Landmark Chambers

Heritage case-law, including ancient trees: latest developments

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Overview

- Part 1:
  - *City and Country Bramshill Ltd v SSHCLG [2021] EWCA Civ 320,*
    - Assessing heritage impact, Palmer principle disapproved
    - Isolated Homes
  - *Weston Homes* litigation: Bedford approach in doubt

- Part 2:
  - Alternatives
  - Other heritage cases
  - Ancient Trees

City and Country Bramshill Ltd v SSHCLG

Landmark Chambers

City and Country Bramshill Ltd v SSHCLG

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- Challenge to refusal of various appeals in relation to a proposed redevelopment of a grade 1 listed Jacobean mansion and its grounds.

- Main issues
  - Interpretation of “isolated homes in the countryside” in NPPF 80
  - Assessment of less than substantial and more than substantial harm (NPPF 201/202)

Background

- Interpretation of planning policy is a matter of law: ***Tesco v Dundee*** [2012] UKSC 13. This decision significantly expanded the scope for challenge to planning decisions.
- Since (at least) ***Hopkins Homes v SSCLG*** [2017] UKSC 37, the higher courts have consistently sought to qualify; preventing "overly legalistic" attacks on decision-making.
- Distinction emphasised by Lord Carnwath:
  - some questions of interpretation logically prior to exercise of planning judgment
  - BUT some policies may be expressed in "much broader terms, and may not require, nor lend themselves to, the same level of legal analysis"
- ***Samuel Smith v North Yorks CC*** [2020] UKSC 3 applied this to "openness".

Bramshill: isolated homes

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- Inspector had concluded that the proposals would create isolated homes in the countryside as part of her wider conclusion that the proposed housing was unsustainable development.
- C's argument:
  - Her reasoning did not engage with the ***Dartford*** [2017] PTSR 737, which was said to establish that dwellings within the curtilage of an existing structure will not be isolated.
  - She had failed to consider whether the dwellings on site formed a settlement: per ***Braintree*** [2018] 2 P&CR9
  - She had failed to consider how the quantum of housing sought under one of the appeals (235) could rationally be said to result in isolated homes.

Bramshill: isolated homes (2)

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- Sir Keith Lindblom P gave the leading judgment of the court:

  – Emphasised (following ***Hopkins Homes*** and ***Samuel Smith***) that the concept was one of policy not law and "*does not lend itself to rigorous judicial analysis… As with many other broadly framed policies in the NPPF, its application will depend on the facts of the case, and decision-makers will have to exercise their planning judgment in a wide variety of circumstances*" (para 30)

Bramshill: isolated homes (3)

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- Confirmed the interpretation of NPPF 80 (then 79) set out in ***Braintree***:

> "The essential conclusion…in paragraph 42 of [Braintree] is that in determining whether a particular proposal is for "isolated homes in the countryside", the decision-maker must consider "whether [the development] would be physically isolated, in the sense of being isolated from a settlement". What is a "settlement" and whether the development would be "isolated" from a settlement are both matters of planning judgment for the decision-maker on the facts of the particular case."

Bramshill: isolated homes (4)

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- He also
  - stressed distinction between the finding/ratio in ***Braintree*** and obiter comments in that case and in ***Dartford*** (which was about meaning of PDL)
  - Commented (obiter) that the reason why remoteness from a settlement was key was that this was the approach most consistent with Government's evident intention in producing the policy, as part of the aim of promoting sustainable development in rural areas.

- Inspector had referred to ***Braintree*** and her reasoning was unimpeachable.

Bramshill: heritage

- Appellant argued that Inspector had failed to comply with "principle" in ***Palmer*** [2017] 1 WLR 411
- In ***Palmer***, Lewison LJ considered challenge to an LPA decision where officer had advised that there would be no overall adverse effect on the setting of a listed building from noise and smell of poultry sheds "*if proposed mitigation measures were put in place*". He rejected the claim, stating at [29]:

  "I would accept … that where proposed development would affect a listed building or its setting in different ways, some positive and some negative, the decision maker may legitimately conclude that although each of the effects has an impact, taken together there is no overall adverse effect on the listed building or its setting. That is what the officers concluded in this case. … ."

Bramshill: heritage (2)

Landmark Chambers

- Appellant argued at inquiry that ***Palmer*** “internal balancing” should be applied.
- Inspector declined to apply approach, saying that ***Palmer*** ***“****clearly does reinforce that a balancing exercise needs to be carried out but does not direct the decision maker to only one method by which that should be done*”.
- She was faced with situation where variety of appeals made it difficult to match harms of each proposal against individual benefits.

