



MONTAGU EVANS TALKS...

BRAMSHILL APPEAL - WHAT DOES IT MEAN FOR HERITAGE PLANNING?

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THE APPEAL

The Claimant, City and Country Bramshill Ltd, appealed against Hart District's decision to refuse a mosaic of permissions for new housing and change of use to the main and related listed buildings.

There was a long inquiry convening over several weeks in the winter 2017–18. The Inspector's decision letter was issued on 19 January 2019, where she dismissed the appeals against refusal for the enabling or housing components of the scheme. Chris Miele, Head of our Heritage and Townscape team, appeared as the heritage witness for the Appellants.

The main issues which City and Country disputed, and which Lindblom LJ considered in its judgment, amounted to four discrete points.

- First, whether the Inspector had erred in her approach to 'isolated homes in the countryside'.
- Second, was her treatment of sustainability.
- The third and fourth grounds touched on matters of considerable interest to heritage-related development in the planning system.

We comment on the third and fourth point below.

TESTING OF THE "INTERNAL HERITAGE BALANCE"

The first of the heritage matters looked specifically at whether, as a matter of law, a decision maker should balance harmful impacts and heritage benefits when applying section 66 (1) of the P(LBCA) Act 1990.

The argument put by the claimant was based around another Court of Appeal judgment that considered paragraph 66 (1) known as [Palmer](#) ([2016] EWCA Civ 1061).

The Palmer Judgement

This judgement concerned the impact of noise and smells generated by a poultry farm on the setting of a listed building. The Court considered how Herefordshire (the LPA), had treated this impact relative to demonstrable setting benefits to the listed building, the latter cancelling out the former.

In determining that case, the judge restated an important formulation on the "considerable weight" point, concluding that such weight will not be uniform but will depend on the extent of the assessed harm and the heritage value of the asset (in that case, grade II listed), amongst other things.

Lewison LJ found that that the LPA in question had legitimately concluded no harm, and at paragraph 29 stated:

"I would accept... that where proposed development would affect 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..."

This balancing out within the statutory duty has been known as 'the internal heritage balance' by practitioners. Practically this has meant that paragraphs 195 or 196 would only be engaged if there was "net" harm after the internal heritage balance.

The approach has been accepted at many appeals by all parties but not at others. It was not accepted at the Bramshill Inquiry by the Rule 6 parties which included Historic England and the National Trust.

Application at Bramshill

Lindblom LJ concluded there is nothing in section 66 (1) that requires the decision maker to apply the Palmer principle of an "internal heritage balance".

Essentially, the judgement concludes (see paragraph 74 particularly) that the balancing of harm versus benefit is a matter of planning judgment for the decision maker, working through paragraphs 193 to 196 of the Framework. The Palmer principle, so-called, then, is no more than a balancing out of harm and benefit, which practitioners are well used to.

THE INTERACTION OF SECTION 66 (1) WITH THE DEVELOPMENT PLAN

The second of the heritage matters featuring in the judgment is another one that often puzzles practitioners



and authorities, namely the interaction as between the development plan, Framework policy and the section 66 (1) duty (and by parity of reasoning so too [sections 16](#) (2) and [72](#) (1) in the same act).

The development plan in question has several policies which the parties agreed were not consistent with the Framework on the basis they state that harm to heritage assets "will not be permitted".

The obvious inconsistency is the absence of the balancing provisions (see paragraphs 195 and 196 of the Framework).

The claimant argued that the Inspector had erred in law for giving those policies 'significant' weight.

Lindblom LJ found that any inconsistency does not necessarily introduce a conflict with the Framework or section 66 (1) because they do not preclude a balancing exercise where that is appropriate (see paragraph 87). Practitioners will in their daily work identify local plan policies which are out of step with the terms of the Framework. This does not invalidate the policy, as is sometimes suggested. As the judge observed, the Inspector performing the section 66 (1) duty was 'free to give such weight to local plan policies as she reasonably judged appropriate', and was indeed obliged to do that [88].

"GREAT WEIGHT"

What is notable in *Bramshill*, is that Lindblom LJ states that the "great weight" provision in paragraph 193 of the Framework does not predetermine the weight to be attributed to the conservation of a "heritage asset":

"... The concept in paragraph 193 – that "great weight" should be given to the "conservation" of the "designated heritage asset", and that "the more important the asset the greater the weight should be" – does not predetermine the appropriate amount of weight to be given to the "conservation" of the heritage asset in a particular case. Resolving that question is left to the decision-maker as a matter of planning judgment on the facts of the case, bearing in mind the relevant case law, including Sullivan L.J.'s observations about "considerable importance and weight" in Barnwell Manor."

Lindblom LJ emphasises the unequal balance in favour of the desirability for preservation of special interest (the reference to Barnwell Manor). However, he also leaves the weight to be afforded to harm for the decision-maker based on the facts of the case.

In our practice, that weight is usually the product of the extent of impact to the significance of an asset; the relevance of the impact to that significance; and the importance of the asset.

CONCLUSIONS

The judgment is useful more generally because it treats many of the important High Court and Court of Appeal judgments which are a feature of historic environment practice, and so provides an overview of them and their interaction with one another.

TALK TO ONE OF THE TEAM



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