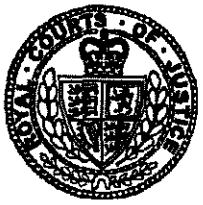

Neutral Citation Number: [2014] EWHC 1895 (Admin)

Case Nos: CO/735/2013
CO/16932/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 June 2014

Before :

Mr Justice Lindblom

Between :

The Queen (on the application of
(1) The Forge Field Society
(2) Martin Barraud
(3) Robert Rees) — **Claimants**

- and -

Sevenoaks District Council — **Defendant**

- and -

(1) West Kent Housing Association
(2) The Right Honourable Philip John Algernon Viscount De L'Isle — **Interested Parties**

Mr James Strachan Q.C. (instructed by **Winckworth Sherwood**) for the **Claimants**
Mr Alexander Booth (instructed by **the Council Solicitor of Sevenoaks District Council**) for the **Defendant**

Hearing dates: 24 and 25 March 2014

Judgment Approved by the court for handing down

Secretary of State for the Environment [1992] 2 A.C. 141, at p.150 A-G). There is a statutory presumption, and a strong one, against granting planning permission for any development which would fail to preserve the setting of a listed building or the character or appearance of a conservation area. The officer acknowledged in his report, and the members clearly accepted, that the proposed development would harm both the setting of Forge Garage as a listed building and the Penshurst Conservation Area. Even if this was only "limited" or "less than substantial harm" – harm of the kind referred to in paragraph 134 of the NPPF – the Council should have given it considerable importance and weight. It did not do that. It applied the presumption in favour of granting planning permission in Policy SP4(c) of the core strategy, balancing the harm to the heritage assets against the benefit of providing affordable housing and concluding that the harm was not "overriding". This was a false approach. Its effect was to reverse the statutory presumption against approval.

46. Mr Booth submitted that the Court of Appeal's decision in *Barnwell* did not change the law, but reflected the familiar jurisprudence applied in a number of previous cases – for example, in *The Bath Society v Secretary of State* [1991] 1 W.L.R. 1303. The Council complied fully with the requirements of sections 66 and 72. The officer's conclusion that the harm to the setting of the listed building and to the character and appearance of the conservation area was only "limited" and thus "less than substantial" is not criticized as unreasonable, nor could it be. Following the policy in paragraph 134 of the NPPF, the officers weighed that less than substantial harm against the substantial public benefit of providing affordable housing to meet an identified need. There is no suggestion that they struck this balance unreasonably. They also found that the harm was not such as to be "overriding" under Policy SP4(c). This too was a reasonable planning judgment.

47. In my view Mr Strachan's submissions on this issue are right.

48. As the Court of Appeal has made absolutely clear in its recent decision in *Barnwell*, the duties in sections 66 and 72 of the Listed Buildings Act do not allow a local planning authority to treat the desirability of preserving the settings of listed buildings and the character and appearance of conservation areas as mere material considerations to which it can simply attach such weight as it sees fit. If there was any doubt about this before the decision in *Barnwell* it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation area, it must give that harm considerable importance and weight.

49. This does not mean that an authority's assessment of likely harm to the setting of a listed building or to a conservation area is other than a matter for its own planning judgment. It does not mean that the weight the authority should give to harm which it considers would be limited or less than substantial must be the same as the weight it might give to harm which would be substantial. But it is to recognize, as the Court of Appeal emphasized in *Barnwell*, that a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering.

50. In paragraph 22 of his judgment in *Barnwell* Sullivan L.J. said this:

"... I accept that ... the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell L.J.'s judgment [in *The Bath Society*] is authority for the proposition that 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"".

51. That conclusion, in Sullivan L.J.'s view, was reinforced by the observation of Lord Bridge in *South Lakeland* (at p.146 E-G) that 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 ground of some other public interest". Sullivan L.J. said "[there] is a "strong presumption" against granting planning permission for development which would harm the character of appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight"" (paragraph 23). In enacting section 66(1) Parliament intended that the desirability of preserving the settings of listed buildings "should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given "considerable importance and weight" when the decision-maker carries out the balancing exercise" (paragraph 24). Even if the harm would be "less than substantial", the balancing exercise must not ignore "the overarching statutory duty imposed by section 66(1), which properly understood ... requires considerable weight to be given ... to the desirability of preserving the setting of all listed buildings, including Grade II listed buildings" (paragraph 28). The error made by the inspector in *Barnwell* was that he had not given "considerable importance and weight" to the desirability of preserving the setting of a listed building when carrying out the balancing exercise in his decision. He had treated the less than substantial harm to the setting of the listed building as a less than substantial objection to the grant of planning permission (paragraph 29).

52. I think there is force in Mr Strachan's submission that in this case the Council went wrong in a similar way to the inspector in *Barnwell.*

53. I bear in mind the cases – and there are many of them – in which the court has cautioned against reading committee reports in a more demanding way than is justified (see, for example, the judgment of Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Council* [2010] EWCA Civ 1286, at paragraphs 18 to 21).

54. Mr Strachan did not submit that the officer ought to have reached a different view about the degree of harm that the development would cause to the setting of the listed building and to the conservation area. He recognized that such criticism would have been beyond the scope of proceedings such as these, unless it could be supported on public law grounds. He pointed out that the Council's Conservation Officer seems to have misunderstood the relevant statutory provisions and the relevant policy and guidance, apparently thinking that there is a "test" of "substantial harm or loss of significance" to heritage assets both in the legislation and in the NPPF. But the main thrust of his argument went to the Chief Planning Officer's treatment of the acknowledged harm to heritage assets in the balancing exercise which he undertook. This, as Mr Strachan submitted, was the crucial part of the advice given to the members on this matter.