Heritage Assets and their Setting: Views from a Lawyer

Nigel Hewitson

"Plus ça change, plus c'est la même chose."Jean-Baptiste Alphonse Karr (1849)

Introduction

A string of recent cases has focussed attention on the protection of the setting of historic assets and, in particular, the nature and extent of the duties of planning decision-makers (be they local planning authorities, Inspectors or the Secretary of State) when deciding applications that affect the setting of such assets.

This paper will:

- explain the current legal position;
- set out the duties of decision-makers; and
- provide some, hopefully, helpful tips on how both decision-makers and applicants should approach the process in order to minimise the risk of expensive and time-consuming legal challenges.

The statutory duties

"Setting" is only referred to once in the legislation. The Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Building Act") s.66 provides:

> "In considering whether to grant planning permission for development which affects a listed building *or its setting*, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building *or its setting* or any features of special architectural or historic interest which it possesses."(emphasis added)

It is worthy of note that the corresponding duty of decision-makers in relation to conservation areas in the Listed Building Act s.72 makes no reference to setting:

> "In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

But note that the courts have accepted that it is legitimate to include in a conservation area the setting of buildings that "form the heart" of the area.[1] That said, it is important to recognise that setting clearly forms part of the conservation area. Thus development within the setting of such a building would be development in the conservation area. To the extent that the conservation area itself can be said to have a setting, that is not protected by statute. Nevertheless, development affecting the setting of an unlisted building in a conservation area is clearly capable of affecting the character and appearance of the conservation area and this paper proceeds on that basis.

[1] *R. v Canterbury CC Ex p. David Halford* , February 1992, CO/2794/1991.

It should also be noted that there is no corresponding duty to have regard to setting under the Scheduled Monuments and Archaeological Areas Act 1979, which protects scheduled monuments (but note the comments in relation to Development Consent Orders below). As we shall see, other types of "heritage asset" protected under the policies of the National Planning Policy Framework ("NPPF") enjoy no statutory protection of any kind. The one exception to that statement is World Heritage Sites. Many of them enjoy statutory protection in any event (e.g. Stonehenge, the Tower of London, and a number of others are scheduled monuments, and much of the City of Bath consists of either listed buildings and/or conservation areas). But over and above any statutory protection a particular World Heritage Site may enjoy, the UK is under a Treaty obligation to "ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory" including adopting suitable policies to ensure such protection.[2] In relation to World Heritage Sites, then, the UK Government would place itself in breach of an international Treaty if it failed to provide proper protection. The relevant policies dealt with below need to be read in that context when considering World Heritage Sites.

Finally, in relation to statutory duty, it is worthy of note that the situation is different when it comes to considering Development Consent Orders under the Planning Act 2008. Regulation 3 of the Infrastructure Planning (Decisions) Regulations 2010 ("the Regulations")[3] provides that:

> "(1) When deciding an application which affects a listed building or its setting, the decision-maker(a) must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.
>
> (2) When deciding an application relating to a conservation area, the decision-maker must have regard to the desirability of preserving or enhancing the character or appearance of that area.
>
> (3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the decision-maker must have regard to the desirability of preserving the scheduled monument or its setting."

Note that the provision only requires that decision-makers must have "regard" (rather than have "special regard" or pay "special attention") to the desirability of preserving listed buildings and conservation areas. The Regulations also import statutory protection for the setting of a scheduled monument when considering a Development Consent Order.

What is "setting"?

Rather unhelpfully, and as is all too often the case in planning legislation, there is no definition of "setting" either in the Listed Building Act or in the Town and Country Planning Act 1990 (which contains definitions of a number of terms common to the two Acts), but a couple of cases assist us.

Extent of setting

The physical extent of a building's setting was considered in *R. (on the application of Miller) v North Yorkshire CC* ("*Miller*"),[4] in which Hickinbottom J noted the lack of a definition of "setting" and stated that the extent of the setting of a building or monument was a matter of judgement to be considered "in the round" and may include:

- the view from the heritage asset towards the development;
- the view from the development towards the heritage asset; and

[2] Under the Convention Concerning the Protection of the World Cultural and Natural Heritage adopted by UNESCO, November 16, 1972.
[3] Infrastructure Planning (Decisions) Regulations 2010 (SI 2010/305).
[4] *R. (on the application of Miller) v North Yorkshire CC* [2009] EWHC 2172 (Admin).

- any other relevant view which includes both the heritage asset and the development.

Duration of setting

In *National Wind Power Ltd v Secretary of State for the Environment, Transport and the Regions*,[5] permission was sought for 25 wind turbines close to ancient monuments. As is normal in the wind industry, the permission was proposed to be temporary for 25 years. The Inspector considered that, although the turbines would seriously damage the coherence of the ancient landscape and the setting of the monuments would be "profoundly compromised", the period of disturbance in archaeological terms was limited. Nevertheless he concluded on archaeology:

> "While the remains and their landscape setting thus possess considerable intrinsic interest, the visual impact of the turbines on that intrinsic interest, though significant and discordant in landscape terms, would in pure archaeological terms be slight and unenduring. Even so, the presumption against development [in PPG16], which I consider still applies in this case, is a factor to be weighed in the balance against need …"

The court accordingly upheld the decision to refuse permission. So it can be seen that even development of relatively short duration can affect setting.

