Case No. CO/775/01

Neutral Citation Number: [2001] EWHC Admin 927

IN THE HIGH COURT OF JUSTICE

QUEEN’S BENCH DIVISION

ADMINISTRATIVE COURT

The Royal Courts of Justice

The Strand

LONDON WC2A 2LL

Date: Thursday 25 October 2001

Before:

MR JUSTICE OUSELEY

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THE RUGBY FOOTBALL UNION

Claimant

v

SECRETARY OF STATE FOR LOCAL GOVERNMENT, TRANSPORT AND THE REGIONS

Defendant

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Mr John Steel QC and Mr Thomas Hill (instructed by Denton Wilde Sapte, Five Chancery Lane, Clifford's Inn, London EC4A 1BU) appeared on behalf of the Claimant.

Ms Nathalie Lieven (Miss Carine Patry appeared for judgment) (instructed by Treasury Solicitor) appeared on behalf of the Defendant

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Judgment As Approved by the Court

**Mr Justice Ouseley:**

1. On 19th April 2000 the Rugby Football Union, as the owners and operators of Twickenham Rugby Football stadium, submitted an application under section 192 of the Town and Country Planning Act 1990 to the London Borough of Richmond upon Thames for a certificate of lawfulness of proposed use, in relation to the use of the stadium as a concert hall for the holding of musical concerts open to the public, within Use Class D2 of the Schedule to the Town and Country Planning (Use Classes) Order 1987.
2. The certificate was sought in respect of an unlimited number of concerts. The Council failed to determine the application within the normal eight week period. On 11th July 2000 an appeal was lodged against that non-determination pursuant to section 195 of the Act. The appeal was dismissed by the Secretary of State's appointed person in a decision letter dated 19th January 2001. The RFU under section 288 of the 1990 Act now challenges his decision.

**The Law**

1. Section 192 of the Town and Country Planning Act 1990 provides:

"(1) If any person wishes to ascertain whether-

(a) any proposed use of buildings or other land … would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question.

(2) If on an application under this section the local planning authority are provided with information satisfying that the use or operations described in the application would be lawful, if instituted or begun at the time of the application, they shall issue a certificate to that effect and in any other case they shall refuse the application."

1. A proposed use will be lawful if, among other things, it does not amount to "development" within the meaning of section 55 of the 1990 Act, since in those circumstances permission will not be required for it by virtue of section 57 of the Act.
2. Section 55(2) of the Act provides:

"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 [in respect of 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;"

1. Article 3(1) of the Use Classes Order provides that:

"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 on the land."

1. Class D2 of the Schedule to the Use Classes Order includes the following uses:

"Class D2. Assembly and leisure

Use as-

(a) a cinema,

(b) a concert hall,

(c) a bingo hall or casino,

(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."

**The Facts**

1. It was agreed before the appointed person by the London Borough of Richmond Upon Thames and before me by the Secretary of State that the Twickenham stadium was within Class D2(e) of the Schedule to the Use Classes Order, although as the argument developed before me, it became clear that there was some disagreement as to the basis upon which it was there. It was however at least within Class D2(e) as "an area for other outdoor sports".
2. The RFU submitted that the Secretary of State had erred in law in concluding that the proposed use as a concert venue fell outside the scope of "use as a concert hall" within Class D2(b) of the Use Classes Order and, alternatively, erred in law in concluding that the proposed use fell outside the scope of "an area for other outdoor sports or recreations."
3. A further error of law was alleged in relation to the appointed person's conclusion that the proposed use involved a material change of use because it was said that he had failed to consider the correct base line of the potential activity at Twickenham against which to measure the materiality of the change involved in the proposed use.
4. The decision letter recorded in paragraph 2 the following:

"Both parties accepted that the present use of the appeal site as a sports stadium fell within Class D2 of the Schedule to the Town and Country Planning (Use Classes) Order 1987 (the UCO). The main purpose of the appeal was to establish that the proposed use for holding concerts would also fall in Class D2, amounting either to use as a concert hall, in Class D2(b), or to use for recreational purposes, in Class D2(e), so that the change of use would not involve development of the land, by virtue of Article 3(1) of the UCO and section 55(2)(f) of the 1990 Act. In the Council's view, the proposal would not fall within any of the categories in Class D2, and would, as a matter of fact and degree, constitute a material change of use of the land, for which planning permission would be required."

