Heritage challenges after *Mordue* - business as usual?

Introduction

1. When the Court of Appeal issued its judgment in the case of *Mordue v Secretary of State for Communities and Local Government and others* [2015] EWCA Civ 1243 it was generally heralded as providing much-needed clarity on the correct approach for a decision-maker dealing with the application of the duty in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("Listed Buildings Act") and the associated paragraphs in the National Planning Policy Framework 2012 concerning harm to heritage assets.[1] *Mordue* built on a line of robust decisions on heritage assets including, most notably, the case known as "*Barnwell Manor*"[2].

2. Less significantly, the judgment of Sales LJ is also responsible for introducing the word, "fasciculus" into the vocabulary of the majority of those who read it, including, presumably, Kerr J who in *R. (on the application of Blackpool BC) v Secretary of State for Communities and Local Government* [2016] EWHC 1059 (Admin) provided similarly much-needed clarity on the word's meaning.[3]

3. Latin vocabulary aside, *Mordue* was an appeal relating to a planning permission granted by an inspector for the erection of a single wind turbine, which would impinge to a certain extent on the views of a Grade II* listed church, and affect to a very limited degree the setting of other listed buildings. The inspector concluded that the significant adverse effect of the development on the character of the landscape was limited to a small area and no heritage asset in the area would suffer substantial harm. Moreover, the harm that would be caused by the development was outweighed by its environmental benefits.

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[1] Please see Appendix at end of this paper for the provisions.

[2] *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137, referred to in *Mordue* as "the East Northamptonshire Case".

[3] Diminutive of Latin fasces, "[a] bundle of rods bound up with an axe in the middle and its blade projecting. These rods were carried by lictors before the superior magistrates at Rome as an emblem of their power" (Oxford English Dictionary).

4. Declining to quash the decision, the key conclusion of Sales LJ was that:

> ***Paragraph 134 of the NPPF appears as part of a fasciculus of paragraphs, set out above, which lay down an approach which corresponds with the duty in section 66(1). Generally, a decision-maker who works through those paragraphs in accordance with their terms will have complied with the section 66(1) duty. When an expert planning inspector refers to a paragraph within that grouping of provisions (as the Inspector referred to paragraph 134 of the NPPF in the Decision Letter in this case) then – absent some positive contrary indication in other parts of the text of his reasons - the appropriate inference is that he has taken properly into account all those provisions, not that he has forgotten about all the other paragraphs apart from the specific one he has mentioned. Working through these paragraphs, a decision-maker who had properly directed himself by reference to them would indeed have arrived at the conclusion that the case fell within paragraph 134, as the Inspector did.***[4]

5. Rather than asserting a change in the law from the position established in *Barnwell Manor*, Sales LJ distinguished the case at hand. Unlike the former, it was not one where there were positive indications that the decision-maker had failed to comply with the duty under section 66(1) of the Listed Buildings Act. In those cases, such indications would have had to have been dispelled by a countervailing positive reference to the relevant duty in the reasons themselves in order to avoid the conclusion that the decision-maker had erred as a matter of substance in the test being applied.

6. Laying to rest any confusion generated by *Barnwell Manor*, he stated that the familiar basic principles from the key cases on reasons, *Save Britain's Heritage* and *South Bucks DC v Porter (No. 2),* applied to decisions on section 66(1)/heritage cases in the same way as to any other decision; in effect, it was "business as usual" for heritage decisions.

[4] [28]

7. What follows is an analysis of the key high court challenges concerning harm to heritage assets that have followed *Mordue*.

