Neutral Citation Number: [2013] EWCA Civ 1411

Case No: A3/2013/0389

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, CHANCERY DIVISION
Miss Vivien Rose QC (sitting as a Deputy Judge of the Chancery Division)
HC12C00065

Royal Courts of Justice
Strand, London, WC2A 2LL

12 November 2013

B e f o r e :

LORD JUSTICE PATTEN
LORD JUSTICE TREACY
and
LORD JUSTICE CHRISTOPHER CLARKE

Between:

SUSAN SNELLING **ROY MERISON**	**Claimants/Appellants**
- and -	
BURSTOW PARISH COUNCIL	**Defendant/Respondent**

Ms Emma Dring (instructed by Messrs Edward Harris) for the Appellants
Ms Estelle Dehon (instructed by Hedley's Solicitors) for the Respondent
Hearing date : 11th October 2013

Lord Justice Patten :

1. Burstow Parish Council ("the Council") is the freehold owner of some allotments at a site known as Hunter's Moon in Burstow, Surrey. The Council wishes to sell part of the site (about 0.353 ha out of a 1.24 ha) for development as affordable housing. This is objected to by the claimant allotment holders who have sought in different ways to challenge the legality of the proposed sale. This appeal is brought by the claimants against the order of Ms Vivien Rose (as she then was) dated 24th January 2013 who dismissed their claim for a declaration that the

Council's power of sale is limited to that contained in s.27 of the Commons Act 1876 ("the 1876 Act"). If the claim is correct it would require the Council to identify alternative land which is more suitable for use as allotments and, in particular, to use the proceeds of sale in the purchase of that land.

2. The Council has taken the view and contended successfully before the judge that they are entitled to exercise the power of sale contained in s.32 of the Small Holdings and Allotments Act 1908 ("the 1908 Act") as qualified by the Allotments Act 1925 ("the 1925 Act"). This would permit them, subject to obtaining the consent of the Secretary of State for Communities and Local Government, to sell the land unconditionally provided that they are satisfied that it is not required for the purpose of allotments. As I understand it, the Council takes the view that any displaced allotment holders can either be accommodated on other parts of the Hunter's Moon site or on an alternative site some 1.2 kilometres away. They have therefore sought and obtained the consent of the Secretary of State to the proposed sale on the basis that they are now able to exercise the s.32 power.

3. The judge decided that the Council is right in is contention about s.32 of the 1908 Act: see [2013] EWHC 46 (Ch). Her decision is challenged by the claimants on a number of grounds, all of which are ultimately points of statutory construction. The resolution of this issue requires the court to make sense of a number of what the judge accurately described as rather tangled statutory provisions. But it is convenient to begin with what seems to be common ground.

4. The land at Hunter's Moon was enclosed and appropriated as allotments for the labouring poor under an inclosure award made in 1855 pursuant to s.31 of the Inclosure and Improvement of Commons Act 1845 ("the 1845 Act"). The effect of the award was to place the management of the allotments under the control of the incumbent churchwardens and two other nominated persons in the relevant parish, who were styled "Allotment Wardens" by s.108 of the 1845 Act. Section 73 further provided that:

> "All Allotments which shall be made to the Churchwardens and Overseers under this Act shall be held by the Churchwardens and Overseers of the Poor for the Time being in the same Manner and with the same legal Powers and Incidents as if the same Allotments were Lands belonging to the Parish, but in trust nevertheless for the Purposes for which the same shall be allotted…"

5. The 1876 Act amended the 1845 Act by including a number of additional powers and provisions relating to the use of allotments and the income which they generated. Under s.27 surplus rents from allotments appropriated for the benefit of the labouring poor under the Inclosure Acts (which are referred to in the 1876 Act as "field gardens") were to be used for the improvement of field gardens in the same parish and:

> "... the allotment wardens of any field gardens may, with the approval of the Inclosure Commissioners, sell all or any part of the allotment vested in them, and out of the proceeds of such sale purchase any fit and suitable land in the same parish or neighbourhood: Provided, that the land so purchased shall be held in trust for the purposes for which the allotment so sold as aforesaid was allotted, and for no others; and provided, that the Inclosure Commissioners shall not sanction any such sale as aforesaid unless and until it shall be proved to their satisfaction that land more suitable for the purposes for which the allotment proposed to be sold was allotted may and will be forthwith purchased; and the proceeds of any such sale shall be paid to the Inclosure Commissioners, and shall remain in their hands until such purchase of other land as aforesaid."