1. The appointed person then correctly set out the appropriate approach to the issues.

**The Concert Hall Issue**

1. On the first issue, which was whether the proposed use would fall within Class D2(b) of the Schedule to the Use Classes Order as a concert hall, the appointed person said this:

"Taking first the appellants' argument that the proposal would amount to use as a concert hall, in Class D2(b), I accept that the UCO as a whole can apply both to buildings and to other land; and I am also aware that the categories in Class D2(a) to (d) do not refer primarily to types of buildings but to types of use. Nevertheless, the use in Class D2(b) is defined specifically as 'use as a concert hall', not more generally as use for holding concerts or as a concert venue, and it seems to me that, having regard to the ordinary meaning of the words, a use as a concert hall can only take place in a location having characteristics which enable it to function in the nature of a hall. The dictionary definition of 'hall' is a large room or chamber. I therefore tend to agree with the Council's view that use as a hall of any sort must necessarily be restricted to a building or part of a building that is enclosed both vertically and horizontally. For example, a building designed for use as a theatre, cinema or assembly hall could, in my view, function as a concert hall with little or no adaptation; similarly, any large enclosed building, such as a warehouse or aircraft hangar, could have characteristics enabling it to be used as a concert hall, within the scope of Class D2(b).

6. By contrast, a mainly open stadium like Twickenham does not, in my view, possess the necessary degree of enclosure to function as a concert hall, and I do not consider that the inclusion of both indoor and outdoor activities in Class D2 as a whole is sufficient to extend the use defined very precisely in Class D2(b) to that extent."

1. Mr John Steel QC for the Rugby Football Union submitted that the appointed person had wrongly focused on the need for the enclosure of a venue in order for it to be a concert hall. Such an approach ignored the varying degrees of enclosure which concert halls had. On that basis a rugby stadium with a retractable roof in Wales, say, could be a concert hall whilst Twickenham stadium could not be a concert hall.
2. The focus of the Use Classes Order was properly on the use to which the land or buildings were put and not on the land or buildings themselves. Further, the language of section 55(2)(f) was important, focusing on "use for a purpose", language repeated in paragraph 3(1) of the Use Classes Order. The purpose of use as a concert hall was to hold concerts and, therefore, if Twickenham was being used for holding concerts, it was being used for the purposes of a concert hall and therefore "as a concert hall" within the Use Classes Order.
3. Miss Lieven for the Secretary of State submitted that the nature of the premises was critical. As a matter of dictionary definition "concert hall" or "hall" was an enclosed building, not one open to the air. Insofar as an issue might arise as to whether a particular building was or was not a concert hall by virtue of the degree of its enclosure or other characteristics, that was a matter of fact and degree for the reasonable judgment of the decision-maker, provided that he directed himself correctly as to the true meaning or scope of "concert hall" in the context of the Use Classes Order.
4. The fact that that might lead to different conclusions as between stadia with and without retractable roofs was not absurd. The obvious potential for greater environmental impact from music played in a structure which was not enclosed gave a rationale for such a distinction. The correct approach was not to ask whether in such circumstances Twickenham was being used for the purposes for which a concert hall was used; the correct approach was to ask: was it then being used "as a concert hall"? Twickenham stadium could not be described as a "concert hall" when it was in use for the holding of concerts.
5. In my judgment, the key issue is whether the correct approach is the one advanced by Mr Steel, who says that the Use Classes Order is satisfied because when concerts are being held, Twickenham stadium is being used for the purposes for which a concert hall is used and thus is being used "as a concert hall", or whether it is the one advanced by Miss Lieven, who says that the Use Classes Order is only satisfied if, when concerts are being held there, Twickenham stadium has the physical characteristics of a concert hall, which requires an enclosed building. Merely being used for concerts is insufficient.
6. It was accepted by Mr Steel that whatever the requirements as to enclosure might be for a concert hall, it could not be said by him that Twickenham stadium itself was a concert hall just because concerts were being held there. That is plainly correct. Indeed, I consider Miss Lieven to be right when she says that as a matter of dictionary definition, or the common use of language, a hall is an enclosed building which has to have a roof.
7. Hence, the question is: for the purposes of the Use Classes Order, is it sufficient to focus on the purpose or use to which concert halls are put, ie holding concerts? Or is it necessary to focus on the question of whether Twickenham has the physical characteristics of a concert hall, when concerts take place there?
8. I consider Miss Lieven's approach to be correct. The natural structure of the Use Classes Order means that in order to qualify for the change from a use within D2(e) to the use within D2(b), the change from "use as an area for other outdoor sports" to "use as a concert hall", the reference to "use for a purpose of the same class" within section 55and article 3 of the Use Classes Order simply requires that the language of the two applicable paragraphs be satisfied. Those are the purposes in this context. The appointed person, therefore, correctly asked the question: when concerts take place there, is Twickenham used as a concert hall? To which he correctly answered that it was not, because it lacked an essential physical characteristic - it had no roof. It is insufficient for it simply to be a concert venue. The building is not and never could be used as a concert hall because it lacks the essential characteristic for a concert hall, namely a roof.
9. I consider that in order to be able to take advantage of the changes within the Use Classes Order it is necessary for the essential physical characteristics of (in this case) a roof to be present in order for the change of use to be exploited. Just as, on a more obvious level, for a swimming bath to be used as a cinema or vice versa, the physical means of water containment have to be eliminated or provided as the case may be.
10. I accept that some classes or purposes within the Use Classes Order use the different phraseology of, for example, in class D1 "use for the provision …", or within Class A1 under the rubric of "shop":