Heritage challenges after *Mordue*

Forest of Dean

8. Shortly after *Mordue* came the important decision of Coulson J *in Forest of Dean DC v Secretary of State for Communities and Local Government* [2016] EWHC 2429 (Admin). This case concerned the interaction between paragraphs 14 and 134 of the NPPF, the central issue being whether paragraph 134 of the NPPF was a specific policy indicating that development should be restricted for the purposes of disapplying the presumption in favour of sustainable development in paragraph 14. Given that the case of *Mordue* is not directly relevant to *Forest of Dean* (indeed it was not cited in the judgment), for a more in depth analysis of its significance in the context of paragraph 14 of the NPPF, please refer to the paper of Alistair Mills, "NPPF Case Law Update: NPPF Decision-Making, 'Sustainable Development'", the Green Belt".

Lensbury

9. The first high court challenge citing *Mordue* was *R. (on the application of Lensbury Ltd) v Richmond Upon Thames LBC* [2016] EWHC 980 (Admin); [2016] Env. L.R. 29. It concerned two challenges to the grant of planning permission by Richmond Council to Teddington and Ham Hydro Co-operative Ltd for a 3-turbine electricity generation facility at Teddington Weir. The claimant was the leasehold owner of land and buildings in the vicinity of the site, upon which it operated a leisure club-cum-hotel. The Claimant's land and the site of the proposed development fell into the Teddington Lock Conservation Area and were within the setting of a number of statutory listed buildings.

10. The Council's Planning Committee Report concluded that:

47. …it is not considered that the visual impact [of the development] is generally negative… As a consequence it is not considered to compromise heritage assets, registered or otherwise, within their immediate or wider context, as has been suggested or the objectives set out in the Thames Landscape Strategy.

48. The need for an acceptable exposition of balancing benefits in order to balance such highly adverse impact would only arise if the premise that there was such a highly adverse impact was accepted. The proposal is seen as acceptable in its own right and not dependent on a required level of "green" measures or alternative benefits.

11. The Claimant sought to challenge the grant on the basis that there had been an unlawful failure to consider the impacts of the proposed development on heritage assets. The Claimant submitted that the Council's planning officers did not assess the significance of any heritage assets affected. Further, they gave no "special attention", or even any consideration, to whether the development preserved or enhanced the character or appearance of the area (section 72 Listed Buildings Act) or preserved the footbridge or its setting (section 66 Listed Buildings Act).

12. Supperstone J gave these arguments short thrift, agreeing with the Council that on a fair reading of paragraph 47 of the report, the officers were saying that in their judgment there would be no harmful impact on the conservation area or the listed footbridge. That being so there was no need for an exposition of balancing benefits. This assessment, of the relationship of the proposal with the adjoining heritage assets, was a planning judgment for the Council to make. The reasons given by the Council were comprehensible and sufficient.

13. Arguably *Lensbury* is a good example of how *Mordue* may have turned the tide in challenges based on heritage issues and paved the way for a more flexible approach for decision-makers. Crucially, Supperstone J agreed that the Council had made a finding that there was *no* harmful impact on heritage assets. Nonetheless the Officer's Report neglected to expressly mention the relevant paragraphs in the NPPF or the duties under the Listed Buildings Act. It loosely referenced the language of the relevant tests in the NPPF but by no means methodically worked through them or made it clear that it was acting in a way consistent

with its statutory duties with regards to heritage assets. For Supperstone J, however, this reasoning was sufficient. It should be noted that this decision has been to the Court of Appeal, although permission was not given on the heritage point.

Whitby

14. *Whitby v Secretary of State for Transport* [2016] EWCA Civ 444; [2016] J.P.L. 980 was a challenge to the construction of the Ordsall Chord: an elevated chord railway running from Manchester to Salford. The Court of Appeal was required to consider the meaning and effect of paragraphs 132 and 133 of the NPPF in the context of the development harming the significance of a designated heritage asset and the decision-maker's approach to a suggestive alternative alignment.