Faced with the absence of a statutory definition of "setting", government guidance has sought to step into the breach. Planning Policy Guidance ("PPG") Note 15: Planning and the Historic Environment (now, of course, superseded by first Planning Policy Statement ("PPS") 5 and then the NPPF (as to which see below)) had this to say about setting:

> "The setting is often an essential part of the building's character, especially if a garden or grounds have been laid out to complement its design or function. Also, the economic viability as well as the character of historic buildings may suffer and they can be robbed of much of their interest, and of the contribution they make to townscape or the countryside, if they become isolated from their surroundings, e.g. by new traffic routes, car parks, or other development."[6]

In discussing whether a local planning authority should give public notice of an application it goes on to say:

> "… the setting of a building may be limited to obviously ancillary land, but may often include land some distance from it. Even where a building has no ancillary land—for example in a crowded urban street—the setting may encompass a number of other properties. The setting of individual listed buildings very often owes its character to the harmony produced by a particular grouping of buildings (not necessarily all of great individual merit) and to the quality of the spaces created between them. Such areas require careful appraisal when proposals for development are under consideration, even if the redevelopment would only replace a building which is neither itself listed nor immediately adjacent to a listed building. Where a listed building forms an important visual element in a street, it would probably be right to regard any development in the street as being within the setting of the building. A proposed high or bulky building might also affect the setting of a listed building some distance away, or alter views of a historic skyline. In some cases, setting can only be defined by a historical assessment of a building's surroundings. If there is doubt about the precise extent of a building's setting, it is better to publish a notice."[7]

PPG16: Archaeology and Planning asserted at para.A18 that:

[5] *National Wind Power Ltd v Secretary of State for the Environment, Transport and the Regions* [1999] N.P.C. 128.
[6] PPG15: Planning and the Historic Environment para.2.15.
[7] PPG15: Planning and the Historic Environment para.2.16.

> "The desirability of preserving an ancient monument and its setting is a material consideration in determining planning applications whether that monument is scheduled or unscheduled."

It went on to say:

> "Where nationally important archaeological remains, whether scheduled or not, *and their settings*, are affected by proposed development there should be a presumption in favour of their physical preservation. Cases involving archaeological remains of lesser importance will not always be so clear cut and planning authorities will need to weigh the relative importance of archaeology against other factors including the need for the proposed development."[8] (emphasis added)

The presumption in favour of preservation is amplified at para.A27:

> "As stated in paragraph 8, where nationally important archaeological remains, whether scheduled or not, and their settings, are affected by proposed development there should be a presumption in favour of their physical preservation in situ i.e. a presumption against proposals which would involve significant alteration or cause damage, or which would have a significant impact on the setting of visible remains."

There is, of course, nothing novel in a presumption against development being introduced by policy. Probably the most well-known such presumption is the presumption against inappropriate development in the green belt originally contained in PPG2 and now set out in the NPPF para.89.

PPG15 and PPG16 were withdrawn and replaced by PPS5 in 2010. PPS5 defined "setting" in the following terms:

> **"Setting:**
>
> The surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral."

It defined "significance" as follows:

> **"Significance:**
>
> The value of a heritage asset to this and future generations because of its heritage interest. That interest may be archaeological, architectural, artistic or historic."

On March 27, 2012, the old system of PPGs and PPSs was swept away in favour of a single NPPF. The NPPF adopted the same definition of "setting":

> **"Setting of a heritage asset:**
>
> The surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral."

It also adopted the PPS5 definition of significance, but with the addition of a sentence confirming that significance may derive from an asset's setting:

[8] PPG16: Archaeology and Planning para.A8.

> **"Significance (for heritage policy):**
>
> The value of a heritage asset to this and future generations because of its heritage interest. That interest may be archaeological, architectural, artistic or historic. Significance derives not only from a heritage asset's physical presence, but also from its setting."

Contrast with "curtilage"

It is important to note that setting is not the same as curtilage, although curtilage is likely in most cases to form part of the setting. The Planning (Listed Buildings and Conservation Areas) Act 1990 s.1(5) provides that:

> "In this Act 'listed building' means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act:
> - any object or structure fixed to the building;
> - any object or structure *within the curtilage of the building* which, although not fixed to the building, forms part of the land and has done so since before lst July 1948,
>
> shall be treated as part of the building."(emphasis added)

What constitutes curtilage has been the subject of considerable case law. In essence, it is an area of land enjoyed with a listed building. In the leading case, *Attorney General ex rel Sutcliffe v Calderdale MBC*,[9] the Court of Appeal had to determine whether a number of mill workers' cottages were in the curtilage of the listed Nutclough Mill in Hebden Bridge. The court held that three factors had to be taken into account in deciding this question:

- the physical "layout" of the listed building and the structure;
- their ownership, past and present; and
- their use or function, past and present.

Note that the curtilage is treated as part of the listed building so that proposals to demolish or to alter or extend a curtilage building in a way that affects its character, even though it is not itself separately listed, require listed building consent. The fact that a building is in the setting of a listed building does not (unless it is a pre-1948 building which is also in the curtilage) lead to it requiring Listed Building Consent, but rather the s.66 duty is imposed where development requiring planning permission is proposed.