6. The Local Government Act of 1894 ("the LGA 1894") brought into existence parish councils. Section 5(2)(c) provided that:

"The legal interest in all property vested either in the overseers or in the churchwardens and overseers of a rural parish, other than property connected with the affairs of the church, or held for an ecclesiastical charity, shall, if there is a parish council, vest in that council, subject to all trusts and liabilities affecting the same, and all persons concerned shall make or concur the making such transfers, if any, as are requisite for giving effect to this enactment."

7. The powers, duties and liabilities of churchwardens and overseers of the parish in relation to the holding or management of allotments were transferred to parish councils under s.6(1)(c)(iii). This would therefore have included the power of sale contained in s.27 of the 1876 Act.

8. The Council in this case came into existence on 1st January 1895 and at its first meeting on 7th January two members of the Council were formally appointed as Allotment Wardens in conformity with s.6(4) of the LGA 1894. This provided that:

"Where any Act constitutes any persons wardens for allotments, or authorises or requires the appointment or election of any wardens committee or managers for the purpose of allotments, then, after a parish council for the parish interested in such allotments comes into office, the powers and duties of the wardens, committee, or managers shall be exercised and performed by the parish council, and it shall not be necessary to make the said appointment or to hold the said election, and for the purpose of section sixteen of the Small Holdings Act, 1892, two members of the parish council shall be substituted for allotment managers or persons appointed as allotment managers."

9. The 1908 Act is described in its preamble as:

"An Act to consolidate the enactments with respect to Small Holdings and Allotments in England and Wales".

But it also confers a number of new powers and duties on borough, urban district and parish councils to provide and manage allotments. These include a duty under s.23 to provide a sufficient number of allotments for the "labouring population" in the event of a shortfall in the number of available allotments on private land; a power under s.25 to purchase or lease land for use as allotments including a power of compulsory purchase; and in sections 27 and 28 provisions governing the allocation and letting of allotments. "Allotments" are defined in s.61(1) of the Act as including field gardens.

10. Section 32 of the 1908 Act contains a power of sale which, as originally enacted, was in the following terms:

"(1) Where the council of any borough, urban district, or parish are of opinion that any land acquired by them for allotments or any part thereof is not needed for the purpose of allotments, or that some more suitable land is available, they may, with the sanction of the county council, sell or let such land otherwise than under the provisions of this Act, or exchange the land for other land more suitable for allotments, and may pay or receive money for equality of exchange.

(2) The proceeds of a sale under this Act of land acquired for allotments, and any money received by the council on any such exchange as aforesaid by way of equality of exchange, shall be applied in discharging, either by way of a sinking fund or otherwise, the debts and liabilities of the council in respect of the land acquired by the council for allotments, or in acquiring, adapting, and improving other land for allotments, and any surplus remaining may be applied for any purpose for which capital money may be applied; and the interest thereon (if any) and any money received from the letting of the land may be applied in acquiring other land for allotments, or shall be applied in like manner as receipts from allotments under this Act are applicable."

11. The reference to the need for the sanction of the county council contained in s.32(1) was deleted by s.272(1) of and Schedule 30 to the Local Government Act 1972 which, as part of local government re-organisation, transferred powers in respect of allotments from county and district councils to parish councils.

12. The s.32 power as enacted was one of the new powers conferred by the 1908 Act on local councils consequent on their duty under s.23 to provide sufficient allotments for the labouring population in their respective boroughs, districts and parishes and the reference in the first part of s.32(1) to land acquired by them could properly be read in that context as referring to allotment land acquired under the powers contained in s.25. But s.33 of the 1908 Act then goes on to deal with the voluntary transfer to the councils of allotments held by wardens under the Inclosure Acts and with cases where there has been a statutory transfer of responsibility.