15. It was common ground between the parties that the railway would cause substantial harm to several listed buildings, to the settings of others, and to the character and appearance of the Castlefield Conservation Area. The centerpiece of the Claimant's objection was "Option 15", a potential alternative to the proposed development whereby the new chord would branch off, largely avoiding harm to listed buildings, their settings, and the conservation area, but would run through a large vacant site called "Middlewood Locks". Middlewood Locks was identified in the Salford Unitary Development Plan as a "key opportunity" for comprehensive commercial and residential redevelopment, which was seen by Salford City Council as vital to the successful regeneration of central Salford.

16. At the time of the Secretary of State's decisions, guidance associated with the superseded Planning Policy Statement 5 ("PPS5"), "Planning for the Historic Environment", remained extant. It was very similar in substance to polices in the NPPF and required:

> ***Where substantial harm to, or total loss of, the asset's significance is proposed a case can be made on the grounds that it is necessary to allow a proposal that offers substantial public benefits. For the loss to be necessary there will be no other reasonable means of delivering similar public benefits, for example through different design or development of an appropriate alternative site.***

17. In finding that there was no error in the decision, the Court of Appeal judgment constituted a straightforward application of *Mordue*. Lindblom LJ concluded at [53] that:

> ***The inspector adhered to the approach confirmed y the Court of Appeal in Barnwell Manor, subsequently reaffirmed in Mordue, and to the relevant policy and guidance. He identified the two strands to the test in paragraph 133 of the NPPF, namely necessity and the question of whether substantial public benefits outweigh the harm to the heritage assets. He applied both strands properly, and in a clearly reasoned conclusion… he found the harm to regeneration associated with Option 15 sufficient to exclude that alternative as a "reasonable means" of delivering the public benefits of an Ordsall Chord and as an "appropriate alternative site". Inherent in this conclusion is that the harm to regeneration associated with Option 15 was, in his view, decisively greater than the harm to heritage assets of the highest significance associated with the order scheme.***

18. *Whitby* is perhaps more useful for its exploration of the correct approach for a decision-maker when dealing with alternatives in the context of paragraphs 132 and 133 of the NPPF. Moreover, Lindblom J at [48] identified five aspects of the approach of the inspector, all of which he found to be "impeccable" , which it may be worth decision-makers bearing in mind:

a) The inspector's conclusions that the judgment to be made was "not merely a comparison of the heritage impacts of the two alternatives" and that "it does not necessarily follow that substantial harm to heritage assets on an application site should necessarily justify substantial harm to other interests on an alternative site" ;

b) His conclusion that "[the] test is one of reasonableness" – a reference to the relevant PPS5 guidance;

c) The fact that the inspector directed himself to the relevant parts of paragraph 132 and 133 of the NPPF;

d) His quoting of *Barnwell Manor* where Sullivan LJ referred to the section 66(1) duty applying "with particular force if harm would be caused to the setting of a Grade I listed building, a designated heritage asset of the highest significance"; and

e) His assessment that "an exceptional degree of justification" was not a test to be found in the NPPF or the PPS5 Practice Guide.

Blackpool

19. The case of *Blackpool Borough Council v Secretary of State for Communities and Local Government* [2016] EWHC 1059 (Admin) was another challenge concerning harm to a heritage asset. It was about the future use of a synagogue in Blackpool, a Grade II listed heritage asset of historic and architectural significance, which was not being used for Jewish worship. Blackpool Council sought to quash the decision of an inspector giving permission and listed building consent to modify the building and add five self-contained flats at the back of it. It was common ground that the proposals entailed some harm to the historic and architectural features of the synagogue, including some stained glass windows. Moreover, the parties appeared to be in agreement that the harm to the heritage asset was less than substantial, yet more than *de minimis*. Accordingly, paragraph 134 of the NPPF applied (the test was one of weighing harm against any public benefits to be gained from the project, including securing the optimum viable use).