A further contrast may be drawn when it comes to inter-visibility. *Miller* seems to indicate that whether something is in the setting depends largely on whether it can be seen from the listed building or alternatively, adversely affects views of it. It is not necessarily the case that a curtilage building will be visible from the listed building or vice versa. In *Secretary of State for the Environment, Transport and the Regions v Skerritts of Nottingham Ltd*,[10] extensive alterations had been made to a stable block which was some 200m from the main Grade II* listed building, and not visible from it because of the topography of the land in between. The Court of Appeal, rejecting an argument based on the earlier case of *Dyer v Dorset CC*[11] that curtilage was a small area of land, held that:

> "The curtilage of a substantial listed building was likely to extend to what were or had been, in the terms of ownership and function, ancillary buildings. Of course, 'physical layout' came into the matter as well. In the nature of things, the curtilage within which a mansion's satellite building were found was bound to be relatively limited, but the concept of smallness was in that context so completely relative as to be almost meaningless and unhelpful as a criterion."

[9] *Attorney General ex rel Sutcliffe v Calderdale MBC* (1983) 46 P. & C.R. 399.
[10] *Secretary of State for the Environment, Transport and the Regions v Skerritts of Nottingham Ltd* [2000] All E.R. (D.) 245.
[11] *Dyer v Dorset CC* [1989] Q.B. 346; [1988] 3 W.L.R. 213.

Relationship to views

It is important to note that setting also often includes, but is not the same as, views. It is, though, most commonly dealt with in relation to visual matters: see *Miller*. A number of local planning authorities have adopted polices to protect important views. Examples include:

- **The London View Management Framework (Mayor of London 2010):**

  The framework details various linear views, vistas (long narrow triangles drawn on a map) and "river vistas" (mostly from Thames bridges). Development which encroaches into these views is subject to quite strict control policies.

- **View Cones (Oxford CC 2005):**

  Oxford was one of the first UK cities to protect views (in 1962). Its current policies restrict development within six three-dimensional "cones" originating from points around the city and looking towards the centre. It is currently consulting on the addition of a further four cones.

Of course, the existence of heritage assets will frequently be a reason to protect views. However, it is important to note that view frameworks such as the two described above are not primarily heritage protection policies. Other assets, for example, parks and open spaces, might well form part of cherished views. In any event, view frameworks such as those described above, assuming they are adopted as local plan documents, will carry s.38(6) weight but not the enhanced s.66 or s.72 weight that the protection of listed buildings or conservation areas requires.

Cases on the statutory duties

The s.66 and s.72 duties (see above) were considered by the courts a number of times prior to the introduction of the NPPF. In *Bath Society v Secretary of State for the Environment* ("*Bath Society*"),[12] the court held that development which fails to preserve or enhance character should only be permitted if it carries some advantage or benefit which outweighs the failure to satisfy the s.72 duty. The s.72 duty must be regarded as having "considerable importance and weight".

In *South Lakeland DC v Secretary of State for the Environment* ("*South Lakeland*"),[13] the House of Lords concluded that "to preserve" means "to do no harm" and if a proposed development would conflict with the objective of preserving or enhancing the character or appearance of a conservation area:

> "there will be a strong presumption against the grant of planning permission, though no doubt in exceptional cases the presumption may be overridden in favour of development which is desirable on the grounds of some other public interest."

Heatherington (UK) Ltd v Secretary of State for the Environment[14] considered the interrelationship between the s.66 duty and the duty under the Town and Country Planning Act 1990 s.54A (now the Planning and Compulsory Purchase Act 2004 s.36(6)) to determine applications in accordance with the local plan unless material considerations indicate otherwise. Following *Bath Society*, the court concluded that "considerable importance and weight" should be attached to the s.66 duty just as it was to the s.72 duty.

It can be seen that the law in this area was reasonably settled long before the introduction of the NPPF. In considering developments affecting conservation areas, a listed building or its setting, "considerable

[12] *Bath Society v Secretary of State for the Environment* [1991] 1 W.L.R. 1303.
[13] *South Lakeland DC v Secretary of State for the Environment* [1992] 2 A.C. 141.
[14] *Heatherington (UK) Ltd v Secretary of State for the Environment* (1995) 69 P. & C.R. 374.

importance and weight" had to be attached to the relevant statutory duty. In the case of conservation areas, this importance and weight amounted to a "strong presumption" against development which would cause harm.

The NPPF's advice on heritage decision-making

As was noted above, other than in the case of Development Consent Orders, there is only statutory protection for the setting of listed buildings. There is no protection in statute for the setting of a conservation area or a scheduled monument. Protection of the setting of anything other than a listed building has always relied on policy or guidance, such as PPG 15 and PPG16, then PPS5 and now the NPPF.

The NPPF adopted pretty much wholesale the terminology of PPS5. In particular it adopts the PPS5 concept of "heritage asset", which is defined as follows:

> **"Heritage asset:**
>
> A building, monument, site, place, area or landscape identified as having a degree of significance meriting consideration in planning decisions, because of its heritage interest. Heritage asset includes designated heritage assets and assets identified by the local planning authority (including local listing)."

It will be noted that the definition includes "designated heritage asset", defined as follows (again adopted from PPS5):

> **"Designated heritage asset:**
>
> A World Heritage Site, Scheduled Monument, Listed Building, Protected Wreck Site, Registered Park and Garden, Registered Battlefield or Conservation Area designated under the relevant legislation."