13. The judge helpfully set out the provisions of s.33 with the excision of some unnecessary parts and with the now repealed provisions in italics:

> "33. (1) The allotment wardens under the Inclosure Acts 1845 to 1882, having the management of any … allotments or field gardens … may, by agreement, with the council … transfer the management of that land to the council, upon such terms and conditions as may be agreed upon with the sanction, as regards the allotment wardens of the Board, and thereupon the land shall vest in the council.
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> *(2) All trustees within the meaning of the Allotments Extension Act 1882, required or authorised by that or any other Act to let lands in allotments to cottagers, labourers, journey men or others in any place, may if they think fit, … sell or let the land to the council…upon such terms as may be agreed…*
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> (3) Where, as respects any rural parish, any Act constitutes any persons wardens of allotments, or authorises or requires the appointment or election of any wardens, committee, or managers for the purpose of allotments, the powers and duties of the wardens, committee, or managers shall, subject to the provisions of this Act, be exercised and performed by the parish council, or, in the case of a parish not having a parish council, by persons appointed by the parish meeting, and it shall not be necessary to make the said appointment or to hold the said election.
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> (4) The provisions of this Act relating to allotments shall apply to land vested in, or the management whereof has been transferred to, a council under this section or the corresponding provision of any enactment repealed by this Act in like manner as if the land has been acquired by the council under the general powers of this Part of this Act."

14. The provisions of enactments repealed by the 1908 Act (referred to in s.33(4)) are set out in the Third Schedule and include sub-sections (3) and (4) of s.6 of the LGA 1894.

15. It can be seen that s.33(3) is essentially the re-enactment of s.6(4) of the LGA 1894 and, like s.6(4), transfers to parish councils the powers and duties of allotment wardens created under previous statutes. Section 33(4) therefore applies the provisions of the 1908 Act not only to allotment land, the management of which is transferred to a council under s.33 ("this section"), but also where the management of the land is vested in the council under s.6(4) of the LGA 1894. In both cases the land is treated as if it had been acquired by the council under s.25 of the 1908 Act, one consequence of which would be that the relevant council would appear to have the benefit of the power of sale contained in s.32 of the 1908 Act.

16. One possible argument is that the reference in s.33(4) to land vesting in or the management of such land being transferred to a council "under this section" is a reference only to s.33(1) which does both. If that is right and it does not include s.33(3) then the reference to the corresponding

provisions of repealed enactments cannot be a reference to s.6(4) of the LGA 1894 and would be limited, perhaps, to s.13(1) of the Allotments Act 1887 which gave allotment wardens under the Inclosure Acts the power to transfer management of the allotments under their control and ownership to a sanitary authority. A parish council, like the Council in this case, which had acquired the management of allotments under s.6(4) would therefore be limited to exercising the power of sale contained in s.27 of the 1876 Act.

17. But Ms Dring, for the appellants, does not put her case on this basis and I think that she was right not to do so. As Ms Dehon for the Council points out, s.33(4) differentiates between ("or") cases where land has vested in the council under s.33 and those where only management has been transferred. The distinction is an odd one if s.33(1) alone is being referred to because in those cases the vesting of title is the automatic and inseparable consequence of the transfer of the management of the allotments. The more natural reading of s.33(4) is that it was intended to apply to any statutory provision which had the effect of transferring the management of the allotments to the council. It would therefore apply both to s.33(3) and correspondingly to s.6(4) of the LGA 1894.

18. The present dispute about the Council's power to dispose of part of the Hunter's Moon allotments stems from the fact that s.27 of the 1876 Act has not been expressly repealed. Given the very different terms upon which the powers were granted and may be exercised, both sides advanced submissions to the judge that only one remains available to the Council. The appellants contend that the inconsistency between the two powers can be removed by the application of the principle *generalia specialibus non derogant*. The s.27 power which continues in respect of allotments created under the 1845 Inclosure Act should be treated as being preserved as a special power by construing s.32 as inapplicable to allotments of that kind. The Council, on the other hand, rely upon the application of s.32 (through s.33(4)) as an indication of a legislative intent that the sale of allotments which were either acquired by a council under s.25 of the 1908 Act or fall within the scope of s.33 should be governed exclusively by the s.32 power. To that extent, s.27 of the 1876 Act should be treated as impliedly repealed. In the alternative, they say that the Council has available to it both powers of sale and may choose which to exercise.