Bramshill: heritage (3)

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- Sir Keith Lindblom P:
  - Rejected contention that s.66(1) or NPPF stipulated any particular approach to the balancing of heritage harm against likely benefits ([72]-[73])
  - Emphasised that the concept in NPPF 199 that great weight be given to the conservation of a designated asset "*does not predetermine the appropriate amount of weight to be given to the "conservation" of the heritage asset in a particular case*."
  - There is no ***Palmer*** principle as suggested.

Bramshill: heritage (4)

Landmark Chambers

- Also addressed concepts of substantial and less than substantial harm (at [74]:
  - What amounts to substantial harm will always depend on circumstances and is a matter of fact and planning judgment
  - NPPF does not direct DM to adopt and specific approach to identifying harm or gauging its extent

- Approved the methodical approach of the Inspector which had ensured that both harms and benefits were fully appreciated.

Weston Homes v SSHCLG (CO/4743/2020)

Landmark Chambers

Weston Homes v SSHCLG (CO/4743/2020)

Landmark Chambers

- Challenge to refusal of appeal in relation to new residential tower in Norwich City Conservation Area.
- Main ground of claim alleged failure to apply **"*Bedford*"** approach to calibration of heritage harm
- Holgate J. granted permission noting that: "The substantive hearing will also provide an opportunity for the court to consider the ratio of the decision in ***Bedford***, and the extent to which it remains good law in the light of current policy and more particularly ***Hopkins*** and ***Samuel Smith***."
- Claim withdrawn following ***Bramshill.***

Alternatives

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R (Save Stonehenge WHS Ltd) v SST [2021] EWHC 2161 (Admin)

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- DCO for construction of new 13km route for A303. Dual carriageway + 3.3 km tunnel.
- Third parties argued that alternative tunnel options should have been considered.
- Applicant had carried out an options appraisal, which the ExA addressed, but neither the ExA or the SST went on to express their own conclusions about the possible alternatives.
- This was in circumstances where Panel found that the road would cause substantial harm to the World Heritage Site.

R (Save Stonehenge WHS Ltd) v SST (2)

Landmark Chambers

- Holgate J. held that:
  - (1) the designation of the site as a WHS and (2) the extent of identified heritage harm put the case into the exceptional category of cases (per ***Trusthouse Forte***) where an assessment of relevant alternatives is required.
  - NB neither ExA or SST thought that the proposal would be net beneficial in heritage terms.

Other cases

- A number of LPA decisions were quashed on heritage grounds.

- Reflects continuing need for LPAs to take particular care when summarising representations from consultees as well as the statutory duty and relevant NPPF provisions in light of the ***Barnwell Manor*** line of authorities.

R (Kinsey) v Lewisham LBC [2021] EWHC 1286:

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- 110 unit redevelopment of 1970s sheltered housing
- Committee granted permission but quashed on four grounds
  - Failure to correctly advise members of duty to give considerable weight
  - OCR also omitted and changed several elements of conservation officers' advice (which was withheld from public)
  - Lang J also held that conservation officers' advice should have been made public
  - Separate ground succeeded re legitimate expectation that Council would consult the Design Review Panel.

R (Liverpool Open and Green Spaces) v Liverpool CC [2020] EWCA Civ 861:

- Upheld conclusion of Kerr J that Council's application of s.66(1) of the Listed Buildings Act was flawed because:
  - No adequate reference to need to give great weight to heritage assets
  - No reference to consultation response from Council's conservation team (strong objection)

- Lindblom LJ at [81]-[82], the OCR left "substantial doubt" as to whether the s.66(1) duty was discharged.

R (Wyeth-Price) v Guildford [2020] EWHC 3355 (Admin)

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- Lang J applied *Liverpool Open Spaces* to quash *r*esidential permission near listed buildings (inc Grade II*).
  - Officer had referred to introductory paras on heritage in NPPF (now 194-198) and to s.66(1), but :
    - Had not explained how s.66(1) was to be applied;
    - Had not referred to or demonstrably applied the decision-making policies in NPPF 199-201; and
    - His consideration of the potential impacts did not reflect NPPF guidance.
  - Lang J suggested that application of ***Mordue*** principle (NPPF compliance sufficient to discharge s.66(1) duty requires that the NPPF is properly worked through for members