As we will see, the NPPF seeks to treat all designated assets alike, regardless of whether they enjoy statutory protection. As will have been noted, the term "heritage asset" is a very wide one and even the somewhat narrower term "designated heritage asset" goes much wider than statutorily protected assets such as listed buildings, conservation areas and scheduled monuments. Also included are assets such as parks, gardens and battlefields, which have no statutory protection at all. Yet the NPPF defines "setting" so as to relate to all heritage assets (see above). It thereby bestows a protection on assets and their settings which arguably Parliament never intended.

The explanation for this apparent disconnect between the law and policy goes back to a failed attempt to reform heritage protection law. A draft Heritage Protection Bill was published for consultation in April 2008. The main thrust of the draft was to introduce a single register of heritage assets encompassing listed buildings, scheduled monuments, parks and gardens, battlefields and World Heritage Sites. The Bill never reached its first reading in Parliament as it was dropped from the Queen's Speech in 2009.

Undeterred, English Heritage (or Historic England as we should now call them), the Department for Culture, Media and Sport and the Department for Communities and Local Government proceeded to produce new guidance, in the form of PPS5, adopting the terminology which would have been in the legislation had the Heritage Protection Bill become law: "heritage asset"; "significance" etc. Relevant paragraphs of PPS5 have been distilled into the NPPF, leading to it referring generically to "heritage assets" or "designated heritage assets". As we will see, this has led to the courts making decisions to some extent on the basis of impact on the setting of heritage assets, the protection of which, as previously noted, was never intended by Parliament: see in particular *National Wind Power* (see above), where the impact was on the setting of scheduled monuments and *East Northamptonshire DC v Secretary of State for*

Communities and Local Government ("*Barnwell Manor*"),[15] where the impact was, at least in part, on a scheduled monument and a registered park and garden.

The NPPF advises that decisions on applications should be made on the basis of the significance of the asset and the harm (substantial or less than substantial) that the proposed development would cause to the significance of the heritage asset. Note that significance expressly includes interest derived from an asset's setting.

The following paragraphs offer particular advice on how decisions should be made under the NPPF:

- **Paragraph 128:**

  "In determining applications, local planning authorities should require an applicant to describe the significance of any heritage assets affected, including any contribution made by their setting."

- **Paragraph 129:**

  "Local planning authorities should identify and assess the particular significance of any heritage asset that may be affected by a proposal (including by development affecting the setting of a heritage asset)."

- **Paragraph 132:**

  "When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting."

- **Paragraph 133:**

  "Where a proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:
  — the nature of the heritage asset prevents all reasonable uses of the site; and
  — no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and
  — conservation by grant-funding or some form of charitable or public ownership is demonstrably not possible; and
  — the harm or loss is outweighed by the benefit of bringing the site back into use."

- **Paragraph 134:**

  "Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

- **Paragraph 137:**

  "Local planning authorities should look for opportunities for new development within Conservation Areas and World Heritage Sites and within the setting of heritage assets to enhance or better reveal their significance. Proposals that preserve those elements of the

[15] *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137.

> setting that make a positive contribution to or better reveal the significance of the asset should be treated favourably."

The key distinction is drawn in paras 133 and 134 between "substantial" harm and "less than substantial" harm. This is not defined and is obviously a question of subjective professional judgement. In some cases it will be clear whether harm is substantial or less than substantial. Other cases, obviously, might be less clear-cut and it is entirely possible (indeed likely) that one respected professional might legitimately take the view that the harm is substantial, while another equally respected professional might, equally legitimately, take the view that it is less than substantial.

The importance of the distinction, of course, lies in the way the NPPF advises that the existence of the harm should be weighed in the balance. If the harm is substantial, the NPPF advises that there is effectively a presumption against development except in the limited circumstances described in para.133 (see above). If the harm is less than substantial, para.134 advocates weighing the harm against the public benefits. However, certainly when considering a conservation area or a listed building or its setting, para.134 is on the face of it at odds with the s.66/s.72 duties to have special regard/pay special attention to the desirability of preserving the area, the building or its setting. The balancing exercise in such a case cannot simply be a "normal" planning balancing exercise. (As we shall see the wording of para.134 has led more than one decision-maker into conducting the balancing exercise incorrectly when considering the setting of listed buildings.) Where other heritage assets are concerned and the harm is less than substantial, presumably the balancing exercise is exactly the same as for any non-heritage planning case. It is for the decision maker to attach such weight as s/he reasonably thinks fit and weigh them against each other.

The NPPF and the earlier cases have informed the recent line of cases, to which we now turn.

Barnwell Manor and beyond

The judgment of the Court of Appeal (Maurice Kay LJ, Sullivan LJ and Rafferty LJ) in *Barnwell Manor* caused something of a stir in planning circles when it was handed down last year! The case involved a challenge to the decision of the Secretary of State to grant planning permission for a four-turbine wind farm. The Inspector concluded that there would be harm to the setting of various heritage assets, particularly Lyveden New Bield (Grade 1 listed building; scheduled monument and Grade 1 on the Register of Historic Parks and Gardens). He decided that that harm would be less than substantial "and reduced by its temporary (25 year) nature" (contrast with *Miller* (above)). He balanced that harm against the positive contribution to renewable energy needs and targets the development would make and concluded the harm was outweighed by the benefits.