"Use for the following purposes-

(a) for the retail sale of goods…

(b) as a post office."

1. That distinction, however, reinforces my view that one looks simply to see if the requirement of the particular paragraph is satisfied: is this stadium, therefore, used as a concert hall? The question is not: is this a building which although not a concert hall is nonetheless being used for the purposes for which a concert hall is used? The Use Classes Order would simply have referred to use "for concerts" or "as a concert venue."
2. I find nothing odd at all about an issue of fact and degree arising as to whether a structure is or is not a concert hall, as to whether it possesses or lacks the requisite characteristics of a concert hall. The appointed person's approach recognises that a large enclosed building, such as a warehouse, could be a concert hall because it was entirely enclosed. That accords with the Use Classes Order. A sports stadium with a retractable roof might well be used as a concert hall when concerts were held there.
3. I do not consider that this approach deprives the Use Classes Order of effect in relation to changes from outdoor sports. The Use Classes Order permits the change of sport where it might be thought that the change of sport involved a different use because there could be different impacts from the relative popularity of the sports involved, or from degrees of professionalism or, for example, from the use of an area for training as opposed to playing matches.
4. But the fact that the provision in Class D2(e) relating to outdoor sports may have quite a limited role, as opposed to a very large role on the approach which I have adopted, persuades me that that approach in the context of permitting changes of uses without planning permission being required, is correct rather than wrong.
5. Mr Steel's argument that the approach of the appointed person impermissibly took amenity considerations into account is wrong. Those amenity considerations merely provide the rationale for the approach within the Use Classes Order, which I consider to be correct. In my judgment it would very odd if the addition of the words "for other outdoor sports or recreation" in the 1987 UCO had meant that any area used for outdoor sports, for example a collection of pitches, could be used for live rock concerts without the need to consider whether planning permission was necessary. Yet that is the necessary consequence of Mr Steel's argument that any area used for outdoor sport or recreation can be used for the purposes of a concert or dance venue.
6. Mr Steel also relied on the availability of other means of amenity control for music venues, cinemas and dance halls and, in particular, the availability of the control mechanism of a public entertainment licence. This was not something which had been considered by the appointed person, and I am very reluctant to draw upon any knowledge which I might have on that matter which may be rather less that Mr Steel kindly assumed.
7. However, I do not in principle consider that the potential application of a system of control over the volume of music and the numbers of people attending venues, other than the planning system, is a reliable indicator that the broad rationale for the approach to the Use Classes Order, which I adopt, is wrong.