20. Kerr J at [40] identified the key issue in the case as:

> ***…whether, on a fair reading of the decision and the language used in it, the cumulative force of those points is sufficient to persuade the court that the inspector must have fallen into the error of giving less than "considerable importance and weight" to the finding of harm to the synagogue and its features of special architectural and historic interest (in Glidewell LJ's words in the Bath Society case)*** **[in accordance with the section 66 duty]** ***or that he gave less than "great weight" to the conservation of the synagogue (in the words of paragraph 132 of the NPPF).***

21. Kerr J quashed the inspector's decision. Even though, correctly, the inspector carried out the paragraph 134 NPPF balancing exercise, weighing harm he had found against the public benefits he judged the development would deliver, he fell into error by regarding the harm to the significance of the synagogue as relatively slight. Because in his judgment it was relatively slight, he decided that the weight to be given to that harm should also be relatively slight. This was clearly wrong as he should still have given "considerable importance and weight" to the preservation of the synagogue. The inspector had even mischaracterized aspects of the development that would undoubtedly harm a heritage asset, such as the reduction in the synagogue hall's floor space, as *beneficial* to the significance of the building rather than detrimental.

22. *Blackpool* should serve as a cautionary tale to decision-makers who ignore the Court of Appeal's advice in *Mordue*. Nowhere in his decision had the inspector made any reference to the relevant paragraphs in the NPPF. Even though, of course, an inspector is not obliged to refer to it by name, decision-makers are best advised to work through the paragraphs in the NPPF methodically to ensure that they are complying with their relevant duties under the Listed Buildings Act and giving appropriate weight to the desirability of avoiding harm to heritage assets in their decisions.

Irving

23. The next significant challenge concerning heritage issues was that of *Felicity Irving v Mid-Sussex District Council* [2016] EWHC 1529 (Admin). The Claimant, Mrs Irving, challenged the grant by Mid-Sussex District Council of planning permission to erect a new detached house on land, the northern part of which lay within the Cuckfield Conservation Area. There were also significant views across the site. Mrs Irving argued that the Council's approach to harm to the conservation area was flawed and that it had not complied with its section 72 duty, nor applied the heritage paragraphs in the NPPF properly.

24. The point of contention arose from the fact that the Council's officer's report found that there would be a harmful effect on the character and appearance of the Conservation Area, but sought to look at in the context of the Conservation Area *as a whole*:

> ***… the main impact of the proposed development would be on the character of the immediate vicinity through the loss of panoramic views to the south. Construction of the dwelling will obstruct long views from the western end of Courtmead Road, from the public footpath abutting the northern boundary and from within the site itself. The views across the open countryside to the distant South Downs are a distinctive feature of the southern edges of the Cuckfield conservation area and they engender a particularly strong sense of place. Loss of these views will diminish an important quality of this part of the designated area and as a result this weighs against the favourable recommendation of the application proposals.***

25. Nonetheless, the report stated:

> ***However, the area in which the diminution will be experienced in limited to the western end of Courtmead Road, the public footpath and from within the site itself. From elsewhere in the southern fringes of the conservation area, similar panoramic southerly views will remain. Thus, while there is damage to a component of the heritage asset i.e. the conservation area, the special character of the conservation area as a whole will be preserved…***

26. Gilbart J firmly dismissed this as the wrong approach, stating:

> ***If there is harm to the character and appearance of one part of the Conservation Area, the fact that the whole will still have a special character does not overcome the fact of that harm. It follows that the character and appearance will be harmed. While I accept that the question of the extent of the harm is relevant to consideration of its effects, it cannot be right that harm to one part of a Conservation Area does not amount to harm for the purposes of considering the duty under s 72 PLBCAA 1990.***

27. It should be noted that Gilbart J gave permission to appeal on the question of whether, when one is considering if there would be harm to the character and appearance of a

conservation area for the purpose of section 72 (or the NPPF), one *can* approach the question on the basis that there would not be harm to it overall. For now *Irving* stands.

28. The lesson of *Irving* for decision-makers is that, if harm to *any* part of a conservation area is identified, they should proceed to consider the appropriate matters pursuant to section 72 and the NPPF. If the decision-maker really means to say that the harm to the site is *de minimis*, they should make a clear finding as such.