Lang J at first instance and the Court of Appeal (Maurice Kay; Sullivan and Rafferty LJJ) concluded that it was Parliament's intention in enacting s.66(1) that decision-makers should "give considerable importance and weight" to the desirability of preserving the setting of listed buildings as part of the balancing exercise. While this phrase caused a stir among practitioners, it is worth noting that the Court of Appeal was simply taking the test applied to a conservation area case in *Bath Society* (see above) and applying it to the case of a listed building. This seems to me entirely uncontroversial. The s.66 and s.72 duties are all but identical, so if it is reasonable for a court to characterise the s.72 duty in terms of giving considerable weight and importance to that factor, the same must surely be true of a listed building. In the present case, the Court of Appeal held that the Inspector had not given considerable weight and importance to the impact on setting. As Sullivan LJ put it:

> "… the Inspector did not assess the contribution made by the setting of Lyveden New Bield, by virtue of its being undeveloped, to the significance of Lyveden New Bield as a heritage asset. The Inspector

> did not grapple (or if he did consider it, gave no reasons for rejecting) the objectors' case that the setting of Lyveden New Bield was of crucial importance to its significance as a heritage asset …"

Whilst the Inspector was entitled to reach the conclusion that the harm was less than substantial, Sullivan LJ cast doubt on his reasoning for reaching that conclusion. The Inspector had applied a "reasonable observer" test, asserting that any reasonable person looking at views of Lyveden New Bield would clearly understand that the turbine array was a modern addition separate from the planned historic landscape. Sullivan LJ commented that if that were to be the principal basis for deciding whether harm was substantial or not:

> "… it is difficult to envisage any circumstances, other than those where the proposed turbine array would be in the immediate vicinity of the heritage asset, in which it could be said that any harm to the setting of a heritage asset would be substantial."

In terms of the balancing exercise, Sullivan LJ went on to comment:

> "[The Inspector] appears to have treated the less than substantial harm to the setting of the listed buildings … as a less than substantial objection to the grant of planning permission."

The Inspector may have been misled by NPPF para.134 which, as discussed above, appears to advocate a straightforward balancing exercise where the harm to a designated heritage asset is less than substantial. In fact, as noted above, the s.66 duty still falls to be applied in the case of the setting of a listed building whether the harm is substantial or less than substantial.

A case where the Inspector expressly fell into the para.134 trap, so to speak, is *North Norfolk DC v Secretary of State for Communities and Local Government* ("*North Norfolk*").[16] North Norfolk DC applied to quash the decision, made by the Inspector appointed by the Secretary of State, to allow an appeal for a wind turbine at Pond Farm, Bodham in Norfolk. The grounds of the application included an allegation that the Inspector had failed to properly apply the s.66 duty.

The proposed turbine had an impact on the setting of a number of listed buildings in the area, including Barningham Hall, Baconsthorpe Castle (both Grade I) and a number of Grade II* churches. Addressing the impact on those settings, the Inspector's decision letter stated:

> "… I agree with the officer's opinion in their (sic) report to committee that [the development] would lead to less than substantial harm, engaging paragraph 134 of the NPPF. The harm will be weighed against the public benefits of the proposal in the final issue."

Robin Purchas QC, sitting as a Deputy High Court Judge, concluded that the Inspector has thus misdirected himself, concluding that:

> "… the Inspector's approach seems to me at this level to have balanced the relative harm and benefit as a matter of straightforward planning judgement without that special regard required under the statute. Thus he treated the balance under paragraph 134 of the NPPF as the same exercise as that in respect of the landscape effects."

The decision was quashed as a result.

Barnwell Manor was followed four months later by *R. (on the application of Forge Field Society) v Sevenoaks DC*("*Forge Field*").[17]*Forge Field* involved a claim for judicial review of two planning permissions granted by Sevenoaks DC for the proposed development of affordable housing on Forge Field, which was within the Penshurst Conservation Area and would affect the setting of various listed

[16] *North Norfolk DC v Secretary of State for Communities and Local Government* [2014] EWHC 279 (Admin).
[17] *R. (on the application of Forge Field Society) v Sevenoaks DC* [2014] EWHC 1895 (Admin).

buildings (including the Grade II* Star House). In so far as is relevant for present purposes, Lindblom J found as follows:

- Following the reasoning in *Barnwell*, he concluded that there is "a strong presumption against granting planning permission" where, as here, there is harm to the setting of a listed building and the character and appearance of a conservation area. Even if the harm identified is "limited" or "less than substantial" the DC should give that harm considerable importance and weight.
- The officer report simply weighed benefit against harm without considering whether the benefit was sufficient to outweigh the strong presumption against planning permission being granted.
- There was an alternative proposal to provide affordable housing on another site which would have equally met the local need for affordable housing. Affordable housing need was one of the matters weighed against the harm to the heritage assets:

> "If there is a need for development of the kind proposed, which in this case there was, but the development would cause harm to heritage assets, which in this case it would, the possibility of the development being undertaken on an alternative site on which that harm can be avoided altogether will add force to the statutory presumption in favour of preservation. Indeed, the presumption itself implies the need for a suitably rigorous assessment of potential alternatives."