**Outdoor Sport And Recreations**

1. The second issue was whether Twickenham stadium as at least an area used "for other outdoor sports" (ie rugby) would be used as a venue "for other outdoor sports or recreation" when used for concerts.
2. The appointed person said:

"The appellants submitted that the public recreation, but the issue here, as they recognise, is whether it is a recreation within the context of Class D2(e). The use of the term 'other …recreations' (my emphasis) indicates to me that the scope of Class D2(e) only extends to recreations which are of a similar nature to those which might take place in a swimming bath, skating rink or gymnasium. Otherwise, use as a swimming bath, skating rink or gymnasium might be expected to have been included in separate sub-paragraphs of the Class, like each of the uses in paragraphs (a) to (d), and use as an area for other indoor or outdoor sports or recreations would not have been included with these specific activities. In my opinion, this implies that uses within paragraph (e) involve active participation in some kind of physical activity or pastime, perhaps like the dance studio use in the Elmbridge appeal decision … The more passive enjoyment of a concert, on the other hand, seems to me to be of a different nature, more like the general concept of a 'pleasant occupation', even though arguably more active than enjoyment of a public library which the Court of Appeal held, in the cited case of *Millington v SSE*, to extend beyond the particular meaning of 'recreations' in the context of the UCO.

8. But I note the Court's view in that case that to interpret the term so widely would be to make the list of categories in Class D2 unnecessary, from which I take support for the view that the class should be interpreted as including only those activities which clearly fall within the specific categories. In my view, for these more passive recreations to be included in Class D2, other than those specified in paragraphs (a) to (d), it would have been necessary for one or more of those paragraphs to encompass recreations other than those specified, with sports and more active recreations to be covered, as now, by paragraph (e)."

1. It was recognised by Miss Lieven that this approach by the appointed person contained an error in that the appointed person had contrasted active rugby playing with passive concert spectating, which is not a like-for-like comparison. The spectators at a rugby match, even when urging on one side or advising the referee as to his or the other side's shortcomings, are no more active than many of those who attend the sort of concert which might be contemplated at a sports stadium.
2. However, Miss Lieven submitted that that did not matter. She gave three reasons: first, Twickenham stadium fell within Class D2(e) because rugby was played there and it was that which meant that it was used for outdoor sport and it was within D2(e) only for that reason. Second, she submitted that the concert performers in the context of concerts at Twickenham stadium, the parallels to the rugby players, were not engaged in recreation themselves but rather in their profession or work. Third, she submitted that the appointed person was right in saying that "other recreation", read as part of Class D2(e), meant active recreation or, as it can be put, the concept was one of "physical recreation".
3. The focus of Class D2(e), and of the part of that Class in question, was on the player or performer (the doer or the participant) and not on the spectators, however large or small in number, however silent or vocal. Twickenham was not within Class D2(e) as a place of other outdoor recreation for spectators. If outdoor recreation, including watching sport rather than some outdoor physical recreational activity were within the Use Classes Order, the effect of the extension of the Use Classes Order in 1987 would have been to render the rest of Class D2(e) quite unnecessary, and indeed the rest of Class D2. The extent of recreation within the Use Classes Order was not so wide.
4. Miss Lieven supported her submissions by reference to *Millington v Secretary of State for the Environment, Transport and the Regions* (1999) JPL 644, at page 657. HHJ Rich said:

"The test of whether a use of land is an area for outdoor sports or recreations is not determined by whether the activity may probably be described as recreational in nature. It is not sufficient that the area should be used for purposes which may be called recreational purposes, as opposed merely to say commercial or educational purposes. It is necessary that it should be used for sports or recreations, either plurally or in the singular. That imports some group activity wherein the sharing of the activity is the essence of the use for a recreation or recreations."