19. It is necessary at this stage to mention what the judge described as the remaining part of the statutory jigsaw which is s.8 of the Allotments Act 1925 ("the 1925 Act"). As originally enacted, this provided:

> "Where a local authority has purchased land for use as allotments the local authority shall not sell, appropriate, use, or dispose of the land for any purpose other than use for allotments without the consent of the Minister of Agriculture and Fisheries after consultation with the Minister of Health, and such consent shall not be given unless the Minister is satisfied that adequate provision will be made for allotment holders displaced by the action of the local authority or that such provision is unnecessary or not reasonably practicable, and where such consent is obtained the sanction of the county council under section thirty-two of the Small Holdings and Allotments Act 1908, shall not be required."

20. The section has undergone various amendments and now reads as follows:

> "Where a local authority has purchased [or appropriated] land for use as allotments the local authority shall not sell, appropriate, use, or dispose of the land for any purpose other than use for allotments without the consent of the Minister of Agriculture and Fisheries and such consent [may be given unconditionally or subject to such conditions as the Minister thinks fit, but] shall not be given unless the Minister is satisfied that adequate provision will be made for allotment holders displaced by the action of the local authority or that such provision is unnecessary or not reasonably practicable."

21. The reference to the Minister of Agriculture and Fisheries should also now be read as a reference to the Secretary of State for Communities and Local Government.

22. This section featured in the argument not only because the Council has in fact sought and obtained ministerial consent for the exercise of the power of sale which they claim is exercisable under s.32 of the 1908 Act but also more importantly because, on the Council's case, it provides allotment holders with a measure of protection against displacement without alternative provision being made for them. The appellants submit that s.8 applies only to land purchased under s.25 of the 1908 Act and that the absence of safeguards for allotment holders and other local residents in the exercise of a s.32 power of sale (by contrast to s.27) is a strong indication that Parliament cannot have intended to remove the historic protection previously afforded to Inclosure Act allotments by the 1876 Act.

23. The judge held that s.8 (as amended) does apply to the exercise of the s.32 power and that the enactment of s.32 had impliedly repealed s.27 insofar as it would otherwise have applied to allotments brought within s.32 by s.33 of the 1908 Act. She said that:

> "25. The drafting of section 33 of the SH&A Act 1908 contains a number of puzzles. The relationship between the power in subsection (1) for allotment wardens under the Inclosure Acts 1845 to 1882 voluntarily to transfer the management of the land to a council and the provision in subsection (3) whereby the powers and duties of persons constituted wardens of allotments are transferred by the operation of statute to the council is unclear. Subsection (3) is limited to rural parishes, whereas subsection (1) applies to all borough, urban district or parish councils. This would appear to leave outwith section 33(4) a class of allotments in urban parishes where the wardens do not choose to transfer the management to the council. This casts doubt on the Council's assertion that section 33 was intended to sweep up into the new 1908 regime *all* land at that time held by councils for the purposes of allotments. However, of course, this lacuna did not in fact exist because all the powers of management of allotment wardens had already been transferred to parish council by section 6(1)(c)(iii) and/or section 6(4) of the LGA 1894. It appears that the powers, the transfer of which section 33(1) and (3) purported to deal with, no longer existed at the time section 33 was enacted. Why subsections (1) and (3) were thought necessary is not at all clear – the draftsmen of the legislation were clearly aware of the existence of section 6 of the LGA 1894 since subsections (3) and (4) (but not subsection (1)(c)(iii)) were repealed by the Schedule to the SH&A Act 1908.
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> 26. Despite the difficulty of construing these provisions, I accept the Council's submission that, as regards allotments which came under the management of the parish council by virtue of section 33(4) of the SH&A Act 1908, they were intended to be governed, and governed exclusively, by the powers set out in sections 26 onwards of that Act. The enactment of the power of sale in section 32 of the SH&A Act 1908 was intended to apply to all allotments acquired under that Act or treated as acquired by it pursuant to section 33(4) of the SH&A Act 1908. That power did to that extent repeal the power set out in section 27 of the Commons Act 1876. There is nothing in the legislation to support the contrary contention that Parliament intended that section 27 of the Commons Act 1876 should continue to apply to field gardens enclosed under the Inclosure Act 1845 and that the power in section 32 of the SH&A Act 1908 should apply only to other kinds of allotments operated by the Council."