As with *Barnwell Manor* and the phrase "considerable weight and importance", the use of the phrase "strong presumption against granting planning permission" caused some excitement among practitioners. But the latter phrase is simply a restatement of the conclusion of *South Lakeland* that there was in that case "strong presumption against the grant of planning permission". Again, it seems to me that it is reasonable that what is sauce for the s.72 duty goose, should also be sauce for the s.66 gander.

It seems to me that *Barnwell Manor*, *North Norfolk* and *Forge Field* are all cases of the decision-maker either getting the application of the statutory duty and associated policy guidance very obviously wrong, or at least not demonstrating that he had properly understood and applied that duty and/or that guidance.

Another case where the decision maker got it wrong (in that case quite spectacularly!) was *Gerber v Wiltshire CC* ("*Gerber*").[18] Dove J quashed planning permission for a 22ha solar farm at Broughton Gifford. The claimant only became aware of the development when the photovoltaic arrays were being installed. Despite the solar farm operator standing to lose some £12 million, permission was quashed on three grounds:

- The council should have consulted the claimant and had breached his "legitimate expectation" that he would be notified of a development proposal of this sort.
- As the council had considered that the solar farm development would have an effect on listed buildings in the area and a conservation area, English Heritage should have been consulted.
- The council had failed in its duty to have "special regard" to the desirability of preserving the setting of listed buildings and had carried out a "flawed" assessment of environmental issues.

With admirable understatement, Dove J commented:

[18] *Gerber v Wiltshire CC* , Unreported, CO/3930/2014.

> "The status of Gifford Hall as a Grade II* listed building and the failure to give its interests a proper and lawful consideration attracts, in my view, very significant weight in the overall balance of considerations."

The final case we need to consider for present purposes is *Mordue v Secretary of State for Communities and Local Government* ("*Mordue*").[19] This was another proposed wind turbine which would have had an impact on a number of listed buildings, including particularly the Church of St Mary in Wappenham. An application was made under the Town and Country Planning Act 1990 s.288 to quash the Inspector's decision to grant planning permission. One of the principal issues was whether the Inspector had properly discharged his s.66 duty. Again, the Inspector had concluded that the harm was less than substantial and that the correct approach was to apply para.134, which he did without stating what weight he had placed on the heritage impacts.

John Howell QC (sitting as a Deputy High Court Judge) allowed the claim albeit "with reluctance". He held that the consequence of *Barnwell Manor* was to put the onus of proof on the Secretary of State to demonstrate that considerable importance and weight had been given to the impact on listed buildings, in contrast to the ordinary position in public and planning law where it is for a claimant to establish that the decision was legally flawed.

> "Normally, therefore, the mere failure to state what weight is being given to a consideration when a material planning policy specifies what it should be does not mean that the reasons provided are inadequate: see e.g. *O'Connor v Secretary of State for Communities and Local Government* [2013] EWCA Civ 263."

The Deputy Judge considered that he was bound by the Court of Appeal on this issue, which was decisive in the present case. However, he expressed the view that, because of this reversal of the burden of proof, the Court of Appeal's approach was highly questionable in the light of previous case law which was not grappled with in the *Barnwell Manor* case.

The Deputy Judge also suggested (obiter) a solution to the problem of para.134 that ostensibly runs counter to the s.66 duty. In his view, paras 132 and 134 need to be read together. It will be recalled that para.132 advises that "great weight should be given to the [heritage] asset's conservation. The more important the asset, the greater the weight should be."

As he eloquently put it:

> "In my judgment, a decision-maker who follows the guidance given in paragraphs 132 and 134 of the NPPF (when dealing with a case in which the proposed development will result in less than substantial harm to the value of a listed building (for example by development within its setting)) will comply with the obligation imposed by section 66(1) of the Listed Buildings Act as interpreted by the Court of Appeal in the [*Barnwell Manor*] case. When a proposed development will result in harm to the value of a listed building (for example by development within its setting) but that harm is less than substantial, however, then a decision-maker following the guidance will give 'great weight' to any such harm. Giving any such weight to any such harm must at least involve giving 'considerable weight' to it.
>
> Further, as the policy itself illustrates, it cannot be inferred from the fact that the decision-maker considers that the proposed development will cause less than substantial harm that he or she necessarily regards such harm as having less than 'considerable weight'."

[19] *Mordue v Secretary of State for Communities and Local Government* [2015] EWHC 539 (Admin).

Permission to appeal has been granted for *Mordue*. The appeal is due to be heard towards the end of October 2015. It is to be hoped that the Court of Appeal will provide some clarity, particularly on the para.134 point.

Conclusions

The key questions following this line of cases are:

- What exactly is the duty of the decision-maker in considering applications which involve impacts on setting and, equally importantly?
- How does the decision-maker demonstrate that the duty has been properly complied with?

Duties of decision-makers

What I find interesting is that the concerns of practitioners I have spoken to have centred on the supposed judicial changes to the nature of the decision-makers' duties; the duty to give "considerable weight and importance" to heritage interests (*Barnwell Manor*) and, more concerning, the "strong presumption against development" where there is an adverse impact on a heritage asset (*Forge Field*). But in my view, at least in terms of the nature of the duty, the recent cases have done nothing but reflect previously decided cases and/or existing guidance. The phrase "considerable importance and weight" is a direct quote from *Bath Society*, which was decided in 1991. The phrase "strong presumption against planning permission" is a direct quote from *South Lakeland*, which was decided in 1992. As noted above, all that *Barnwell Manor* and *Forge Field* have done is taken phrases adopted in well-established conservation area case law (*Bath Society* and *South Lakeland*) and apply those same tests in listed building cases. Given the similarity in the wording s.66 and s.72 duties, that does not seem at all unreasonable. As I said above, what's sauce for the s.72 goose ought to also be sauce for the s.66 gander.

