Watch this space

Finsbury Park raises more questions than it answers about the legality of the closure of public open spaces by local authorities, write David Matthias QC and Katherine Barnes

It is no secret that cash-strapped local authorities are increasingly looking for innovative ways of raising additional income from their assets. One typical example involves the temporary closure of public open spaces to hold private events in return for a fee. Unsurprisingly, local residents are often unhappy about their parks and commons being used in this manner and have challenged the legality of such conduct in a number of cases, very few of which have actually gone to a full hearing.

One recent case which did go to a full hearing was the High Court decision of R (Friends of Finsbury Park) v Haringey LBC (2016) EWHC 1454 (Admin), although it is unlikely that this will be the last. We think that Finsbury Park raises more questions than it solves.

In Finsbury Park, a group of local residents judicially reviewed the decision of Haringey London Borough Council to hire Finsbury Park to Festival Republic Ltd for the Wireless music festival in 2016.

The claimants’ main ground of challenge was that Haringey’s decision was ultra vires. First, it was argued that closing part of Finsbury Park breached the restrictions on the duration for which a park might be closed to the public under section 44 of the Public Health Acts Amendment Act 1890.

In so far as relevant, this section provides that a local authority ‘may on such days as they think fit (not exceeding 12 days in any one year, nor four [six in London] consecutive days on any one occasion), close to the public any park […] or any part thereof, and may grant the use of the same, either gratuitously or for payment, to any public charity or institution, or for any agricultural, horticultural, or other show, or any other public purpose’.

Second, the claimant contended that the decision violated the restriction on the size of the area which may be closed under the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967. Broadly speaking, article 7, schedule 1, of the Act authorises the use of open space in London for the provision of public entertainment provided that the area set aside does not exceed one acre or one-tenth of the total open space.

In its defence, Haringey relied on section 145 of the Local Government Act 1972. Section 145(1) empowers a local authority to provide, facilitate, or subsidise anything necessary or expedient for the provision of entertainment of any nature. Subsection (2) provides that, without prejudice to the generality of subsection (1), a local authority: ‘(a) may for the purposes therein specified enclose or set apart any part of a park or pleasure ground belonging to the authority or under their control; (b) may permit any theatre, concert hall, dance hall or other premises provided by them for the purposes of sub-section (1) above and any part of a park […] enclosed or set apart as aforesaid to be used by any other person, on such terms as to payment or otherwise as the authority may think fit, and may authorise that other person to make charges for admission thereto’.

In particular, Haringey argued that section 145(2)(a) must constitute a general power to close an area in a park to the public, as otherwise this subsection would be an unnecessary provision.

This argument was accepted by Mr Justice Supperstone, who went on to explain that, in his view, section 44 of the 1890 Act and article 7 of the 1967 Act are additional powers which ‘an authority may rely upon should it so choose’.

However, there are a number of problems with this approach. For a start, the most natural meaning of enclosing land in the context of a park involves its separation from other land – for example, by erecting railings or fencing. This does not necessarily extend to closing parts of the park to the public.

Further, and arguably more problematically, the decision does not consider the implications of the Open Space Act 1906 (which is applicable to Finsbury Park under section 19(2) of the 1906 Act and article 32 of the London Authorities (Property etc.) Order 1964).

Under section 10, a local authority with an interest in or with control over any open space shall ‘hold and administer the open space […] to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose’.

It is at the very least questionable whether use of a park for a music festival such as Wireless classifies as enjoyment of the park by the public as an open space. Indeed, not only does a large-scale music festival arguably conflict with use as an open space, but the relevant part of the park will be closed to non-ticket holders, and therefore the public at large.

It is therefore doubtful whether Finsbury Park can be seen as a reliable precedent for the interpretation of the relevant statutes – for now, at least, the case is not closed on the closure of open spaces by local authorities.