1. The question which he was addressing was whether visits by tourists, academics and others to an ancient monument constituted for them an outdoor recreation. I do not accept that there is any requirement for a group activity within the concept of outdoor recreation. For example swimming, skating, and other recreations may be undertaken in a solitary manner, even though numbers may be present each separately but simultaneously engaged in recreation. Nor do I consider that any relevant distinction can be drawn in all circumstances between recreation, education, and commerce. However, HHJ Rich highlighted the limits of recreation and, in particular, the role of the concept of sport as providing a context.
2. The Court of Appeal in that same case (reported (2000) JPL 297) upheld the decision of HHJ Rich but not explicitly endorsing all of his reasoning on this point. Schiemann LJ said:

"Mr George, relying on Australian and American decisions, submitted that 'recreations' in that context must be given a sufficiently wide context to embrace any pleasant occupation including the obtaining of historical, geographical or topographical information by members of the public and that, for instance, a public library can be a source of recreation. If that submission be right the list under D2 would be unnecessary. It would suffice to refer to 'use of any area for indoor or outdoor recreations'.

I consider that the Secretary of State was perfectly justified in finding that, in the context of the use of the word in the Use Classes Order, what had gone on in the days before the vineyard was established did not amount to use of the land for the purpose of recreation. Whether he was justified in concluding that the post vineyard visits fall within the concept of recreation in the Use Classes Order it is not necessary for us to determine. I record my doubts."

1. Mr Steel submitted that "recreation" had at least sufficient width to encompass being a spectator at a concert or a rugby match without stretching the concept beyond the intent of the Use Classes Order. Indeed, that was what Class D2 was in part about. A concert hall within Class D2(b) contemplates an audience for the performance. A cinema also contemplates an audience for the film programme. Those are striking examples of his point.
2. He said that on Miss Lieven's submission there was still no reason for a swimming bath or skating rink to be referred to. This was by way of a response to her submission that his approach meant that the rest of Class D2 was otiose.
3. Mr Steel also submitted that it would be quite artificial to divide a stadium, like Twickenham, into two parts (pitch and stand) or into two aspects (players and spectators) when seeing how Twickenham stadium fitted into the Use Classes Order in which it was accepted that it fitted. The whole could properly be seen as "an area for outdoor sport and recreation". The concert performers were the equivalent to the rugby players who also were professional players. The spectators at the match were engaged in recreation, just as much as spectators or the audience at a concert.
4. I did not find this issue straightforward. My mind changed a number of times. However, I have come to the firm conclusion that Miss Lieven is right. The focus of Class D2(e) is on sport or physical recreation. The words "or other outdoor recreation" need to be read in the context of Class D2(e) which is clearly dealing with physical activities rather than hobbies, interests, or recreational activities of an artistic or creative nature. It cannot cover all those ways in which a person can enjoy recreation in a broad sense without becoming so broad as to render the rest of Class D2 otiose, or creating quite remarkable possibilities for uncontrolled changes of use. It would be inappropriate so to interpret the extension of the Use Classes Order in 1987.
5. I also conclude that the words in question should be seen as relating to that group of activities which it extends, which are those in Class D2(e), rather than to all those in Class D2 as a whole. The connotation and context of D2(e) is sport and physical recreation, the role of physical recreation being to cover those many situations where the physical activity would not be described as a sport because, for example, it might be done alone for private pleasure, I instance for these purposes a jogging track. This approach fits with the approach of the Court of Appeal in Millington.
6. I do not consider therefore that the presence of spectators is material to Class D2(e). Twickenham is within Class D2(e) because it is an area used for outdoor sport, in this instance rugby union. It is not the presence of more or less passive spectators which brings it within the purpose of Class D2(e). They may enjoy watching rugby. For them, in common sense language, watching rugby may be one of their recreations but they are not themselves engaged in physical recreation. Twickenham is not, for Class D2(e) purposes, an area used for outdoor recreation by spectators.
7. So far as concert performers are concerned it is only reasonable to assume that those contemplated here are professional musicians. No doubt they derive much pleasure from their own music-making but they are not for that reason alone engaged in recreation. Nor are they engaged in physical recreation however much the performance may make demands on their stamina. Their activities do not bring Twickenham within the scope of other outdoor recreation.
8. The concert goers are the equivalent to the rugby spectators for these purposes, but their enjoyment of the music or spectacle does not constitute "other recreation" for the purposes of Class D2(e) any more than does the rugby spectators' enjoyment of rugby. The reason why Twickenham stadium is within Class D2(e) is because sport is played there and not because sport is watched there. The reason why the concerts are not within Class D2(e) is that the concert performance is neither sport nor recreation, nor is watching the concert recreation.
9. This distinction between watching and playing sport means of course that an important aspect of Twickenham stadium is disregarded. However, the distinction is a perfectly rational one in the context of the Use Classes Order. It is perfectly rational to focus on physical activity rather than on watching physical activity. If Twickenham had to be approached as an area used for watching professional sport it would not be within Class D2(e) at all.