I have also heard it said that *Barnwell Manor* and *Forge Field* have extended the duty to give considerable weight and importance to the preservation of other heritage assets. Again, not true in my view. Both *Barnwell Manor* and *Forge Field* involve listed buildings, thus engaging s.66, and, insofar as other heritage assets are involved they simply apply the tests set out in the NPPF paras 133 and 134. It is the NPPF which has extended a level of protection to other heritage assets and their settings, although, as noted (above) the settings of scheduled monuments have been protected by policy for a number of years under PPG16, then PPS5, including "a presumption against proposals which would involve significant alteration or cause damage, or which would have a significant impact on the setting of visible remains". That protection, in large part, is simply restated in the NPPF para.133.

Thus I do not think that what we might conveniently refer to as the *Barnwell Manor* line of cases has changed the nature of the duty significantly (or probably at all). What it has done is throw a spotlight on the second of my questions: how does the decision-maker demonstrate that the duty has been complied with and that the decision is properly made?

Two common threads run through *Barnwell Manor*, *Forge Field*, *North Norfolk* and *Gerber*. The first is the failure of the decision-maker to comply with, or at least to demonstrate compliance with, his duties when considering impact on setting. But a second, and equally important, issue that runs through all these cases to a greater or lesser extent is how the NPPF para.134 has been dealt with. It seems to me that para.134 is the real villain of this piece. It has induced a number of decision-makers to believe that, where harm to a listed building or conservation area is less than substantial, a straightforward planning balance is appropriate and, as a result, they have failed to apply the rather greater weight to heritage interests that is required by the law in the case of listed buildings and conservation areas. It cannot be emphasised too strongly that where a decision-maker is considering less than substantial harm to a listed building, its setting or a conservation area, the s.66 and/or s.72 duty (as appropriate) must be applied alongside para.134.

Where there is less than substantial harm to other designated heritage assets, I think, as far as para.134 is concerned, John Howell offered the solution in his obiter comments in *Mordue*. Provided one reads it together with para.132 and bears in mind the need to attach appropriate weight to the preservation of the heritage asset(s), one should not go far wrong.

The table below summarises, in my view, the correct approach to decisions involving development in the setting of the different types of designated heritage asset depending on whether the harm is substantial or less than substantial:

	Less than substantial harm	**Substantial harm**
Development affecting setting of listed building	Balancing exercise under the NPPF para.134 BUT the s.66 duty must be applied, which involves: • Giving considerable weight and importance to the desirability of preserving: *Barnwell Manor*. • A strong presumption against planning permission applies even where impact is less than substantial: *Forge Field*.	The s.66 duty must be applied, which involves: • giving considerable weight and importance to the desirability of preserving: *Barnwell Manor*; • a strong presumption against planning permission applies: *Forge Field*; AND • permission should be refused except in the limited circumstances set out in the NPPF para.133.
Development affecting character or appearance of conservation area	Balancing exercise under the NPPF para.134 BUT the s.72 duty must be applied, which involves: • Giving considerable weight and importance to the desirability of preserving or enhancing: *Bath Society*/*Barnwell Manor*. • A strong presumption against planning permission applies even where impact is less than substantial: *South Lakeland*/*Forge Field*.	The s.72 duty must be applied, which involves: • giving considerable weight and importance to the desirability of preserving or enhancing: *Bath Society*/*Barnwell Manor*; • a strong presumption against planning permission applies: *South Lakeland*/*Forge Field*; AND • permission should be refused except in the limited circumstances set out in the NPPF para.133.
Development affecting other heritage asset	Balancing exercise under the NPPF para.134 BUT apply para.132 such that the more significant the heritage asset the greater its interests should weigh in the balance: *Mordue* (obiter).	Permission should be refused except in the limited circumstances set out in the NPPF para.133.

Demonstrating compliance with the duty

It seems that just following the correct process may not be enough. The cases indicate that one must demonstrate that one has done so. *Mordue*, I think rightly, doubted the legitimacy of effectively putting the onus on the decision-maker to justify their decision rather than, as would be normal, placing the burden of proving that the decision was flawed on the claimant. Nevertheless, *Barnwell Manor* is Court of Appeal authority and, as John Howell QC had to acknowledge, a judge at first instance will remain bound by it, at least pending the *Mordue* appeal.

Of interest in this regard is *R. (on the application of Garner) v Elmbridge BC*.[20] Mr Garner sought judicial review of Elmbridge BC's decision to grant planning permission for the comprehensive redevelopment of land at Hampton Court railway station on the south bank of the river Thames. Hampton Court Palace, a scheduled monument and Grade I listed building, lies opposite on the north bank. Insofar as is relevant to this paper, Mr Garner alleged that Elmbridge had failed in its duty to have special regard to the desirability of preserving the setting of Hampton Court Palace. His application was dismissed at first instance (Ouseley J). Mr Garner appealed to the Court of Appeal.