24. Her answer to Ms Dring's point in relation to s.8 of the 1925 Act was that although s.8 refers to land "purchased" by the council, the closing words of the section as originally enacted which refer to ministerial consent obviating the need for county council consent under s.32 indicate that s.8 was intended to apply to any exercise of the s.32 power including in relation to land brought within the section by the provisions of s.33(4):

"32. If section 8 of the Allotments Act 1925 had referred to land 'acquired' for use as allotments instead of 'purchased', then it would have been clear that Parliament intended that allotments which came into the control of the parish council by virtue of section 33(4) of the SH&A Act 1908 were now to be subject to the requirement for the consent of the Minister. The fact that section 8, as originally enacted, expressly referred to Ministerial consent replacing the county council's consent under section 32 of the SH&A Act 1908 shows that section 8 was intended to apply to the exercise of the power of sale under section 32 of the SH&A Act 1908. As it is, section 8 of the Allotments Act 1925 referred to only one of the methods available to the parish council for acquiring land under powers in the SH&A Act 1908 – purchasing but not taking on lease or, for example acquiring compulsorily. Should this be taken to indicate that section 8 was intended to apply only to land which was *actually* purchased under section 25 of the SH&A Act 1908 and not to land acquired by the exercise of any other power under that Act or by the operation of section 33(4) of that Act? I do not consider that the wording has that effect because that would largely defeat the purpose of section 33(4). The purpose of that section was, as stated, to ensure that allotments that came under the control of the council by operation of the preceding section 33(1), (2) and (3) or by operation of a repealed provision should be treated in the same way as land 'acquired' by the council under its general powers for the purposes of the provisions of that Act, including the power of sale under section 32.

33. The fact the wording of section 33(4) of the SH&A Act 1908 provides that land is to be treated as acquired by the Council under its general powers only for the purpose of applying 'the provisions of this Act' rather than for all purposes does not assist the Claimant. As I have said, the relevant power of sale is the power under section 32 *of that Act* and section 8 of the Allotments Act 1925 is an ancillary provision supplementing that earlier power of sale."

25. On this basis, there was no gap in the protection offered to Inclosure Act allotments and the controls imposed by s.8 could fairly be regarded as a satisfactory alternative to those contained in s.27. The judge therefore rejected Ms Dring's submission that Parliament must have intended the absence of protection under s.32 to be remedied by the continuing application of s.27 in relation to Inclosure Act allotment land transferred to parish councils under the LGA 1894.

26. Both of the judge's conclusions are challenged on this appeal. Ms Dehon for the Council supports the judge's conclusions in relation to the application of s.8 of the 1925 Act but does not rely upon the judge's finding that there was an implied repeal of s.27. She contends that ss. 27 and 32 are alternative powers (both with safeguards) and that the Council may choose which it exercises.

27. It is convenient to begin with the issue about s.8 because the absence of protection is relied upon by Ms Dring as an important indicator that Parliament cannot have intended allotment land previously protected under s.27 to lose all such protection on any sale after 1908. Ms Dring relies for this purpose on the provisions of s.32 itself which, apart from requiring the consent of the county council to the sale, give the councils referred to a freer hand both in relation to the decision to sell and in relation to the use of the proceeds of sale. In particular, there is no continuation of the obligation to use the proceeds of sale to purchase other allotment land or of the requirement that the land so purchased should be held on trust for the purposes of the original allotment.