Palmer

29. Finally, the Court of Appeal has very recently applied *Mordue* in *R (Palmer) v Herefordshire Council* [2016] EWCA Civ 1061. In *Palmer* the Council had granted permission for the erection of four poultry broiler units and associated infrastructure at Flag Station, Mansel Lacy, Herefordshire. Flag Station, a Grade II listed disused railway station built in about 1863, was 50 metres from the broiler units. The Claimant alleged that the Council had failed to demonstrate that it gave appropriate weight to the desirability of preserving the setting of that listed building, and failed to consider in that context non-visual harm to its setting.

30. The Council had considered the matter of harm to Flag Station by assessing its compliance against its development plan policy HBA4, Setting of Listed Buildings, policy LA4, Protection of Historic Parks and Gardens, and section 12 of the NPPF (on heritage assets). HBA4 stated:

> ***Development proposals which would adversely affect the setting of listed buildings will not be permitted. The impact of the proposal will be judged in terms of scale, massing, location, detailed design and the effects of its uses and operations.***

31. LA4 stated:

> ***Development which would destroy, damage or otherwise adversely affect the historic structure, character, appearance, features or setting (including the designed visual envelope) or a registered park or garden will not be permitted.***

32. Dismissing the appeal, Lewison LJ at [30] applied *Mordue*, finding that the explicit reference to section 12 of the NPPF, in the absence of contrary evidence, pointed to the conclusion that any duty under section 66(1) was complied with. Moreover, he found that the conclusion that the proposals would comply with policy HBA4 *necessarily* entailed the proposition that there was no adverse effect on the setting of a listed building and that either section 66(1) was not engaged, or if engaged, the policy itself was sufficient compliance.

33. Councils may want to take note of *Palmer* when formulating policies on heritage assets to ensure those policies in themselves ensure compliance with the relevant statutory duties.

Conclusion

34. Undoubtedly, *Mordue* provides valuable guidance to decision-makers when faced with potential harm to heritage assets. Although the Court of Appeal made clear that it was *not* departing from previous cases such as *Barnwell Manor*, the courts appear nonetheless to be applying somewhat less scrutiny to decisions on heritage.

35. Indeed, the cases in this paper, postdating *Mordue*, predominantly turn on the familiar principles relevant to all planning cases. The critical points to remember are that heritage assets have statutory protection, unlike other material considerations; and the NPPF has a complex template for their consideration. Although the courts are taking a more forgiving approach, it is good practice to refer to both of these aspects of heritage law and policy if the decision is to be truly safe from challenge.

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Appendix: Legal Framework

Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (" the 1990 Act ") provides:

> ***"(1) 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."***

Section 72 of the 1990 Act provides:

> ***"(1) In the exercise, with respect to any buildings or other land in a conservation area, of any of the provisions mentioned in sub-section (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.***
>
> ***(2) The provisions referred to in sub-section (1) are the planning Acts …"***

A finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "***considerable importance and weight***" (*The Bath Society v Secretary of State for the Environment [1991] 1 W.L.R. 1303* , per Glidewell LJ at 1319; and see *East Northamptonshire District Council v Secretary of State for Communities and Local Government [2015] 1 W.L.R. 45* , per Sullivan LJ at [22]–[23] and [29]).

The relevant policies of the NPPF are paragraphs 128–135, the material parts of which provide:

> ***"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. The level of detail should be proportionate to the assets' importance and no more than is sufficient to understand the potential impact of the proposal on their significance… 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) taking account of the available evidence and any necessary expertise…***
>
> ***…***

131. In determining planning applications, local planning authorities should take account of:

"• the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation; …"

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. …

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: …

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.

135. The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that affect directly or indirectly non-designated heritage assets, a balanced judgment will be required having regard to the scale of any harm or loss and the significance of the heritage asset."