**Material Change Of Use**

1. The third issue was whether even though the proposed use fell outside the scope of the Use Classes Order, nonetheless was a material change of use involved? The appointed person said:

"Although I have concluded that the proposed change of use of the stadium would not have been lawful by virtue of the UCO, planning permission would still only be required if it amounted to a material change of use, as a matter of fact and degree. No information was given in the context of this appeal about the frequency or nature of the proposed concerts, and the appellants chose not to counter the Council's submissions that the impact of the proposal on the amenity of neighbouring residents would probably be materially different from that of the sports events normally taking place in Twickenham Stadium. In the absence of evidence to the contrary, it seems likely to me that, as the Council maintains, the timing of the concerts the pattern of arrival of the audience, and particularly the nature, duration and intensity of the nose produced, could have such an effect on the character of the locality as to give rise to a material change of use. Bearing in mind that the onus of proof in LDC appeals is entirely on the appellants, I am not therefore satisfied that, on the balance of probability, the proposal would not amount to development requiring planning permission. The appeal fails accordingly."

1. I do not accept Mr Steel's submission of an error by the appointed person in looking at an incorrect base line or at amenity. It was suggested that the appointed person had ignored the full extent to which Twickenham stadium could be used for sport. There was no restriction in law on the number of sporting events, their type, or duration. It was even possible that a small number of non-sporting events could take place without there being a material change of use. The appointed person ought to have assessed the materiality of any change of use against that theoretical potential level of use.
2. In my judgment, if the appointed person had so approached matters he would have been bound to make a similar assumption in relation to the unlimited concerts envisaged by the certificate of lawful proposed use which was sought. He was, however, entitled to approach matters on the basis of what now normally happens, and on the basis of what would normally happen in the event of the certificate being granted. There was no inconsistency of approach. I doubt any way, that the answer to the question arrived at by the appointed person would differ on either approach. The important thing, however, is consistency in approach.
3. The RFU provided no information to the appointed person about the frequency or nature of concerts and did not seek to counter the evidence of the London Borough of Richmond upon Thames in this respect. This is a legitimate approach, of course, to take to an application for a certificate. However, the appointed person then has to do the best he can in the circumstances in judging materiality.
4. I have some reservations about the extent to which an assessment of likely impact from the way in which a particular use may be carried out at a particular place is really the key to whether there is a change in the character of the use of land. A change in the character of the use of land can of course occur even where on the facts of a particular case there is little impact and may not occur even where there is a substantial impact. However, here the appointed person was entitled to conclude that concerts differed from rugby matches in ways which materially affected the character of the use and was assessing impact in that context rather than forecasting whether any change would be objectionable.