28. The judge expressed the view that the possible cessation of the charitable trust by the exercise of the s.32 power could be regarded as consistent with a dilution in the 1876 Act and in subsequent legislation of the requirement that the allotments should be the exclusive preserve of the labouring poor of the parish. The Land Settlement (Facilities) Act 1919 removed references to the labouring poor and required councils to provide allotments where there was a

sufficient local demand regardless of the circumstances of the would-be allotment holders. But it is not in my opinion necessary to attempt to delve further into that particular issue. It is both clear and common ground that if the 1908 Act conferred the s.32 power of sale on parish councils which had acquired allotment land and management responsibilities under s.6 of the LGA 1894 then it was exercisable according to its terms and no trust, charitable or otherwise, attaches to the proceeds of sale. There was therefore a significant change in the legal position in 1908 which subsisted at least until 1925 even if the Council is right about s.8 of that Act.

29. Section 8 is relied on by the Council as having remedied any possible gap in protection for the allotment holders but I am not persuaded that it either had this effect or was intended to do so. On the premise that s.32 does apply to what I shall refer to as s.6(4) allotments, it is difficult to regard the 1908 Act as having done anything less than to provide a completely new set of provisions for the acquisition, management and disposal of allotment land in the context of the statutory duty in s.23 to provide a sufficient number of allotments to meet local demand. Consistently with that, s.32 empowers the Council to dispose of what the side note refers to as superfluous or unsuitable land which they can either use to purchase alternative allotments or to defray other expenses including the maintenance and improvement of existing allotments.

30. The continuation of a charitable trust would obviously be inconsistent with this statutory scheme and the changes made by the 1925 Act have to be looked at in the same context. The 1925 Act was passed "to make further provision for the security of tenure of tenants of allotments". Section 8 therefore requires the minister to consent to a sale and to be satisfied either that adequate provision will be made for displaced allotment holders or that such provision is unnecessary. It is therefore more restrictive than would otherwise be the case under s.32 which does not require the county council to form any particular view about the position of the allotment holders and requires the parish council to be satisfied that the land is not used for an allotment or that other suitable land is available.

31. The difficulty which I have with the judge's wide construction of the word "purchased" in s.8 is that if it was truly the intention of Parliament that s.8 should operate in every case then the provisions of s.32 became completely redundant insofar as they required consent by the county council. The provisions of s.8 which obviate the need to obtain the consent of the county council where ministerial consent is obtained only make sense if the latter is not a requirement in every case. There must therefore be a category of cases which fall within s.32 but where s.8 has no application.

32. The concluding words of s.8 are, in my view, consistent with the word "purchased" being given its ordinary meaning and not an extended meaning of "acquired". It is, I think, significant that s.32(1) of the 1908 Act uses the word "acquired" but the draftsman of the 1925 Act has not followed suit. Since the word "purchased" can be given a meaning which both accords with the terms of s.25(1) of the 1908 Act and is consistent with the drafting of s.8, I decline to give it a wider meaning. In my judgement, s.8 has no application to the sale in this case and the minister's consent was unnecessary.

33. What follows from this is the appellant's argument that Parliament cannot therefore have intended to reduce allotment holders protection to the level contained in s.32 and that the 1908 Act must therefore be construed so as to leave s.27 as the sole power of sale exercisable in respect of s.6(4) allotments. One can, I think, ignore for these purposes the fact that the requirement for county council consent was subsequently removed. This was effected by s.272(1) of and Schedule 30 to the Local Government Act 1972 as part of a move to transfer the functions concerning allotments away from county and district councils to parish councils and can have no relevance to a consideration of what Parliament intended when enacting s.32 in 1908.

34. The judge's answer to the argument that the maxim *generalia specialibus non derogant* applies to preserve s.27 as the applicable power of sale was that the 1908 Act, properly construed, impliedly repealed s.27 in favour of s.32. But both are simply different views about the construction of s.32 of the 1908 Act in the absence of any express repeal of s.27 and the inconsistency between the two provisions in terms of when a sale will be permitted. One can present the arguments in a number of different ways by asking why s.27 was continued in effect if it was only to have concurrent application with s.32 rather than an exclusive one; whether Parliament can really have intended to remove s.27 protection from s.6(4) allotments; and whether the existence of the wide s.32 power which, on the express language of s.33(4), does apply to s.6(4) allotments suggests (as the judge found) that s.27 was to cease to have any further application to such land.