[20] *R. (on the application of Garner) v Elmbridge BC* [2011] EWCA Civ 891.

Much of Mr Garner's argument turned on the wording of the Committee report and the reasons given for granting planning permission. Specifically, neither the officer's conclusion to the report nor the reasons given for the grant of permission specifically mentioned s.66 or a summary of the duty and included the words "on balance", which Mr Garner took to be an indication that only a normal planning balancing exercise had been undertaken.

Sullivan LJ in his leading judgement, however, dismissed in no uncertain terms the notion that there was a requirement to specifically mention the s.66 duty:

> "I do not accept that in order to show that it had complied with the duty under section 66(1) the respondent had to pass through a particular series of legal hoops first to decide a) and then if not a) to decide b) etc. the need to comply with section 66(1) did not place the respondent in a legal straightjacket when it came to giving a summary of the reasons for its decision … the challenge to the adequacy of the summary reasons fails on the facts for the following reasons. First, the summary reasons should not be construed in isolation. They summarise the outcome of what in the present case was a lengthy planning process … The context in which the summary reasons are prepared is important and an important part of the context in the present case is that members were accepting a planning officer's recommendation to grant planning permission. There is no dispute that the planning officer's report concluded in the light of inter alia the planning officer's view that there was a lack of objection from English Heritage that the classical scheme would not harm the setting of the Palace."

However, pending any clarification which the Court of Appeal may offer when *Mordue* comes to appeal, in order to minimise the risk of challenge to decisions, it will be advisable for decision-makers not only to carry out the balancing exercise correctly but to demonstrate that they have done so. I offer the following tips with all due diffidence and without offering any warranty as to their ultimate efficacy!

Key tips for decision-makers

The key point for decision-makers is that committee reports, minutes and decision letters will need to set out an "audit trail" of their reasoning. In my experience, this aspect of report drafting is not universally well handled. Even very good planning officers seem to have a blind spot when it comes to heritage duties. I have had occasion numerous times to review draft committee reports and had to prompt the officer to state the s.66 duty etc. (In some ways it surprises me that there have not been more cases before the courts alleging failure to adequately discharge duties towards heritage assets and their setting!)

The audit trail I have in mind is a relatively simple process. A sound report would contain the following:

- A statement of the appropriate duties: Sections 66/72, relevant paragraphs of the NPPF (principally 133 and/or 134) and the statement from the cases that heritage interests should carry considerable importance and weight.
- A proper assessment of the significance of the heritage asset(s).
- A clear statement, with justification, of whether the harm is substantial or less than substantial.
- A proper detailed description of the balancing exercise the author has undertaken between harm and benefits including a clear statement that considerable importance and weight has been given to the relevant duties listed in the first bullet point (above).

I recognise that planning officers and Inspectors are extremely busy and that it may be too much to ask that an audit trail as set out above can be followed in every case. I therefore offer you (without any warranty!) a simple all-purpose paragraph to insert in the reasons for granting planning permission where there is harm to the setting of a heritage asset, which ought to avoid any unpleasantness in most cases:

> "In arriving at this decision, considerable importance and weight has been given to the desirability of preserving the setting of [insert name(s) of heritage asset(s)] a [insert type and grade of heritage asset—e.g. a Grade II* listed building]. It is nevertheless considered that the public interest in [insert factors in favour of grant—e.g. need for renewable energy; addressing the shortage of suitable housing in the area; satisfying the projected need for school places or whatever it may be] clearly outweighs the harm to these heritage asset(s)."

Of course, this paragraph is not a panacea in all cases, hence my (only partly tongue in cheek) comment that I am not offering a warranty as to its success. Decision-makers will still need to be seen to be behaving *Wednesbury* reasonably and there will come a point where simply asserting that the benefits outweigh the harm will not be enough to carry the day. It needs to be recognised that the greater the harm and/or the more important the heritage asset, the greater the public benefits will need to be in order for this form of words to justify a decision to grant permission notwithstanding harm to heritage interests. If not, one risks a finding that no reasonable decision-maker could have come to the conclusion taking account of all relevant factors.

Key tips for developers

Developers will want to address the following at as early a stage in the development process as possible, and certainly before they are committed unconditionally to purchase a development site:

- Have a professional assessment carried out of the impact of the proposals on any heritage assets or their setting.
- Consider whether any amendments to the scheme (such as reducing height or breaking up bulk) could ameliorate or even remove the harm. (Remember the *Miller* principles relating to views in and out of the heritage asset.)
- Have pre-application discussions with the local planning authority's conservation officer. S/he may not agree with your assessment but, if not, it is best to establish that early on; it may still be possible to amend the scheme to accommodate his/her concerns.
- Consult and engage with relevant organisations (Historic England of course, but also national societies, e.g. The Victorian Society; The Twentieth Century Society etc, as well as local history groups and local residents).
- Ensure that the planning officer has your detailed heritage report to assist him/her in drafting the committee report.
- Instruct your lawyers to critically examine the committee report when it is published and point out any ways in which it does not contain a proper "audit trail" as outlined above. Remember: it is in your interests to avoid a judicial review if at all possible; it is your development that will be delayed!

There is, of course, nothing to prevent you offering the text above to the local planning authority or Inspector to include in the reasons for grant should they be minded to grant permission.