**Conditions**

1. I also heard submissions about the interpretation of the conditions on the planning permissions for the east north and west stands, and the extent to which they did or did not remove Use Class Order rights anyway.
2. The appointed person dealt with that as an informative. It would of course matter if the appointed person's decision were wrong in relation to his interpretation of the Use Classes Order, because the meaning of the condition could then bite on what use was lawful even though it might fall within the scope of the Use Classes Order.
3. The appointed person set out his views:

"My opinion is that the conditions do not purport to control the use of the whole stadium; each condition applies only to 'the building hereby permitted', that is, to the individual stand to which each permission relates. Each condition provides that the stand in question shall only be used 'ancillary to; (or in one case 'in connection with') the 'main use of the premises as a sports stadium, and for no other use' without the Council's prior written consent. Clearly, this prevents any separate use of the stands, independent of the stadium as a whole, as the appellants appear to accept. However, in my view, as a matter of simple construction, having regard to the inclusion of the specific words 'as a sports stadium', the conditions also require consent to use the stands if and when the premises are used for any purpose other than as a sports stadium."

1. I agree. The words "for no other use" are clear. They have no other sensibly discernible purpose than to prevent some other use which might otherwise be permissible without planning permission. The Use Classes Order is an obvious source of such a permission.
2. I am satisfied that those words meet the test of being sufficiently clear for the exclusion of the Use Classes Order in relation to the three stands in question, albeit by implication. That test is set out in *Dunoon Development Limited v Secretary of State for the Environment and Poole Borough Council* [1992] JPL 1936, a decision of the Court of Appeal. Those conditions do not apply to the pitch or to the south stand.
3. However, and notwithstanding the attractive submissions of Mr Steel for the RFU, for the reasons which I have given this application is dismissed.

**MISS PATRY**: My Lord, I appear on behalf of Miss Lieven and I would ask for the Secretary of State's costs in this matter. Cost schedules have been prepared.

**MR JUSTICE OUSELEY**: The cost schedules are agreed?

**MISS PARTY**: They are agreed. As such, I would ask for costs in the sum of £5,216.40.

**MR JUSTICE OUSELEY**: Yes.

**MISS PATRY**: There may be a slight change from the one you have, my Lord.

**MR JUSTICE OUSELEY**: I have £5,066.40, what has it gone up to?

**MISS PATRY**: £5216.40, this includes the cost of attendance at judgment today.

**MR JUSTICE OUSELEY**: Mr Hill?

**MR HILL**: My Lord, notwithstanding that increase, I cannot resist that application.

**MR JUSTICE OUSELEY**: There will be an order for costs in favour of the first defendant in the sum of £5,216.40.

**MR HILL**: My Lord, I am required to ask your Lordship for leave if we wish to take this case to the Court of Appeal and I do so on two grounds. First, my Lord, that the case your Lordship has heard and just decided has obviously involved some complex issues of construction, and your Lordship has acknowledged that the matter has not been straightforward, that your Lordship's mind has turned one way and the other during the course of argument.

But secondly, and perhaps more importantly, this case does of course give rise to important public interest implications which are profound. Now your Lordship's decision will overturn the perceived wisdom on this issue the view of the Department is before your Lordship, the view of the Land Use Gazetteer, the practice of countless local planning authorities up and down the country is before your Lordship, and clearly the decision today will represent an overturning of that perceived wisdom.

My Lord, also there are implications for both the sports and music industry which may be profound. There are stadia up and down the country relying upon this, the extent to which they can flexibly be used for either sporting or musical events, and the music industry may of course find itself deprived of a number of venues which have been relied upon for concerts for a good many years. On those grounds, I would ask that we be allowed leave to take the matter to the Court of Appeal.

**MR JUSTICE OUSELEY**: Miss Patry?

**MISS PATRY**: My Lord, the Secretary of State does understand that issue two is not a straightforward matter and that is clear at the stage when the case was first heard and that is clear in your judgment today. As such, I would ask simply that if leave is given today that leave be simply limited to the second issue. Your Lordship has given a very clear judgment as to issues one and issues three. The only point of discussion, I would submit, would be issue two.

**MR JUSTICE OUSELEY**: I am going to grant permission to appeal. I do not intend to limit it. Whilst obviously I found one more difficult than another does not mean that somebody else might find the one I found difficult easy and the other one more debatable. I think it is also artificial with those two matters of construction involved to limit it. Whether the last point is pursued, I doubt it is going to take very long for the Court of Appeal to deal with it anyway. You can have leave.

**MR HILL**: Thank you, my Lord.