35. The resolution of these issues of statutory construction has to begin not with prior theories about what Parliament is likely to have intended in 1908 but with an examination of the language and purpose of the relevant legislation. The 1908 Act, as already explained, was intended to consolidate existing enactments relating to allotments and to supplement those provisions with the additional powers of purchase, management and sale. Consistently with this, it was to be of general application and, for the reasons I have given, s.33(4) brings within the statute s.6(4) allotments and confers on the parish councils in whom they are vested all the powers including that contained in s.32. Although s.27 is not expressly repealed by the 1908 Act, there is nothing in the language of either s.32 or s.33 to indicate that those provisions should have an application limited by the scope and effect of s.27. As the judge recognised, one searches in vain for an adequate explanation of why s.33(3) of the 1908 Act was in fact necessary, given that s.6(4) would already have transferred management responsibilities to the parish council. But this confirms rather than denies that the statute was intended to be all-embracing and it may for that purpose have unnecessarily duplicated some of the transfer provisions. The judge was therefore right in my judgement to conclude that there is nothing in the 1908 legislation itself to support the contention that s.27 was to continue as the only available power of sale in respect of s.6(4) allotments.

36. The points taken about the differences in the level of protection for allotment holders between the two powers of sale create obvious inconsistencies between them. But it does not follow from this that something has, so to speak, to give whether by way of the implied repeal of s.27 or the qualified effect of s.32. It is well established that the Court will not lightly infer the implied repeal of an earlier statute. In *O'Byrne v. Secretary of State for Environment, Transport and the Regions* [2002] HLR 30 Laws LJ at [68] said that:

> "if there is an inescapable logical contradiction between the earlier and the later statute, the former is repealed by implication. But the contradiction asserted must be *inescapable*; so that where (as here) an implied repeal is said to be based on the construction of the later statute, that construction must be shown to be the only rational interpretation which is available."

37. This was based on the earlier statement of principle by AL Smith J in *Kutner v Phillips* [1891] 2 QB 267 at p 271 that:

> "a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together…..Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time a repeal will not be implied and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together."

38. Earlier in his judgement in *O'Byrne* Laws LJ put it more pithily by saying that an anomaly between the two statutes would not give rise to an implied repeal but an absurdity might be a different matter.

39. It seems to me that we are not in that situation. Although it is difficult to see why the s.27 power has been preserved, it is possible to give effect to the new and much wider power contained in s.32 without the need to remove s.27 from the statute book. Redundancy is not enough for this purpose. There is nothing in s.27 which limits or otherwise impacts on the operation of s.32. They are simply different powers arising under different statutes.

40. For much the same reason, I am also unconvinced that this is a case where the principle of statutory interpretation embodied in the maxim *generalia specialibus non derogant* compels the opposite conclusion, namely that s.32 should be construed so as not to apply to s.6(4) allotments. The principle was set out by Sir John Romilly MR in *Pretty v Solly* (1859) 26 Beav 606 in these terms:

> "The general rules which are applicable to particular and general enactments in statutes are very clear, the only difficulty is in their application. The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

41. Although I recognise the force of Ms Dring's argument that there is a significant reduction in the level of protection for allotment holders between s.27 and s.32, that change is explicable as part of the comprehensive overhaul of the statutory provisions governing allotments which the 1908 Act was intended to effect. There is nothing in the language of s.32 which enables one to give it the limited meaning for which the appellants contend and the express inclusion of s.6(4) allotments in s.33(4) makes it very difficult to see why they were not intended to be subject to the general powers contained in the 1908 Act which is what s.33(4) says. One can easily see why two inconsistent provisions in the same statute may have to be reconciled by a division of their relevant subject matter. But it is much more difficult to apply that process of interpretation to two provisions in different statutes which are consecutive in time and where the second in time is in terms all-embracing. The better view is that these are different, although overlapping provisions, and the Council may choose between them.

42. For these reasons, I would dismiss the appeal.

Lord Justice Christopher Clarke :

43. I agree.

Lord Justice Treacy :

44. I also agree.