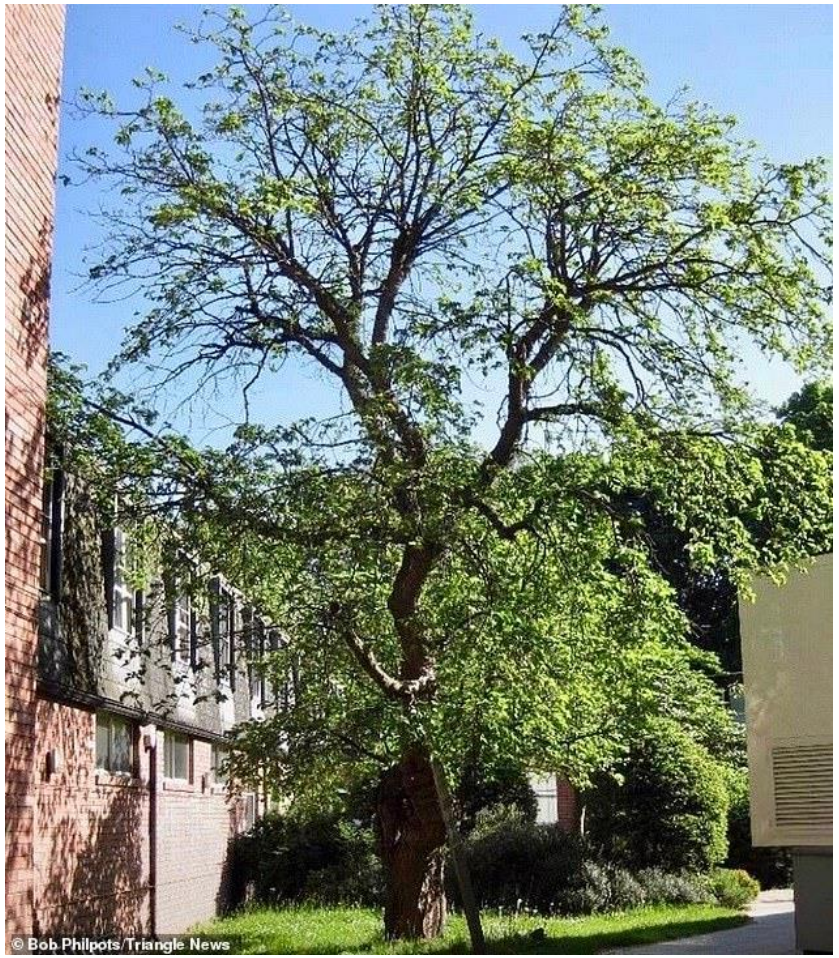
Ancient trees

- NPPF 180(c):

  "*when determining planning applications LPAs should apply the following principles… (c) loss or deterioration of irreplaceable habitats should be refused unless there are wholly exceptional reasons*[63]*, and a suitable compensation strategy exists*"

- Footnote 63: "*For example, infrastructure projects (including nationally significant infrastructure projects, orders under the Transport and Works Act and hybrid bills), where the public benefit would clearly outweigh the loss or*
- *deterioration of habitat*"

Juden v Tower Hamlets LBC [2021] EWHC 1368 (Admin)



- Permission quashed for redevelopment of London Chest Hospital involving relocation of veteran mulberry tree
- Council found tree more likely than not to survive, but risk it would not.
- Officers had drafted OCR on basis that 180(c) did not apply; but late amendments identified it as a material consideration and advised that WEC existed.
- However, that advice packaged the suitability of the compensation strategy with question of WEC.

- Court held that:
  - Requirements for wholly exceptional circs AND suitable compensation strategy are cumulative
  - Not appropriate to consider whether a suitable compensation strategy can be achieved as part of assessment of whether WEC exist.
- Noted that it would have been open to officers to advise that 180(c) did not apply, advice could have been couched in terms of risks and important factors.

Government intention to further strengthen

- Rebecca Pow, Parliamentary Under-Secretary at DEFRA, on 20 October 2021 responded to Lords Amendments to Environment Bill:
  - Taking forward work on ancient woodland inventory
  - Committed to review NPPF "*to ensure that it is being correctly implemented in the case of ancient and veteran trees and ancient woodland"* and if necessary amend NPPG
  - Will consult on strengthening NPPF wording "*to better ensure the strongest protection of ancient woodland, while recognising the complex delivery challenges for major infrastructure.*"
  - LPAs to be required to consult SSLUHC on applications affecting ancient woodland

Thank you for listening

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