and "purposes ancillary to the use of Dundonald Recreation Ground" are not to be read subject to excluding any such uses if they fall within Use Classes D1 and D2.

55. First, it seems to me that the phrase "no other purpose (including any other purpose within Classes D1 and D2 of the Schedule to the Town and Country Planning (Use Classes Order) 1997)" naturally reads as meaning that it excludes <u>other</u> purposes including <u>other</u> purposes within D1 and D2. The two references to "other purpose" plainly mean, in my judgment, purposes other than the two permitted purposes/uses.

56. In that context, the function of the parenthetical reference to other purposes within D1 and D2 is to make it clear that purposes other than those stated are not permitted even if they fall within D1 and D2. If that section had not been included, it might have been said that the phrase "no other purpose" was not sufficient to exclude the ability which might otherwise have existed to change uses within those classes as permitted by s. 55(2)(f) of the 1990 Act, above. Accordingly, community use within D1 as a day nursery or for education would have allowed the change of use to e.g. heath services, gallery, library or exhibitions and an indoor or outdoor recreational use within D2 would have allowed other D2 uses e.g. cinema or dance

hall.

57. The Council clearly wished to control any further changes of use, as was apparent from the reason given for the imposition of Condition 10, and this is manifest from the terms of the condition itself which confines itself to the purposes in contemplation when permission was granted.

58. Secondly, while part of the use of the Pavilion was intended to be for community purposes, as noted, it was also to be used as Mr Wolfe pointed out for "purposes ancillary to the use of Dundonald Recreation Ground" and thus would permit school sports use of the ground floor facilities. However, since that is an educational use within D1, on C's construction of Condition 10 any school related use would be excluded whether it was ancillary to the use of the Recreation Ground or otherwise. Mr Wolfe is explicit as to this conclusion in his skeleton at paras. 34 and 35:

> "34. … the School's continuing use of the Pavilion is plainly not in accordance with the requirements of the CUA – the Pavilion is for community use only.
>
> 35. The School's use also falls within Use Class D1 and is thus precluded by condition 10 on the planning permission."

59. I find that conclusion difficult to square with the purpose of the Permission which, whilst intended to make provision of community use, did not on its face intend to exclude school use. See the Reasons for Approval attached to the Permission which included:

> "The proposed development would provide additional educational floor space which is essential to address an increase demand for school places within the Dundonald Primary School catchment area and the Merton Borough as whole. The need for this school extension and the siting of part of the building extension within the recreation ground have been sufficiently demonstrated and justified and this, in addition to the benefits to be derived for the existing and future recreation ground users from the improved recreational facilities to be provided, and the degree of impact upon the open space, is considered to outweigh the loss of public open space that would arise as a result of the approved development."

60. This is also clear from the s. 106 obligation which was a precondition to the grant of permission and is also a public document: see recitals 1.2 and 1.4 quoted above.

61. Thirdly, and most surprisingly, if Mr Wolfe's submissions were correct C would succeed in excluding Happy Faces but it would be a pyrrhic victory. On C's approach, any use of the Pavilion by DRTC or other local sports groups would also be excluded since they also fall within Use Class D2(e). His approach would exclude not only the community use within D1, and any school-related use, but any

indoor or outdoor or recreational use (including by the community) within D2. This cannot sensibly have been the purpose of the condition. This would mean that the condition would exclude from using the Pavilion those who are, on the face of the condition, intended to be its primary beneficiaries. Mr Wolfe did not have a clear answer to this point in argument.

62. For these reasons, I agree with the Council's construction of Condition 10 and the claim fails.

63. It is unnecessary for me to go further and to consider the CUA, since I have found the interpretation of the condition to be clear and not to present an ambiguity sufficient to enable me to consider extrinsic evidence – including the CUA which was revised and executed after the grant of Permission though existed in draft annexed to the planning obligation at the time of grant. Even if the CUA were admissible, for example by reason of its annexation in draft to the planning obligation, I do not consider that it alters my approach to the interpretation of Condition 10.

64. For similar reasons to those given above with regard to "community purpose", in my judgment "community use" would not exclude the Happy Faces use and cause it to fall outside paras. 2.5 and 2.6 of Schedule 2 to the CUA. The definition of "community use" in the CUA (above) is inclusive ("by the local community including organized sports clubs, organisations and for casual use") and I consider it is broad enough to include Happy Faces. This has to be read in the context that "Sports Facilities" are defined as including the Pavilion the use of which is not confined to sporting activities. Moreover, those provisions appear to me to be directed at regulating the hours of use of the facilities (see the heading to para. 2 "Hours of Access"), whilst being based on a distinction between "school use" and "community use" leaving the regulation of their planning use to Condition 10.

65. Some emphasis was also placed on clause 4 which provides:

> "The Council agrees to make the Multi-use Sports Area available for School and Community Use in accordance with the provisions of Schedule 2 of this Agreement and the Pavilion available for Community Use."

However, since I have concluded both in terms of the construction of Condition 10 and the CUA that "community purpose" and "community use" are broad enough to include Happy Faces, this does lead to any different approach if the Permission is construed in the specific context of the CUA. Moreover, the reference to "making available" in accordance with Schedule 2 appears to be directed at hours of access.

66. Accordingly, reference to the CUA does not lead me to any different conclusion

with regard to the construction of Condition 10 than I have reached in any event.

67. For these reasons I dismiss the application for judicial review.